High Theory in Chinese Law

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The most contested question in the study of Chinese law is also its most enduring one: How should we characterize China's legal system? In recent years, scholars have advanced numerous theories to explain Chinese law. Some have emphasized legality; others have stressed order; still others have described the system as dual or multi-faceted.

This Essay contributes a set of meta-theoretical insights to these discussions. It argues that the preceding debates would benefit from reflecting on the general qualities that make theories good, with special attention to the analytic costs and benefits of different modes of theorizing. It distinguishes between monist theories about legal systems that rely on a single construct and pluralist theories that rely on multiple constructs. Monist theories excel in their economy, coherence, testability, and generativity, as well as in their heuristic and prismatic properties. But they are, as a class, less able to achieve the explanatory breadth and depth of pluralist theories and are more vulnerable to subtler epistemological biases. Pluralist theories, in contrast, tend to explain more but generate less through their attention to nuance and exception.

There are analytic payoffs to recognizing these differences—payoffs for the rigor of internal debates, the strengthening of specific arguments, our interpretation of theoretical trends, and our theorizing about legal systems generally, including American law. More prescriptively, these findings lean in favor of theoretical heterogeneity, where modes of theory are keyed to particular purposes and contexts as well as larger disciplinary and political trends.

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Introduction

Monist theories about law—theories that explain entire legal systems with a single construct—pervade the study of Chinese law. We know them by their shorthand: *rule by law*, *rule of man*, *order maintenance*, and so on.[1] They are maxim-like in their brevity, purporting to capture the heart of their subject. But they are expansive in their scope, seeking to essentialize an entire legal system—and sometimes others, too.[2]

Monist theories about law have helped foster varying pluralist theories of China's legal system. We know these pluralist theories by their implied rejection of unitary frames—legal *dualism*, *dual* normative systems—or by their recognition of multiple social forms or legal regimes.[3] Like monist theory, these theories are a kind of high theory because they seek to explain whole legal systems through general constructs. But unlike monist theories, pluralist theories share a conviction that multiple parameters better capture Chinese law's social complexity.

Conceptual debates about Chinese law have centered on the merits and demerits of these theories.[4] But they have more rarely addressed what is lost and gained with different modes of theorizing. The qualities that make good theory can vary with a field's needs or a theoretician's goals. We might

1. *See, e.g.*, PITMAN B. POTTER, CHINA'S LEGAL SYSTEM 2 (2013) (asserting that Chinese law functions "primarily as an instrument of rule for the Communist Party"); THOMAS B. STEPHENS, ORDER AND DISCIPLINE IN CHINA 4–6 (1992) (proposing a disciplinary model of Chinese law that has been likened to "rule of man" theories); *see* Teemu Ruskola, *Law Without Law, or Is "Chinese Law" an Oxymoron?*, 11 WM. & MARY BILL RTS. J. 655, 656 (2003) (arguing that rule of law and rule of man is "too moralistic and too black-and-white" to be useful in analyzing Chinese law); Donald Clarke, *Order and Law in China*, 2022 U. ILL. L. REV. 541, 559 (arguing that "China possesses a set of institutions whose main purpose is the maintenance of order as the Party sees it").

2. The monist theories surveyed here are often used to describe other legal systems. *See* Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1, 4–11 (Tom Ginsburg & Tamir Moustafa eds., 2008) (delineating ways in which authoritarian countries—including, but not limited to, China—have sought to instrumentalize courts); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 (1997) (arguing that there is a "glint of truth" to rule of man as applied to "American constitutional democracy").

3. *See, e.g.*, Eva Pils, *China's Dual State Revival under Xi Jinping*, 46 FORDHAM INT'L L.J. 339, 353 (2023) (applying dual-state concepts to Xi Jinping-era legal reforms); Hualing Fu, *Duality and China's Struggle for Legal Autonomy*, CHINA PERSPS., 2019, at 3 (analyzing Chinese law by exploring the duality between prerogative and normative spheres); Ling Li, *Order of Power in China's Courts*, 10 ASIAN J.L. & SOC'Y 490, 492–93 (2023) (characterizing Chinese law in earlier work as a "dual normative system"); Sida Liu, *The Shape of Chinese Law*, 1 PEKING U. L.J. 415, 417–43 (2014) (proposing a theory of Chinese law based on its multiple social forms); WILLIAM HURST, RULING BEFORE THE LAW: THE POLITICS OF LEGAL REGIMES IN CHINA AND INDONESIA 30–33 (Mark Fathi Massoud, Jens Meierhenrich & Rachel E. Stern eds., 2018) (conceptualizing reform-era Chinese law as composed of varying "legal regimes").

4. *See infra* Part IV.

privilege how fully a theory accounts for social facts,[5] how easily a theory lends to hypothesis testing,[6] or how well a theory informs policymaking or social criticism.[7] While the best theories may excel on multiple axes, maximizing some theoretical virtues can often lead to a decline in others.[8] Anterior to the question of what theory of Chinese law is best, then, is the question of what makes a theory of Chinese law good.

Monist theories of Chinese law have some formidable advantages. First, they tend to be, in their simplicity, more parsimonious than other theories. Second, monist theories are often more coherent; with fewer constructs come lower odds they will conflict. Third, monism tends to be more falsifiable and is often more provocative; statements that Chinese law is fundamentally about one thing are more easily tested and more likely to elicit counter-theories or refinement. Fourth, monist theories tend to have a heuristic usefulness, enabling users to concisely convey a key attribute of China's legal order—the instrumental nature of its legality, for example, or the imperative of social stability. Finally, monist theories often have a prismatic quality that can help reveal new patterns in familiar areas.

But while monist theories offer notable advantages, they tend to be, as a class, less well-adapted to a primary goal of positive theory: explanation. Compared to theories with multiple parameters, monist theories tend to have less explanatory *scope*—that is, they tend to account for a smaller proportion of the studied phenomenon—and they tend to have less explanatory *depth*, in that they give us a less concrete picture of specific causes, mechanisms, and patterns. "Rule by law," for instance, the monist theory commonly used to describe Chinese law, tells us something important and true about

5. *See* RONALD L. AKERS, CRIMINOLOGICAL THEORIES 1–2 (2d ed. 2012) (stating that an "effective theory helps us to make sense of facts that we already know and can be tested against new facts").

6. A focus on falsifiability is often associated with Karl Popper. KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 57 (Routledge Classics 2002) (1935); *see* E. Tory Higgins, *Making a Theory Useful: Lessons Handed Down*, 8 PERSONALITY & SOC. PSYCH. REV. 138, 141 (2004) (discussing the "so-called Popperian . . . notion that scientists should concentrate on identifying the conditions that would disconfirm their own theory"); Karolin Gieseler, David D. Loschelder & Malte Friese, *What Makes for a Good Theory? How to Evaluate a Theory Using the Strength Model of Self-Control as an Example*, *in* SOCIAL PSYCHOLOGY IN ACTION 3, 9–10 (Kai Sassenberg & Michael L. W. Vliek eds., 2019) ("If a theory is formulated in such a way that makes it impossible to observe something that is prohibited by the theory's assumptions, it is unfalsifiable and therefore not a good theory.").

7. *See* AKERS, *supra* note 5, at 11 ("[T]he value of a criminological theory can be further evaluated by its usefulness in providing guidelines for effective social and criminal justice policy . . . .").

8. *See* Gieseler et al., *supra* note 6, at 10 (explaining that while one can always add new "auxiliary assumptions or boundary conditions to explain observations that initially appear inconsistent with the theory," "every inconsistent observation must not lead to the development of a new auxiliary assumption specifying a new exception," or else the theory will become unfalsifiable and unparsimonious).

instrumentalism in China's legal system.[9] But it admits of notable exceptions once one moves a level deeper—it turns out, for example, that what the law says is often not the decisive factor in even routine traffic disputes.[10] Likewise, theories that center on social stability or policy mandates convey something true and important about extra-legality in Chinese law.[11] Yet these theories have less to say about notable improvements in legal professionalism or a rising legal consciousness.[12] Several pluralist theorists have likened prevailing analyses to the parable of a blind man touching an elephant: Our image of the system varies widely depending on our point of contact.[13] For pluralists, dynamic conflicts or tensions are not raw material from which totalizing concepts can be drawn, but should themselves be central components to a compelling theory of Chinese law.[14]

The Essay's aim is not to resolve these debates but to clarify the analytic moves that are being made and the costs and benefits of making them. There are several conceptual payoffs to recognizing these differences, especially for legal scholars and comparativists. An initial set of gains is theory specific: Understanding where some modes of theorizing outrival others can expand the set of theoretical criteria, clarify the terms of existing debates, and improve theory design by fostering deeper awareness of certain analytic pitfalls. The Essay also invites more general reflections on what kinds of theory are best for the field. Given the distinct comparative advantages of monist and pluralist theories, I suggest that a theoretical heterogeneity is good for the Chinese legal studies community as a whole, especially where modes of theorization are attentive to both specific scholarly goals and larger

9. *See* William P. Alford, *A Second Great Wall?: China's Post-Cultural Revolution Project of Legal Construction*, 11 CULTURAL DYNAMICS 193, 202 (1999) (arguing that China's leaders saw law as a "mechanistic" "tool").

10. Benjamin L. Liebman, *Ordinary Tort Litigation in China: Law Versus Practical Justice?*, 13 J. TORT L. 197, 200 (2020) (finding that "many [tort] cases do not follow the written law" because judges "ignore legal rules or innovate in the interstices of unclear law in ways that ensure that weak or aggrieved parties receive compensation, losses are shared among those able to pay, and the risk of unrest is mitigated").

11. *See* Clarke, *supra* note 1, at 562–63 (defining "extra-legal" as having two meanings: "phenomena or practices that insiders are unwilling to characterize as either legal or illegal," or "a phenomenon or practice that insiders—perhaps virtually unanimously—may have no difficulty in describing as illegal, but that nevertheless persists with more or less open government sanction").

12. On some recent technocratic legal reforms, see Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 306, 323–26, 329–30, 334, 336 (2019); Albert H.Y. Chen, *China's Long March Towards Rule of Law or China's Turn Against Law?*, 4 CHINESE J. COMPAR. L. 1, 17, 22–23 (2016); Jacques deLisle, *Law in the China Model 2.0: Legality, Developmentalism, and Leninism under Xi Jinping*, 26 J. CONTEMP. CHINA 68, 71 (2017).

13. *See* Fu, *supra* note 3, at 4 ("Like the proverbial elephant that was touched by a blind man, Chinese law, reflecting Chinese political and socio-economic realities, takes different shapes."); Ji Li, *The Power Logic of Justice in China*, 65 AM. J. COMPAR. L. 95, 105 (2017) (stating that "judicial behavior in China remains a proverbial elephant to a group of blindfolded men").

14. *See infra* Part II.

disciplinary and political trends. As to the latter, theorists might be more mindful of theoretical interventions that can be tested, given the increasing empirical sophistication of the field.[15] They might also be careful with how they convey monist theories to popular and elite audiences in today's fraught geopolitical setting.[16] Finally, the Essay's reflections are relevant to how we theorize about legal systems generally. At a time of democratic backsliding, there is an increasing need to develop robust conceptual frameworks for understanding legal developments across a variety of regime types.[17] Even in the United States, a closer understanding of the analytic strengths and weaknesses of monism can help contextualize theoretical disagreements in areas as wide-ranging as race, politics, and the law.[18]

I should acknowledge at the outset that the question of what makes desirable theory is itself contested, as it should be in any field that has been enriched by varied disciplinary perspectives.[19] In delineating the qualities of "good theory," I focus mostly on social-science approaches to theorizing, following what I see as the general weight of perspective among scholars writing about Chinese law in English.[20] It may be that I have adopted too cramped a notion of theory; indeed, one of the goals of this Essay is to invite conversation on what a good theory of Chinese law ought to entail. But to at least begin a meta-theoretical conversation of this sort, it helps to start where many participants already stand.

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15. *See* Li Du & Meng Wang, *Empirical Legal Studies in China: Current Status, Emerging Trends and Indications for Legal Education*, 9 ASIAN J. LEGAL EDUC. 135, 142–47 (2022) (conducting content analysis of 456 empirical articles about Chinese law between 2013 and 2020). The turn to empirical methods in Chinese law has been the subject of several conferences. *See, e.g.*, Ian McGullam, *Clarke Program Conference Examines Empirical Legal Studies in the Sinophone World*, CORNELL L. SCH. (Oct. 18, 2023), https://www.lawschool.cornell.edu/news/clarke-program-conference-examines-empirical-legal-studies-in-the-sinophone-world/ [https://perma.cc/P3R4-XCXF]; *Empirical Turn in Chinese Legal Research—Challenges, Strategies, and Solutions*, UNIV. H.K. FAC. L.: NEWSL. (Jan. 2023), https://newsletter.law.hku.hk/empirical-turn-in-chinese-legal-research-challenges-strategies-and-solutions-jan-9-10/ [https://perma.cc/PCS2-P2Y7].

16. *See* Mark Jia, *American Law in the New Global Conflict*, 99 N.Y.U. L. REV. 636, 639 (2024) (arguing that the U.S.–China rivalry has returned "[f]amiliar ideological and nationalistic frames . . . to political-legal discourse").

17. *See generally* Nancy Bermeo, *On Democratic Backsliding*, J. DEMOCRACY, Jan. 2016 (discussing recent global trends in democratic backsliding).

18. *See infra* Part V.

19. *See, e.g.*, Matthew S. Erie, *The Normative Anthropologist*, 73 ALA. L. REV. 803, 804 (2022) (arguing that ethnographic methods have much to offer legal research).

20. *See, e.g.*, Zhang & Ginsburg, *supra* note 12, at 330 (understanding new circuit courts in China as a means for the Supreme People's Court to "lower information and enforcement costs when dealing with lower courts"); Clarke, *supra* note 1, at 553 (applying the "Popperian criterion of falsifiability" to reject a "leadership maintenance" theory about Chinese law); Benjamin L. Liebman, Margaret E. Roberts, Rachel E. Stern & Alice Z. Wang, *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 8 J.L. & CTS. 177, 178 (2020) (applying "computational social science" methods to the increasing availability of case documents in China); Li, *supra* note 13, at 111 (exploring "judicial behavior in China").

The remainder of the Essay proceeds as follows. Parts I and II introduce monist and pluralist theories of Chinese law respectively. Part III refocuses the inquiry on questions of theoretical quality. Part IV then delineates the analytic costs and benefits of monist and pluralist theories of Chinese law. In closing, Part V sketches out some broader conceptual implications.

I. Monism

A monist theory is a theory that seeks to explain an entire legal system with a unitary construct. Part I surveys monist theories in Chinese law.[21] It intends not to exhaust the field, but to summarize many of the leading theories of China's legal system.[22] Not all such theories are similarly situated. Some were developed to describe systemic developments at a particular point in time; others were proposed to show the general direction of movement. But all are monist in their use of a single economical construct to make general claims about China's legal system.

Many monist works on Chinese law discuss the *rule of law*—not because China exemplifies it, but because it is a common reference point for how we understand law today.[23] The rule of law has been called an "essentially contestable concept"[24] as well as a "multi-faceted ideal."[25] To some, it embodies a set of formal principles most closely associated with Lon

21. I do not address theories of Chinese governance, though there is of course overlap between governance and law. For recent theories about the former, see generally CHANGDONG ZHANG, GOVERNING AND RULING: THE POLITICAL LOGIC OF TAXATION IN CHINA (2021); Baogang Guo, *A Partocracy with Chinese Characteristics: Governance System Reform Under Xi Jinping*, 29 J. CONTEMP. CHINA 809 (2020); Jiang Feng, *Party Regulations and State Laws in China: A Disappearing Boundary and Growing Tensions*, 51 CHINESE L. & GOV'T 260 (2019); and Runya Qiaoan & Jessica C. Teets, *Responsive Authoritarianism in China—A Review of Responsiveness in Xi and Hu Administrations*, 25 J. CHINESE POL. SCI. 139 (2020). For discussion of many of the distinctly legal theories, see generally Susan H. Whiting, *Authoritarian Legality and State Capitalism in China*, 19 ANN. REV. L. SOC. SCI. 357 (2023).

22. Some authors describe their theories as models rather than theories. In practice, the "distinction between theories and models is blurred" because "models frequently have a theoretical content and theories are often expressed by models." Guillaume Wunsch, *Theories, Models, and Data*, 36 DEMOGRAFIE: REVUE PRO VYZKUM POPULACNIHO VYVOJE 20, 20 (1994). In general, models are "schematic representations of reality" and tend to be more intermediate to data than theories, such that pluralist theories can often more closely resemble models. *Id.* at 22.

23. *See, e.g.*, Clarke, *supra* note 1, at 546–50 (providing an introductory overview of basic concepts on Chinese law, including "rule of law" and "legality); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 1–5 (2002) (asking and answering the question: "What is rule of law?").

24. Fallon, *supra* note 2, at 7 (explaining that "the 'true,' 'best,' or 'preferred' meaning of the Rule of Law depends on the resolution of contestable normative issues").

25. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008); *see also* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91 (2004) (proposing a typology for understanding "competing formulations" of the rule of law); Lawrence B. Solum, *Equity and the Rule of Law*, 36 NOMOS 120, 121–23 (1994) (pointing to different conceptions of rule of law).

Fuller's principles of legality, for example, that rules are general, prospective, congruent, and clear.[26] To others, we ought also to focus on the "machinery" of legal enforcement, the independence of courts and the fairness of judicial process.[27] And to still others, the rule of law must include substantive ideals concerning morality, justice, human rights, or democracy.[28] These and other formulations are often disputed, though most agree that rule of law must include, at minimum, a commitment to law's role in constraining arbitrary state action.[29]

However one understands the rule of law, scholars have hesitated to apply it to China.[30] Instead, rule of law has given rise to several symmetrical or modified concepts, many developed to accommodate China's distinctive trajectory. Among the most criticized of these is *rule of man*. Put simply, rule of man is what happens when law does not rule.[31] One is "subject to the unpredictable vagaries of other individuals": "bias, passion, prejudice, error, ignorance, cupidity, or whim."[32] Rule-by-man understandings of China have been associated with Thomas Stephens, who contrasts a Western *adjudicative* model based on "rigid, universal codes of imperatives" with a Chinese *disciplinary* or *parental* model based on obedience to hierarchical superiors.[33] Rule-of-man theories are not widely embraced today. They are

26. LON L. FULLER, THE MORALITY OF LAW 46, 63, 81, 94 (1964).

27. JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 216–18 (1979) (describing five rule-of-law principles "designed to ensure that the legal machinery of enforcing the law . . . shall be capable of supervising conformity to the rule of law and provide effective remedies in cases of deviation from it"); *see* Waldron, *supra* note 25, at 20–24 (arguing that an "essential aspect" of law for rule-of-law purposes is the existence of impartial courts and hearing procedures).

28. *See* TAMANAHA, *supra* note 25, at 91 (describing rule of law's substantive formulations as including individual rights to property, contract, privacy, autonomy, dignity, justice, and substantive equality); Jeremy Waldron, *The Rule of Law as an Essentially Contested Concept*, *in* THE CAMBRIDGE COMPANION TO THE RULE OF LAW 121, 122 (Jens Meierhenrich & Martin Loughlin eds., 2021) ("On many accounts, *the rule of law* encompasses political ideals like human rights.").

29. *See* Waldron, *supra* note 25, at 6 ("Most conceptions . . . give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms . . . ."); RAZ, *supra* note 27, at 224 ("The law inevitably creates a great danger of arbitrary power—the rule of law is designed to minimize the danger created by the law itself.").

30. But for an insightful account of rule-of-law discourse among Chinese academics based in mainland China, see generally SAMULI SEPPÄNEN, IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA (2016).

31. *See* Fallon, *supra* note 2, at 2–3 (describing the concepts of rule of law and rule of man as a "familiar contrast"); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

32. TAMANAHA, *supra* note 25, at 122.

33. STEPHENS, *supra* note 1, at 4–6; *see* Ruskola, *supra* note 1, at 661 ("Stephens's contrast between adjudication and discipline is ultimately yet another instance of the contrast between the rule of law and rule of men . . . .").

vulnerable to "oversimplification,"[34] and have little to say about law itself. While Chinese law has never conformed with Western liberalism or due process, one cannot deny that China has a meaningful legal tradition and has pursued a significant program of legal construction.[35] Yet a rule-of-man model would seem to forever "banish China outside of law's empire."[36]

More favored in the academic discourse is *rule by law*: the idea, roughly, that Chinese leaders use laws to govern others but not themselves.[37] Like rule of man, rule by law is symmetrical to the rule of law in that it lacks distinctive content on its own; it is forever referential to the rule of law.[38] And like rule of law, rule by law has its varying formulations.[39] In one version, it describes the state's use and abuse of legal forms to serve various authoritarian ends, often resulting in formal or procedural deviations from legality.[40] In other iterations, rule by law approaches a thin, formal conception of the rule of law—a state that rules its population through evenly applied general laws.[41] The former is often regarded as an authoritarian perversion of rule of law,[42]

34. *See* Clarke, *supra* note 1, at 556 (criticizing Stephens's model for "his idealization of the West and oversimplification of the East").

35. *See* William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 950 (1986) (advising substantial study of imperial China's "formal criminal justice process"); William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEXAS L. REV. 915, 918 (1986) (urging deeper inquiry into "China's rich legal tradition").

36. Ruskola, *supra* note 1, at 661; *see* TEEMU RUSKOLA, LEGAL ORIENTALISM 14 (2013) (arguing that rule-of-man contrasts have had "ruinous analytic consequences for the study of Chinese law").

37. *See* Martin Krygier, *Rule of Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 233, 235 (Michel Rosenfeld & András Sajó eds., 2012) (explaining that in rule-by-law systems, governments are not "reliably and effectively constrained by" law).

38. NICK CHEESMAN, OPPOSING THE RULE OF LAW 22–25 (2015).

39. *Id.* at 22–23.

40. *See* Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281, 283 (2014) (using rule by law to capture the "ways in which law served as the primary means by which political opponents were sidelined in Mubarak's Egypt"); Krygier, *supra* note 37, at 235 (noting that in rule-by-law regimes, laws might be "secret, retrospective, contradictory, impossible to know, to understand, [or] to perform"); JOTHIE RAJAH, AUTHORITARIAN RULE OF LAW 46 (2012) (asserting that "legislation has been a key tool effecting the decimation of" media and civil society in Singapore); Kwai Hang Ng, *Is China a "Rule-by-Law" Regime?*, 67 BUFF. L. REV. 793, 797 (2019) (distilling rule by law into "three essential characteristics . . . commanding, opaque, and arbitrary").

41. *See* Kenneth Winston, *The Internal Morality of Chinese Legalism*, SING. J. LEGAL STUD., Dec. 2005, at 313, 316 (distinguishing "rule by law" from "ad hoc instrumentalism," because in the former, "the commitment to rules—fixed standards of general applicability—is not ad hoc" but rather "deliberate and firm, and the instrumentalism is *consistent* and *principled*"); Jeremy Waldron, *Rule* by *Law: A Much Maligned Preposition* 14–15 (N.Y.U. Sch. L. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 19-19, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378167 [https://perma.cc/M6A4-TBWH] (describing rule by law as a system in which "commitment to rules . . . [with] moral significance, in the respect it pays to human agency and to the need for clarity and predictability").

42. CHEESMAN, *supra* note 38, at 22–24.

while the latter is more principled.[43] In all versions, "by" denotes instrumentality; where rulers employ law as a tool, there is rule by law.

The more principled conception of rule by law is related to the idea of a *thin rule of law*. The latter limits itself to "formal and procedural aspects of legality—for example, the clarity, generality, prospectivity, consistency, and stability of . . . norms," distinct from thicker concepts of rule of law that emphasize substance and rights.[44] Because rule by law, in its more law-respecting form, necessarily contemplates legal discipline for state actors (even if the ultimate rulers remain unfettered), it can resemble a thin rule of law.[45] By stressing consistent observance of law regardless of its normative content, these positivist concepts are also connected to what is sometimes termed *legality*: "the accurate and consistent enforcement of the law against all relevant parties."[46]

These theories—rule by law, thin rule of law, and legality—are recurring characters in academic treatments of Chinese law.[47] Writing in 1999, William Alford observed that Chinese leaders held "a very mechanistic view of officially promulgated law—as fundamentally a tool or technology that can be readily detached from one setting to apply in a second . . . to accomplish particular state objectives."[48] Such "instrumental approaches to legality" are discernible in Western countries too, he argued, but in China's

43. Waldron, *supra* note 41, at 14–15 (stating that rule by law can be a "thin version of legality . . . [with] moral significance, in the respect it pays to human agency and to the need for clarity and predictability").

44. Waldron, *supra* note 28, at 123; *see* Raz, *supra* note 27, at 211 (urging readers not to confuse rule of law with "democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man").

45. *See* Moustafa, *supra* note 40, at 283 (likening "a thin conception of rule of law" to "rule by law").

46. Yiqin Fu, Yiqing Xu & Taisu Zhang, *Does Legality Produce Political Legitimacy? An Experimental Approach*, J. LEGAL STUDIES (forthcoming 2024) (manuscript at 4) (on file with authors), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966711 [https://perma.cc/3DKZ-C39V].

47. *See, e.g.*, Ng, *supra* note 40, at 794 (describing a "near consensus that China is practicing rule by law"); Nicholas Calcina Howson, *Enforcement without Foundation?—Insider Trading and China's Administrative Law Crisis*, 60 AM. J. COMPAR. L. 955, 986 (2012) (distinguishing between rule of law and rule by law in enforcement of insider trading provisions in China); Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 93–101 (2001) (distinguishing between rule of law and rule by law), PEERENBOOM, *supra* note 23, at 137–41 (questioning whether China's law reforms should be best understood in terms of "rule by law"); TAMANAHA, *supra* note 24, at 92 (describing China in a subsection discussing "rule by law"). I have used "rule by law" concepts in my own work. *See* Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1712 (2020) (analyzing instrumental legality in autocracies).

48. Alford, *supra* note 9, at 202; *see* Jerome A. Cohen, *"Rule of Law" with Chinese Characteristics: Evolution and Manipulation*, 19 INT'L J. CONST. L. 1882, 1884 (2021) (noting the Party-state's "enthusiastic embrace" of rule by law); deLisle, *supra* note 12, at 68 (noting the various "supporting functions" "law was expected to perform" in China).

case, historical legacies, among other factors, help explain its appeal.[49] In introducing their edited collection, *Rule By Law: The Politics of Courts in Authoritarian Regimes*, Tom Ginsburg and Tamir Moustafa cataloged ways authoritarian regimes have instrumentalized laws and courts.[50] Chinese rulers, they say, have turned to administrative law as a tool of hierarchical control, and to legal construction as a means "to build regime legitimacy."[51] Mary Gallagher's theory of authoritarian legality focuses similarly on ways China's ruling party "uses" law: "to manage principal-agent problems . . . , to cultivate mass support, and to exploit and reshape social cleavages."[52] James Feinerman describes the National People's Congress's rising stature in the 1990s as evidence of rule by law, wherein "law exists . . . as a mechanism for state power."[53]

Of those favoring a more demanding concept of rule by law, however, there is a tendency to exclude China from its ambit. Jean-Pierre Cabestan, for example, sees rule by law as embodied in the Bismarckian *Rechtsstaat*, understood as "an autonomization of the law within an authoritarian political environment."[54] Against that yardstick, he argues, China's lack of judicial independence impedes realization of a true rule-by-law state.[55] Jeremy Waldron has similarly argued that China may not conform with rule by law, properly understood, because its "law and legal procedures [are] used selectively, in an authoritarian and often inconsistent way."[56]

Several scholars have expressed confidence that China has been moving in a legalistic direction. Randall Peerenboom argued in 2002 that China was in "transition toward . . . rule of law."[57] As evidence, he pointed to a multitude of legal developments since the death of Mao: the "pace and breadth" of lawmaking, the growth of the legal profession, sharp increases in litigation rates, official commitment to legal dissemination, a decline in party influence over judicial decisions, and the enactment of new laws permitting

49. Alford, *supra*, note 9, at 203.

50. Ginsburg & Moustafa, *supra* note 2, at 4–11.

51. *Id.* at 6–7. For one example of how China has used law to build legitimacy, see James V. Feinerman, *The Rule of Law Imposed from Outside: China's Foreign-Oriented Legal Regime Since 1978*, *in* THE LIMITS OF THE RULE OF LAW IN CHINA 304, 308–09 (Karen G. Turner, James V. Feinerman & R. Kent Guy eds., 2000).

52. MARY E. GALLAGHER, AUTHORITARIAN LEGALITY IN CHINA 31 (2017) (emphasis omitted).

53. James V. Feinerman, *The Rule of Law . . . with Chinese Socialist Characteristics*, 96 CURRENT HIST. 278, 280 (1997); *see* Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 385 n.6 (2000) (agreeing).

54. Jean-Pierre Cabestan, *The Political and Practical Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China*, J. CHINESE POL. SCI., Apr. 2005, at 43, 45.

55. *Id.*

56. Waldron, *supra* note 41, at 15.

57. PEERENBOOM, *supra* note 23, at 6.

citizen suits against the government.[58] He described these developments as "considerable evidence of a shift from . . . rule by law toward a system that complies with the basic elements of a thin rule of law."[59]

Taisu Zhang and Tom Ginsburg have argued that China began a decisive shift to legality after 2012.[60] Even if there was a "turn against law" to a more populist legality in the mid-2000s,[61] they say, Party General Secretary Xi Jinping's ascension in 2012 "marked a major turning point" for law-based governance.[62] To show this, they analyze rising judicial pay and prestige, new circuit courts, a new system of quasi-precedents, enhancements to judgments enforcement, efforts to bolster judicial financial independence from local governments, an expansion in the judiciary's review power over administrative actions, heightened rhetorical commitment to the state constitution, and a sweeping 2018 constitutional amendment.[63] But "*legality*," they caution, "in which the letter of the law is enforced more rigorously and afforded greater political respect," is not "the *rule of law* in which . . . political power . . . is effectively constrained and regulated by law."[64] They ultimately conclude that Chinese regime is a "nuanced and sophisticated" rule-by-law state, where the center's instrumental desire for law is more than matched by society's demand for it.[65]

Other scholars have eschewed theories that center on legality. For example, Kwai Hang Ng has expressed doubt that Chinese law conforms

58. *Id.* at 6–7.

59. *Id.* at 558. Peerenboom's understanding of a thin rule of law generally accords with the literature. On his view, rule of law consists of a thin minimum core, comprised of "meaningful restraints on state actors"; conformity with other familiar formal-procedural requirements like generality, congruence, and clarity; and the well-functioning of certain legal institutions and procedures. *Id.* at 65–67. For a general critique of "rule of law" paradigms as applied to China, see Minhao Benjamin Chen & Zhiyu Li, *Courts Without Separation of Powers: The Case of Judicial Suggestions in China*, 64 HARV. INT'L. L.J. 203, 206–12 (2023).

More recently, Peerenboom has argued that under Xi, there has been a "turn away from state socialist rule of law toward a new hybrid Party-state socialist rule of law model," which involves a "more robust role for the Party both in terms of its leadership role and in its role in daily governance." Randall Peerenboom, *The Transformation of State Socialist Rule of Law into Party-State Socialist Rule of Law in the Xi Jinping Era of Comprehensive Rules-Based Governance*, HAGUE J. RULE OF L. 3–4 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4736955 [https://perma.cc/2YKT-458K].

60. Zhang & Ginsburg, *supra* note 12, at 309–11.

61. *See* Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMPAR. L. 935, 936–37 (2011) (characterizing a set of legal changes that included a deemphasis on formal law and adjudication and a focus on pre-1978 mediation practices); Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, *in* MAO'S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE GOVERNANCE IN CHINA 165, 170–71 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011) ("[P]opulism is once again central to the functioning of the Chinese legal system.").

62. Zhang & Ginsburg, *supra* note 12, at 321.

63. *Id.* at 311, 328–31.

64. *Id.* at 316.

65. *Id.* at 387.

with rule by law.[66] Chinese law does not always "command[] obedience," he observes; for example, it can be quite "flexible and pragmatic in its treatment of the socially aggrieved."[67] He ultimately advocates for a *policy implementation* theory of Chinese law, wherein written laws are essentially policy statements that judges carry out with wide latitude without being truly bound to narrow legalistic requirements.[68] Such a theory bears a family resemblance to Mayling Birney's theory on *rule of mandates*, under which officials are expected to implement laws and policies based on hierarchically ranked mandates rather than black-letter law.[69] Under such a system, officials have wide discretion to "adjust the implementation of laws" when they conflict with "higher priority mandates."[70]

Donald Clarke has gone further to argue that legality-based concepts are so ill-suited to explaining institutions conventionally associated with China's legal system that the system is not aptly described as a legal system at all.[71] Such a system is better conceived as an *order maintenance* system, he contends, because it is oriented principally toward "the maintenance of order and the political primacy of the Chinese Communist Party (CCP)."[72] Unlike legality-focused theorists who have concentrated on judicial reforms and legal consciousness, Clarke centers his analysis on extra-legality in areas like anti-corruption enforcement and ethnic detentions.[73] He focuses too on the nature of the CCP's political-legal system, where courts are part of a larger set of coercive institutions under common Party management.[74] Unlike legality-based theories and their assumptions of legal convergence, he explains, order maintenance is an affirmative theory with its own distinctive logic.[75]

A notable skeptic of Clarke is Xin He, who observes that many extra-legal aspects of Chinese law are not centered on stability.[76] Social stability was not the rationale underlying local experiments like land auctions, he explains, as such departures from formal law were actually meant to improve

66. Ng, *supra* note 40, at 797–810.

67. *Id.* 798–803 (emphasis omitted).

68. *Id.* at 811.

69. Mayling Birney, *Decentralization and Veiled Corruption Under China's "Rule of Mandates,"* 53 WORLD DEV. 55, 56 (2014).

70. *Id.*

71. Clarke, *supra* note 1, at 546–47.

72. *Id.* at 543.

73. *Id.* at 562–76.

74. *Id.* at 559–62.

75. *See id.* at 547, 555 (citing Nick Cheesman, whose *law and order* paradigm developed in the context of Myanmar is, like Clarke's *order maintenance* paradigm, asymmetric to the rule of law).

76. Xin He, *(Non)legality as Governmentality in China* 3 (Univ. H.K. Fac. L. Working Paper No. 2020/035, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3612483 [https://perma.cc/3N6W-438X].

the economy.[77] More encompassing of both legal and extra-legal aspects of Chinese law, he believed, is a theory of *governmentality* or *leadership maintenance*.[78] Inspired by Foucault's conception of governmentality as the state's "strategies, tactics, and programs to control society," He argued that a better theory of Chinese law should be based on a wider understanding of the Party's various tool kits for governance.[79] Whether law or extra-legal tools are employed depends ultimately "on the CCP's evaluation of the situation," he concludes, as captured in the question: "[W]hich bundle of strategies suits its reign"?[80]

The preceding concepts all occupy the realm of monist high theory: theories that purport to explain entire legal systems at peak levels of parsimony. While some concepts can be disaggregated into multiple elements (a thin rule of law can be broken down into principles like generality, clarity, prospectivity, and so forth, for example), all such theories claim, in their strong form, that China's legal system is essentially and fundamentally explicable along a single conceptual dimension, whether it is the instrumentalism of rule by law, the legal universalism of rule of law, or the stability orientation of order maintenance.

II. Pluralism

There have been other approaches. In recent years, a number of scholars have abandoned monism in favor of more structurally complex theories of Chinese law. These pluralist theories differ in their conceptual content, clarity, and focus, but they share the conviction that multiple parameters are better suited to Chinese law's social complexity. Unlike monist theories, pluralist theories tend to focus on how different normative orders or social forms can interact, conflict, and co-exist in one system. But unlike highly descriptive or contextual accounts of law,[81] these accounts are still *theories*, pitched at an intermediate level of generalization.

A relatively early account in this category is Sida Liu's 2014 theory on Chinese law's "basic social forms."[82] Following the Simmelian tradition of social geometry,[83] Liu recognized that all systems, including China's, are

77. *Id.* at 4.

78. *Id.* at 6.

79. *Id.* at 5–7.

80. *Id.* at 6.

81. *See, e.g.*, CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, *in* THE INTERPRETATION OF CULTURES 3, 5–6, 9–10, 24, 28 (1973) (espousing "thick description," which requires "theory to stay rather closer to the ground").

82. Liu, *supra* note 3, at 417.

83. GEORG SIMMEL, GEORG SIMMEL ON INDIVIDUALITY AND SOCIAL FORMS 27–28 (Donald N. Levine ed., 1971). Simmel believed that sociology ought to study social forms, leaving investigations into the contents of society to other disciplines. Liu, *supra* note 3, at 417.

filled with "irreconcilable contradictions and conflicts" and so should not be regarded as "fully integrated and smoothly function[ing] machine[s]."[84] He theorized Chinese law to consist of four main components: (1) a social structure that is "internally round, externally square," meaning soft and flexible internal rules but a more professional and Westernized external face;[85] (2) an operational mode of "three positions, one unity," requiring multiple agencies to coordinate on shared matters;[86] (3) ideological opposition between formal-rational and informal-mediative approaches to law;[87] and (4) the "unity of law and politics" as reflected in the continued "dominance of the administrative state over the judiciary."[88] A through line in these various characteristics and a source of their great tensions, he writes, is the "opposition between populism and professionalism."[89]

Liu's theory is *sui generis* in its sociological inspirations, but its multiparametric structure resonates with the contemporaneous work of several political scientists. In her book on environmental litigation, Rachel Stern described China's structure as a "bifurcated legal system," "deeply split" in its treatment of commonplace cases versus politically sensitive cases.[90] Such bifurcation owes to the regime's ambivalence towards law, she explained: a desire "to keep political control while projecting the image of a well-run modern state."[91] From his time-series analysis of Chinese law, Yuhua Wang concluded similarly that China's legal system exhibited only a "partial rule of law," where rulers "tie their hands" in commercial cases to credibly assure investors but maintain "discretionary power in the political

84. Liu, *supra* note 3, at 417.

85. *Id.* at 418–23 (describing, inter alia, the influence of Ma Xiwu's adjudicative style on China's internally round social structure).

86. *Id.* at 423–31 (describing, among other examples, the police, procuratorates, and courts in the enforcement of criminal law); *see also* Juan Wang & Sida Liu, *Ordering Power Under the Party: A Relational Approach to Law and Politics in China*, 6 ASIAN J.L. & SOC'Y 1, 2 (2019) (discussing how China's political legal system is ordered "by the interdependence, co-ordination, and exchange among the political-legal actors and institutions").

87. Liu, *supra* note 3, at 431–39.

88. *Id.* at 439–43.

89. *See id.* at 422, 431–32, 436–38 (noting the difference between how Chinese legal professionals versus ordinary Chinese people understand the nation's legal system). On a related tension between law and stability, see Benjamin L. Liebman, *Legal Reform: China's Law-Stability Paradox*, DAEDALUS, Spring 2014, at 96, 96–97 (describing a "law-stability paradox" for the Chinese Party-state whereby "China's legal reforms have been designed in part to further stability," and yet "party-state leaders appear not to trust legal institutions to play primary roles in addressing many . . . complex issues").

90. RACHEL E. STERN, ENVIRONMENTAL LITIGATION IN CHINA 229–30 (2013); *see also* Margaret Woo, *Law's Location in China's Countryside*, 29 WIS. INT'L L.J. 416, 420 (2011) (finding that China's civil dispute resolution system was "multi-tracked" depending on factors that included whether a case was "run of the mill" commercial litigation, in the countryside, or constituted "major litigation").

91. STERN, *supra* note 90, at 229–30.

realm."[92] William Hurst has argued that reform-era Chinese law consists of multiple legal regimes: a "rule by law" regime in civil law where nonlegal actors "refrain from excessive intervention" in specific cases, but a "neotraditional legal regime[]" in criminal law where insecure elites intervene more heavily.[93]

A related idea, recently revived, is dual-state theory. The concept traces to German lawyer Ernst Fraenkel, who described the Nazi legal system as a "dual state" composed of two "competitive" spheres: a normative state where law governs and a prerogative state where political expediency rules.[94] The former entails "an elaborate and systematic set of established legal norms, rules, codes, and procedures,"[95] while the latter is a "vacuum as far as law is concerned," "regulated by arbitrary measures . . . , in which the dominant officials exercise their discretionary prerogative."[96] The two states exist in a kind of "structural asymmetry," whereby the prerogative state, rooted in a Schmittian conception of sovereignty, necessarily dominates.[97] So understood, the dual state is fundamentally incompatible with the rule of law, even if autonomous norm-following exists in many areas of private ordering.[98]

A number of legal scholars have applied "dual state" concepts to Chinese law.[99] Hualing Fu is among the dual state's leading proponents. "As

92. YUHUA WANG, TYING THE AUTOCRAT'S HANDS: THE RISE OF RULE OF LAW IN CHINA 3–4 (2015) (emphasis omitted).

93. HURST, *supra* note 3, at 30–33.

94. ERNST FRAENKEL, THE DUAL STATE, at xiii, 3, 46 (E.A. Shils, Edith Lowenstein & Klaus Knorr trans., Oxford University Press 2017) (1941).

95. JENS MEIERHENRICH, THE REMNANTS OF THE RECHTSSTAAT: AN ETHNOGRAPHY OF NAZI LAW 163 (2018).

96. FRAENKEL, *supra* note 94, at 3.

97. MEIERHENRICH, *supra* note 95, at 89; *see* FRAENKEL, *supra* note 94, at 57 ("The sovereign is he who has the legal power to command an emergency . . . ." (quoting Carl Schmitt, POLITISCHE THEOLOGIE 1 (2d. ed. 1934))). While "the presumption of jurisdiction rests with the Normative State," Fraenkel explains, "jurisdiction over jurisdiction rests with the Prerogative State." *Id.*

98. FRAENKEL, *supra* note 94, at 46 (concluding that "Rule of Law . . . has been supplanted by the Dual State"); *id.* at 73 (stating that "the courts have successfully maintained the legal system necessary for the functioning of private capitalism").

99. *E.g.*, Pils, *supra* note 3; Hualing Fu & Michael Dowdle, *The Concept of Authoritarian Legality: The Chinese Case*, *in* AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION (Weitseng Chen & Hualing Fu eds., 2020); Fu, *supra* note 3; SHUCHENG WANG, LAW AS AN INSTRUMENT: SOURCES OF CHINESE LAW FOR AUTHORITARIAN LEGALITY (2022). I have used concepts associated with dual-state theory in my own work. Mark Jia, *Special Courts, Global China*, 62 VA. J. INT'L L. 559, 619–20 (2022); Jia, *supra* note 47, at 1720. Cora Chan has applied dual-state theory to the China–Hong Kong relationship. *See generally* Cora Chan, *From Legal Pluralism to Dual State: Evolution of the Relationship Between the Chinese and Hong Kong Legal Orders*, 16 LAW & ETHICS HUM. RTS. 99 (2022). In a review essay that includes significant discussion of China, Russian law expert Kathryn Hendley has advocated for dual-state theories as well. *See generally* Kathryn Hendley, *Legal Dualism as a Framework for Analyzing the Role of Law Under Authoritarianism*, 18 ANN. REV. L. & SOC. SCI. 211 (2022).

neo-authoritarianism advances," he explains, "the Party . . . . has expanded and solidified a prerogative state to solve politically sensitive matters through substantively extra-legal methods."[100] But "largely parallel to[] the extra-legal regime," Fu continues, "there is a normal legal system, less politicised, reform-oriented, and semi-autonomous, which continues to evolve toward maturity and grow in institutionalisation and sophistication by offering rules-based solutions to a wide range of social conflicts."[101] Fu sees these states as "symbiotic," "each depending on the other for its existence," but also porous and interactive, with the prerogative sphere naturally invading the normative sphere, and the normative sphere sometimes even moderating the system's "authoritarian edge."[102]

Eva Pils is another proponent of dual-state theory. Unlike Fu, who defends at length the idea of a growing normative sphere in China, Pils focuses on how there has been a revival of the prerogative sphere under Xi after a sustained period of normative state-building during the reform era.[103] She favors dual-state analysis not primarily because it draws "attention to the possibility of concurrent growth of the normative and prerogative states," but because it "compels us to consider how . . . [the dual state] rejected rule of law through its merely conditional subjection to the law, and its willingness to scorn legality whenever this seemed opportune."[104] She shows how this pattern has played out in the recent persecution of rights lawyers and ethnic minorities.[105]

Another scholar who has employed dual-state concepts is Shucheng Wang. In a recent book, he examines various sources of law—constitutions, intraparty regulations, judicial interpretations, and other forms of judicial guidance and precedent—to show how law can be a tool to help maintain "political stability through strengthening authoritarian legality for the ruler."[106] Although his theory, termed *legal instrumentalism*, most directly recalls rule by law, his explication of the theory relies in part on Fraenkelian ideas. In a chapter on China's "Dual Constitution," he gives attention to the "dynamic interaction between the normative and prerogative institutions," and describes "relatively stable normative institutions [as] pragmatically valuable for authoritarian rulers" to promote growth and to enhance state capacity.[107]

100. Fu, *supra* note 3, at 3.
101. *Id.*
102. *Id.* at 4, 7.
103. Pils, *supra* note 3, at 352–53, 356–59.
104. *Id.* at 360, 374.
105. *Id.* at 360–64.
106. WANG, *supra* note 99, at 14.
107. *Id.* at 57–59.

A different approach to duality is discernible in Ling Li's theory of the *dual normative system*."[108] Unlike dual-state theories that see duality "in the division of space" between "two different legal systems or regimes," she explains, duality is better conceptualized through "the division of labour between two different norm-making authorities: the Party who issues Party rules regulating the Party-state sphere and the state who promulgates laws regulating the state-society sphere."[109] The two spheres are essentially integrated, enabling the Party to delegate significant authority to the state sphere while retaining ultimate "decision-making power."[110] Li further developed this theory in a recent paper arguing that China's political order is embodied in the Party's administrative ranking system (ARS), a formal standardized system that regulates "the power relations between and within all Party and state organs."[111] She argues that this arrangement of "command and dependence relations," termed *order of power*, can explain significant swaths of legal and judicial behavior.[112]

By focusing on how power relations impact legal outcomes, Ling Li evokes Ji Li's work on a "unified positive theory" of judicial behavior in China. Termed the *power logic of justice*, Ji Li's theory posits that all judicial outcomes in China are "function[s] of various configurations of the power status of litigants and the judicial decision maker, plus the distributional patterns of information."[113] In mapping out various power distributions, he focuses on both de jure power sourced in laws, party rules, and practices, and de facto power as "measured by the ability to organize collective action and control of brute force and material resources."[114] Li substantiates his theory through a schematized presentation of "fifteen possible directional configurations of power status."[115] Unlike the previous theories, Li's theory does not purport to explain the Chinese legal system generally, but it is yet another example of a scholar making multi-parametric moves to achieve "more explanatory capacity than . . .other theories."[116]

There are important differences among these theories. Some see subject-specific divisions; others see operational or ideological divides. Some focus only on power exercised by the Party-state; others focus on

108. Ling Li, *"Rule of Law" in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China*, 2 ASIAN J.L & SOC'Y 93, 96, 107–09 (2015) (emphasis added).

109. Li, *supra* note 3, at 493.

110. Li, *supra* note 108, at 110.

111. Li, *supra* note 3, at 493–94, 498.

112. *Id.* at 493. For example, courts have less autonomy in criminal matters when the court's administrative rank matches the procuratorate's, but they have more leeway in civil and commercial cases because litigants in those matters are generally unranked. *Id.* at 508–11.

113. Li, *supra* note 13, at 105.

114. *Id.* at 110.

115. *Id.* at 120.

116. *Id.* at 122.

broader power distributions among different actors. But none can fairly be characterized as monist. Unlike theories about legality or mandates, these later theories do not see a legal system that can be reduced into a single coherent principle. For them, dynamic internal tensions are not raw material from which totalizing concepts can be drawn, but should themselves be central components to good theory.

III. Contestation

For as long as they have existed, theories of Chinese law have been contested. The criticisms have been empirical, conceptual, and methodological, and have generally focused on the merits of individual theories. But if the goal is to determine what theory of Chinese law is best, it helps also to reflect on what makes a theory of Chinese law good—a meta-theoretical inquiry that entails more than assessing theories individually.

Many critiques of theories about Chinese law are empirical. Ng's rejection of rule by law, for example, stems from his review of recent empirical scholarship on how Chinese courts function in practice.[117] "On the basis of the rule by law thesis, it is puzzling to find that Chinese judges often avoid using the law," he writes, citing studies that show courts focusing on compensating victims regardless of what the law requires.[118] In Wen Cui's book on Chinese tax administration, Cui likewise rejects rule by law for misdescribing actual practice.[119] In explaining how the Chinese fiscal state raises revenue without emphasizing audits and truthful reporting, he points to the incentives of frontline tax collectors to privilege taxpayer registration and payment over legal compliance.[120] The result, he says, is that "in the sphere of Chinese taxation . . . there is no *rule by law*, let alone the *rule of law*."[121] On a similar vein, Qianfan Zhang argues that Zhang and Ginsburg have overstated recent judicial reforms' connection to legality, and that legal dualists are wrong to think that the Party-state "judiciously distinguish[es] ordinary and extraordinary cases."[122] Each of the preceding authors measure theories against social facts, and finds the theories wanting.

Other disagreements have been primarily conceptual. Consider recent debates over the dual state. Samuli Seppänen describes the "dual state" as "internally incoherent" because Fraenkel envisioned even the prerogative

117. Ng, *supra* note 40, at 797–810.

118. *Id.* at 799.

119. WEI CUI, THE ADMINISTRATIVE FOUNDATIONS OF THE CHINESE FISCAL STATE 264, 267 (2022).

120. *Id.* at 8, 21.

121. *Id.* at 259.

122. Qianfan Zhang, *The Communist Party Leadership and Rule of Law: A Tale of Two Reforms*, 30 J. CONTEMP. CHINA 578, 589, 594 (2021).

state as sometimes operating under formal rules.[123] Clarke contends that the Fraenkelian dual state does not well describe China because, to be a dual state, a system must have "a pre-existing legal order of which the normative state is a remnant, with the prerogative state as a kind of new and disruptive external force."[124] Responding to critics who point to the hazy conceptual boundaries of legal dualism generally, Kathryn Hendley argues that the dual state should not be regarded as a "blueprint."[125] "A more fruitful approach," she argues, "is to reconceptualize legal dualism as existing along a spectrum" containing a "messy middle."[126]

Still, other critiques of theoretical paradigms have been methodological. In the early years of China's reform era, Alford disagreed with works that analyzed Chinese criminal law through purportedly universal frameworks like "the due process of law."[127] He cautioned that such approaches could lure scholars into false notions of objectivity despite still applying their own "values and traditions."[128] Teemu Ruskola has argued that rule-of-man paradigms have had "ruinous analytic consequences for the study of Chinese law."[129] If "rule-of-law means *not*-the-rule-of-men," he explains, "any would-be Chinese law is an oxymoron."[130]

While the preceding summaries hardly exhaust the critical literature on Chinese legal theory, they illustrate how such debates have generally centered on the merits of individual theories. Largely missing from these conversations—yet all the more important as the field becomes more concept-dense—are more fundamental discussions about theoretical quality.

Some may find this exercise pedantic. Implicit in these debates is the assumption that a good theory of Chinese law is one that well explains it. On this account, approximation of truth is the overriding, even exclusive, goal of theory, and the critical question is which theory best achieves this singular end. But thinkers in adjacent fields have identified other features to which good theories ought to aspire. And while not all such features ought to be equally weighted in the study of Chinese law, all have analytic merit.

123. Samuli Seppänen, *Turning the Party State Inside Out: CCP Intra-Party Regulations as a Theoretical Challenge*, 10 CHINESE J. COMPAR. L. 128, 135–36 (2022); *see also* Sida Liu, *Cage for the Birds: On the Social Transformation of Chinese Law, 1999–2019*, 5 CHINA L. & SOC'Y REV. 66, 81 (2020) (describing the dual state as "flawed . . . because the prerogative and normative parts of the state are mutually dependent" in all cases).

124. DONALD CLARKE, IS CHINA A DUAL STATE? 6 (GWU Law School Public Law Research Paper No. 2022-74, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4317126 [https://perma.cc/6J3E-3BY3].

125. Hendley, *supra* note 99, at 218.

126. *Id.*

127. Alford, *supra* note 35, at 949–51.

128. *Id.* at 946.

129. RUSKOLA, *supra* note 36, at 14.

130. *Id.*

In determining what other disciplinary perspectives might be useful, I assume that most theorists of Chinese law are doing explanatory theory in a broadly social-scientific sense. So understood, theories are essentially constructs, "a set of related concepts, definitions, and assumptions," that we use to order and make legible complex social phenomena.[131] A key goal of explanatory theory is to further knowledge through generating testable propositions.[132] This approach is distinguishable from other modes of theorizing that seek to expose and undermine certain normative assumptions about law, or that see high theory as a guidepost for justifying current practices or for reforming current law.[133] Zhu Suli, the former Dean of Peking University Law School, for instance, has criticized his Chinese colleagues' ideological embrace of Western rule of law, favoring instead a normative approach that stresses China's native resources and social practices in guiding ongoing reform efforts.[134] That is high theory in a different and important sense. But it is not the focus here.

Within the social sciences, there is much agreement on the general qualities of good theory. First, good theories have *explanatory power*. They are strong at accounting for known findings and at minimizing inconsistencies with contradictory findings.[135] Empirical critiques of theories of Chinese law are essentially arguments that theories lack explanatory power. Second, good theories are *parsimonious*, in that they have "few parameters relative to competing theories."[136] A theory that explains Chinese law based on a single construct is more parsimonious than one that relies on

131. Brian Oldenburg, Fiona Crocker & Benjamin Shüz, *Public Health as Social Science*, *in* 19 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 545, 548 (James D. Wright ed., 2d ed. 2015); Frank Davidoff, *Understanding Contexts: How Explanatory Theories Can Help*, IMPLEMENTATION SCI., 2019, at 1, 1.

132. Davidoff, *supra* note 131, at 2.

133. *See* Martha Minow & Susannah Barton Tobin, *Archetypal Legal Scholarship: A Field Guide, 2d. Edition*, 71 J. LEGAL EDUC. 494, 498–99 (2022) (describing different archetypes of legal scholarship, including scholarship that "offer[s] a normative assessment").

134. *See generally* ZHU SULI, SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA'S BASIC-LEVEL JUDICIAL SYSTEM xli-xlii (2016); Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 YALE L.J. 1675, 1677 (2005) (reviewing ZHU SULI, SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA'S BASIC-LEVEL JUDICIAL SYSTEM (2000) and noting Zhu's criticism of "Chinese legal scholars as [being] enamored of trendy Western theory and ignorant of the role of law in Chinese society outside of Beijing and Shanghai"); SEPPÄNEN, *supra* note 30, at 92–96, 107–08, 146 (outlining key aspects of Zhu Suli's thought, including the value placed on "the social functions of the legal system").

135. ANOL BHATTACHERJEE, SOCIAL SCIENCE RESEARCH: PRINCIPLES, METHODS, AND PRACTICES 28 (2d ed., 2012); *see* Gieseler et al., *supra* note 6, at 7 ("One obvious characteristic of a good theory is consistency with empirical observations."); AKERS, *supra* note 5, at 9 (describing "empirical validity" as "the most important criterion" of good theory).

136. Higgins, *supra* note 6, at 141.

multiple constructs.[137] Third, good theories are *testable*. A theory is unhelpful if it is hard to falsify in practice.[138] For example, a theory that explains Chinese law based solely on the Party's desire to maintain power may illuminate certain developments, but it is not easily shown to be false.[139] Fourth, good theories are *coherent*. They are "comprehensible and internally consistent."[140] Fifth, good theories are *precise*. They have "clearly defined concepts and operationalizations that allow for little stretching or subjective interpretation."[141] Sixth, good theories are *generalizable*. While theories may be constructed to explain certain data, good theories are ideally relevant to a broader range of phenomena.[142] Finally, good theories are *generative*. They "inspire new research" and "promote theoretical progress through refinements, sharpening, and the inspiration . . . of new theories."[143]

As explained, most theoretical debates on Chinese law have focused on the first criterion: a theory's explanatory power. But other attributes of good theory also deserve our reflection. Some such qualities are attractive for obvious reasons; no one wants a theory that is inaccurate, incoherent, or imprecise. But these attributes also have the effect of refocusing our inquiry away from pure explanation towards related goals, such as a theory's ability to generate new knowledge or theory refinement. Parsimony, for example, is not merely useful in itself; it is also associated with coherence, testability, and generativity.[144]

We could evaluate each theory introduced here along each of the theoretical criteria outlined above. In so doing, however, we would quickly realize that no one theory bests the others on every dimension. More fruitful at this stage is to assess the analytic costs and benefits to different *modes* of theorizing. As Parts I and II have shown, the divergence between monist and pluralist theories is among the most prominent fault lines within the field. Current debates about legal dualism, for example, have attracted significant disagreement from monists who think Chinese law is better conceptualized

137. *See id.* at 141 ("Adding new parameters to account for additional evidence or to make new predictions increases the complexity of the theory.").

138. *Id.*

139. *See* Clarke, *supra* note 1, at 553 (criticizing a theory based on "Party primacy" as failing Popperian falsifiability); AKERS, *supra* note 5, at 8 ("Another way in which a theory may be untestable is that its propositions are so open-ended that any contradictory empirical evidence can be interpreted or re-interpreted to support the theory.").

140. Higgins, *supra* note 6, at 141.

141. Gieseler et al., *supra* note 6, at 7–8 ("The more precise the formulation of a theory and its background assumptions, the less ambiguous it is for researchers to decide which empirical observations are consistent versus inconsistent with the theory." (citation omitted)).

142. Higgins, *supra* note 6, at 141.

143. Gieseler et al., *supra* note 6, at 10 (parentheses omitted).

144. *See* Higgins, *supra* note 6, at 141 ("By being economical, a theory is more generative.").

as just one order.[145] If we are to distinguish between better or worse theories of Chinese law, it helps to first consider tradeoffs to different levels of theoretical design.

IV. Tradeoffs

As a class, monist theories about legal systems enjoy some considerable advantages over pluralist theories. They tend to be more parsimonious, more coherent, more falsifiable, and more provocative than other theories, which has made them more generative overall. They also have a strong heuristic and prismatic usefulness, facilitating efficient communication and creative reinterpretation of existing facts. But because of their inherent economy, monist theories about law are more limited in their explanatory breadth and depth. As a class, they cannot account for as much of the studied phenomenon as theories with multiple parameters, nor can they supply as concrete a picture of causes, mechanisms, and patterns as theories that are structurally more complex.

I say "as a class" because these are generalizations that admit of important exceptions. My claim is not that *all* pluralist theories explain legal systems better than *all* monist theories; some pluralist theories may just be bad at describing reality. Nor do I believe that *all* monist theories are more testable or generative than *all* pluralist theories; a pluralist theory with very precisely operationalized parameters may be easier to test than a monist theory whose lone parameter is hazily defined.[146] The claim rather is that on average, and *ceteris paribus*, there are strengths and weaknesses to each approach.

Start with some areas where monism excels. Because monist theories are defined here as theories that explain legal systems at peak levels of economy, they optimize by definition one of the first criteria of good theory: parsimony. Parsimony may be inherently valuable, even on purely aesthetic grounds, but it is more importantly correlated with other features of good theory. For one, parsimonious theories tend to exhibit a high degree of internal coherence. When a theory contains multiple constructs, there is a possibility that they will be internally contradictory. For example, Seppänen describes the "dual state" as "internally incoherent" because Fraenkel sometimes envisions the prerogative state as operating under formal rules—

145. *See, e.g.*, Zhang, *supra* note 122, at 593–94 (criticizing other theories); CLARKE, *supra* note 124, at 10 (arguing that China is better characterized as a single "prerogative state unbound in theory or practice by legal restraints").

146. For example, Ling Li's theory of the order of power sees power relations embedded specifically within the party's detailed Administrative Ranking System (ARS). Because the ARS precisely delineates the status of various persons and entities, this can facilitate empirical testing. Li, *supra* note 3, at 494–96.

an attribute that he at other points associates only with the normative state.[147] This is exactly the risk of multiparametric theorizing. In contrast, a monist theory like order maintenance envisions only one organizing principle of the Chinese legal system: stability maintenance.[148] Even if one finds order maintenance to be inconsistent with external evidence, one cannot deny its high degree of internal coherence.

Parsimony and coherence are correlated with testability. A "theory has to be understandable and noncontradictory so that clear predictions can be made."[149] Simple and logical theories are generally more falsifiable. A claim that China's legal system is committed to legality can be disproven through evidence that law continues to be widely ignored. Likewise, the assertion that Chinese law is about policy implementation or the rule of mandates, and not law, can be undermined if there is evidence that officials widely adhere to legal dictates even in the face of higher-order policy priorities or expectations.

In contrast, pluralist theories tend to be harder to test. Consider Hendley's preferred version of dual-state theory, which understands authoritarian legal systems as operating on a spectrum, with the prerogative state on one end, the normative state on the other, and a "messy middle" in between.[150] A spectrum theory is paradigmatically a pluralist theory, in that it consists mathematically of an infinite number of parameters between 0 and 1, and for that reason may come closer to approximating reality. But because it is less parsimonious than monist theories, it is less amenable to hypothesis testing. After all, any empirical evidence of legality would confirm the existence of a normative state; any evidence of extra-legality would support the presence of a prerogative state; and any evidence that is difficult to categorize would confirm the existence of a "messy middle." In none of these instances can the theory be falsified because it already contemplates the entire universe of legal compliance and non-compliance. It's worth noting, too, that the falsifiability problem here is not limited to China or other autocracies. That is because virtually *all* legal systems have internal variations in compliance with the law. If the dual state is a spectrum, then most all contemporary legal systems may qualify.

It follows that monist theories can be quite generative. Because simple, coherent theories are easier to test, people will test them. And because parsimonious theories are necessarily reductive, they are more likely to provoke. "The acid test for a theory is whether its logic compels a process of

147. Seppänen, *supra* note 123, at 136.

148. *See* Clarke, *supra* note 1, at 559 (arguing that "China possesses a set of institutions whose main purpose is the maintenance of order as the Party sees it").

149. Higgins, *supra* note 6, at 141.

150. Hendley, *supra* note 99, at 218.

reasoning that concludes with an implication, often surprising, that suggests new research that otherwise would not be done . . . ."[151]

Monist theories of Chinese law have indeed been generative. Theories of legality, rule of law, and rule by law have led empiricists to test the extent to which law actually matters in China. This has given rise to a significant body of field work and case research, summarized later, that have all questioned the extent to which laws are adhered to in everyday Chinese life.[152] Recent monist theories, moreover, have been especially provocative in their focus on a single parameter. Clarke claims that China has an order system, not a legal system.[153] Zhang and Ginsburg describe a significant "turn toward law."[154] Pitched at this level, both articles have inspired scholarly engagement and disagreement. Some, like Zhang Qianfan, have questioned the degree of China's actual turn to law.[155] Others have proposed alternative theories in direct response to order maintenance.[156] And still others have sought to mediate between these camps by pointing to duality.[157]

Two other benefits of monist theorizing merit discussion. First, monism's reductionism can serve a kind of heuristic usefulness, especially in circumstances that demand efficient communication of essential knowledge. Even if monist theories cannot give depth or texture to an audience, they can convey a key aspect of a legal system through mental shorthand. Whatever flaws rule by law may carry, it conveys something true and important about the instrumental nature of legality in China. Few can dispute that law has been a tool of party–state governance, even if some believe it to be a relatively unimportant one. Likewise, a theory premised on social stability or policy implementation communicates something true and important about some of the basic priorities of Chinese governance. Even if one thinks that these theories shortchange the semi-autonomous nature of private law norms or of the center's commitment to legality, few can deny that order

151. Higgins, *supra* note 6, at 142.

152. *See infra* Part IV. *See generally*, ETHAN MICHELSON, DECOUPLING: GENDER INJUSTICE *IN* CHINA'S DIVORCE COURTS (2022) (finding that Chinese courts routinely violate domestic law in divorce trials).

153. Clarke, *supra* note 1, at 559.

154. Zhang & Ginsburg, *supra* note 12, at 311–12. Or consider an earlier and highly generative debate over whether China had turned against law in the latter half of the Hu Jintao administration. *See* Minzner, *supra* note 61, at 936–37 (identifying a turn against law); Albert H.Y. Chen, *China's Long March Towards Rule of Law or China's Turn against Law?*, 4 CHINESE J. COMPAR. L. 1, 17 (disagreeing with Minzner that "there [had] been a 'turn against law' in China in the first decade of the twenty-first century").

155. Zhang, *supra* note 122, at 589.

156. *See, e.g.*, He, *supra* note 76, at 5–6.

157. *See infra* notes 192–196.

maintenance has more than a "glint of truth" in the context of Chinese governance.[158]

Pluralist theories are less useful communicative heuristics, either because they center conflicting constructs or because they involve many parameters. Theories like the dual state, which envision conflicting parallel orders, impose a higher initial cognitive load on first encounter.[159] Even if the theory is coherent on further scrutiny, its initial reception will more likely lead to confusion, even doubt. How can a legal system be both norm-abiding and fundamentally extralegal? Other theories with many parameters, like order of power, have higher epistemological barriers to entry.[160] Someone new to each theory will need to first understand the details of how power is distributed before they can grasp what the theories entail. The Party's intricate ARS system, for example, the central component of Ling Li's theory, takes time to fully understand.[161]

Finally, monism can have a prismatic usefulness.[162] By focusing on one concept to the exclusion of others, monism can facilitate new and creative interpretations of existing data. For example, Zhang and Ginsburg's views on legality likely led them to a genuinely novel understanding of China's 2018 constitutional amendments.[163] Those amendments, which removed presidential term limits, textually enshrined Party "leadership," and helped to create a powerful new anti-corruption body, were widely criticized as legally regressive.[164] But according to Zhang and Ginsburg, such changes

158. *See* Fallon, *supra* note 2, at 3 (describing rule of man as a theoretical lens in American law).

159. *See* Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 21 & n.96 (2010) (summarizing social psychology literature on how people can "function as 'cognitive misers' who are limited in their capacity to process information and often seek shortcuts to reduce mental burdens").

160. *See generally* Li, *supra* note 3; Li, *supra* note 13.

161. Li breaks even that system down into four dimensions to aid comprehension: spatial, institutional, personal, and Party. *See* Li, *supra* note 3, at 494.

162. I use a prism analogy, inspired by a recent book on Hong Kong, because what one sees in a prism "depends on the angle of viewing." LOUISA LIM, INDELIBLE CITY: DISPOSSESSION AND DEFIANCE IN HONG KONG 11 (2022).

163. *See* Zhang & Ginsburg, *supra* note 12, at 346–47, 356–58.

164. *Id.* at 311–12 & n.14 (recognizing that "some commentators suggest that [the amendments] demonstrate[d] Xi's disregard, if not outright disdain, for rules and norms"); Jianfu Chen, *Chinese Law and Legal Reform: Where to from Here?*, 50 H.K L.J. 243, 257–59, 269 (2020) (arguing that China was "regressing from, rather than progressing towards, establishing a genuine rule of law" under Xi); Jamie P. Horsley, *What's So Controversial About China's New Anti-Corruption Body?*, DIPLOMAT (May 30, 2018), https://thediplomat.com/2018/05/whats-so-controversial-about-chinas-new-anti-corruption-body/ [https://perma.cc/7TX7-7CM3] (arguing that China's new National Supervision Commission's operation "seems at odds with Xi's law-based governance ambition"). For an earlier, more pessimistic take on China's Constitution under Xi, see generally Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the "Urgency" of Political Reform*, 11 U. PA. ASIAN L. REV. 337 (2016).

only confirmed the sociopolitical importance of law in China.[165] Xi could have simply stayed on beyond his term limit and violated the Constitution, they explained, but acting unconstitutionally would have been politically costly.[166] Likewise, they continued, the supervision commissions legalized many of the Party's pre-existing anti-corruption practices, further evidencing the importance of law.[167]

Clarke's belief that China's legal system is better conceived as an order system likely played a similar role in enabling novel interpretations of familiar facts. At various stages of China's legal modernization program, scholars have cited rising caseloads as evidence of China's move towards legality, even rule of law.[168] But if courts are not really courts in the conventional sense, as Clarke argues, but better conceived as "order" institutions committed to social stability, then significant increases in judicial caseloads are not necessarily evidence of growing legality at all.[169] After all, such numbers in isolation "tell us nothing about how the institutions to which complaints are brought operate."[170] And given significant evidence that Chinese courts are expected to prioritize stability over law, rising caseloads may simply indicate growing use of courts for harmonious dispute resolution, or something else.[171]

Whether these interpretations are right or wrong, they are interesting and counter-intuitive. A legal dualist, in contrast, would be more likely to hew to conventional interpretations of known facts because they already have multiple constructs to which conflicting evidence can be sorted—rising caseloads are most naturally thought of as evidence of a normative state, while constitutionalizing Party supremacy seems to confirm the work of the prerogative state. But because a monist isn't able to create new constructs to accommodate new exceptions (or else they would no longer be doing monism), they have an incentive to re-interpret contrary facts creatively.

Although monist theories enjoy a rich set of analytic advantages, they are structurally less well-suited to what many consider to be the primary goal of positive theory: explanation. Because no theory of complex phenomena can account for everything, good theories invariably seek to explain as much

165. Zhang & Ginsburg, *supra* note 12, at 356–58.

166. *Id.* at 356–57.

167. *Id.* at 359–61.

168. *See id.* at 342–43 (citing "unusually explosive growth in [the judiciary's] caseload" as evidence of increased legality); Chen, *supra* note 154, at 17, 24 (observing, as part of a rejoinder to Carl Minzner's assertion that China had turned against law, that Chinese judicial caseloads had increased immensely); PEERENBOOM, *supra* note 23, at 7 (pointing out in a book on China's movement toward rule of law that "[w]hile litigation was virtually nonexistent in 1979, the total number of cases of first instance reached 3 million by 1992, and 5 million by 1996").

169. Clarke, *supra* note 1, at 585.

170. *Id.* (emphasis omitted).

171. *Id.* at 581–83, 585.

of the available data as possible while minimizing inconsistent data.[172] Where genuine exceptions arise that contradict an existing theory, one option is to add new parameters to accommodate conflicting data. "Explanation of a complex social phenomenon can always be increased by adding more and more constructs."[173]

To illustrate, consider a theorist who applies a legality paradigm to Chinese law. Confronting evidence that many areas of Chinese law do not adhere to legality—indeed, actively flout it—a theorist can move down one rung of parsimony and add additional constructs to accommodate these exceptions. Call these new constructions "the prerogative state" or whatever else would best capture the evidence that contradicts the standard case. Invariably, a theory with more constructs to accommodate exceptions will explain more than the same theory that resists accommodation, so long as the constructs are well tailored to the exception. After all, the very definition of explanatory power includes the avoidance or minimization of contradictory findings.[174]

Multiple-parameter theories are also more likely to achieve explanatory depth. To see why, follow pluralism to its logical extreme. If one added a new parameter for every new exception *ad infinitum*, one would end up with a fine-grained image of China's legal system, with excessively detailed accounts of every aspect of the system. The result would hardly qualify as a theory given its lack of parsimony and generalizability, but it would undoubtedly account for various aspects of the system in granular detail. Monist theories, in contrast, tell us something basic about the system, but they are structurally less well suited to explaining concrete causes, mechanisms, and patterns. Rule by law may help us see how law can serve various governance purposes, but it cannot achieve the explanatory depth of a theory that, for example, engages the "operational" level of Chinese law by outlining "patterns of structural differentiation and integration" between various agencies and entities.[175]

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172. *See* Higgins, *supra* note 6, at 141 (noting that explanatory power has two aspects: "One side is that a theory should provide an explanation for known phenomena, including phenomena that appear contradictory. The other side is to ensure that no known findings contradict the theory.").

173. BHATTACHERJEE, *supra* note 135, at 29. The temptation is so great to add parameters to increase explanatory power that social scientists have warned against adding too many constructs. *Id.* (noting that adding ever more constructs "defeats the purpose of having a theory, which are intended to be 'simplified' and generalizable explanations of reality"); Gieseler et al., *supra* note 6, at 10 ("[E]very inconsistent observation [of a theory] must not lead to the development of a new auxiliary assumption specifying a new exception.").

174. There are other interpretive moves one could make. One could try to find another construct that includes both the standard case or the exception, or one could interpret the exception creatively to no longer be an exception. But assuming the exceptions are genuine exceptions, at some point monist theory will meet a natural limit in what it can explain given the complexity of social life.

175. Liu, *supra* note 3, at 423.

There is reason to believe, moreover, that as China's legal system has become increasingly complex, monism's explanatory gaps have grown larger. To see why, consider various monist theories of Chinese law in the light of recent empirical studies. Start with rule of law, rule by law, and legality. All of these theories envision a prominent role for law in serving state purposes, shaping judicial outcomes, or influencing private behavior. Yet, across a wide range of legal subject areas, scholars have questioned how much law has mattered in practice. Recent empirical studies in family law, for example, have found that China's "on-the-ground judicial practices . . . subvert its domestic laws," especially those meant to protect women.[176] Likewise, in criminal law, scholars have found from extensive fieldwork and case analyses that formal laws are routinely ignored in favor of other goals: stability, settlement, and repression.[177] Deep in China's urban centers, real estate markets for illegal land developments have boomed despite the absence of formal property rights protections.[178] In tax administration, the Chinese government has consistently raised revenue since the 1990s with minimal reliance on law.[179] Securities enforcement has in the past been based on "illegal" internal guidance norms that substantively changed the content of Chinese securities law.[180] Medical malpractice disputes evidence the continuing role of violence and protest in the law's "weak" "shadow," with

176. MICHELSON, *supra* note 152, at 12, 32 (analyzing divorce cases from a collection of 4.5 million written decisions); *see* XIN HE, DIVORCE IN CHINA: INSTITUTIONAL CONSTRAINTS AND GENDERED OUTCOMES 25, 121–22, 132, 169–70 (2021) (revealing how "stability and efficiency concerns have prevented the laws intended to protect women from being materialized"); *cf.* KE LI, MARRIAGE UNBOUND: STATE LAW, POWER, AND INEQUALITY IN CONTEMPORARY CHINA 204–05, 209, 224–25 (2022) (arguing that black-letter law is often overridden by other political and pragmatic concerns).

177. *See* Benjamin L. Liebman, *Leniency in Chinese Criminal Law? Everyday Justice in Henan*, 33 BERKELEY J. INT'L L. 153, 217 (2015) (observing "that courts are innovating and adopting flexible practices not entirely consistent with formal laws"); Bo Yin & Yu Mou, *Centralized Law Enforcement in Contemporary China: The Campaign to "Sweep Away Black Societies and Eradicate Evil Forces,"* 254 CHINA Q. 366, 367, 378 (2023) (analyzing how Party General Secretary Xi Jinping's three-year crackdown on "black societies and evil forces" "significantly weakened and distorted the criminal justice system" and "compromised professionalism"); SIDA LIU & TERENCE C. HALLIDAY, CRIMINAL DEFENSE IN CHINA 50 (2017) (documenting a "yawning gap that exists between the aspirational norms promulgated in the statutes and the murky practices of everyday criminal defense").

178. SHITONG QIAO, CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL NORMS 3–4 (2018). On the minimal role of formal property law in China's economic growth story, see Shitong Qiao & Frank K. Upham, *China's Changing Property Law Landscape*, *in* COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES 311, 311–13, 319 (Michele Graziadei & Lionel Smith eds., 2017); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMPAR. L. 89, 109 (2003).

179. *See* CUI, *supra* note 119, at 257 ("The substitution of government interventions for self-assessment in turn makes it unnecessary for the government to pronounce tax policy through the formality of lawmaking.").

180. Nicholas Calcina Howson, *Enforcement Without Foundation?—Insider Trading and China's Administrative Law Crisis*, 60 AM. J. COMPAR. L. 955, 956 (2012).

"[r]outine legal issues . . . frequently converted into political issues."[181] Even in ordinary traffic disputes, where political sensitivities are presumably at a nadir, courts routinely ignore legal requirements to stem not only collective unrest but also individual litigant dissatisfaction.[182] Some scholars have even conceptualized a category of courts, "work-units," that differ from other courts in their relatively minimal use of law.[183]

One might read these studies as supporting a different monist theory like order maintenance. But like a toy on which hammering down one nail only sends up another, opting for another monist theory can have the effect of exposing new explanatory gaps. For while theories that decenter legality can better explain the persistent extra-legal features of Chinese law, they tell us less about how to affirmatively understand recent legislative and legal-institutional changes: extensive lawmaking in areas ranging from administrative litigation to climate mitigation to data privacy;[184] the enactment—after decades of sustained effort—of a unified civil code;[185] reforms to insulate courts financially from local pressure and judges individually from specific interference;[186] the creation of new circuit courts and new specialized courts over intellectual property and finance to combat local protectionism and improve professional adjudication;[187] new forms of

181. Benjamin L. Liebman, *Malpractice Mobs: Medical Dispute Resolution in China*, 113 COLUM. L. REV. 181, 187 (2013).

182. Liebman, *supra* note 10, at 200–01.

183. KWAI HANG NG & XIN HE, EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA 7 (2017) (distinguishing analytically between courts as "work-units" and courts as "firms," the "[m]ost important" difference in which resides "in how much of the law is used").

184. *See* He Haibo, *How Much Progress Can Legislation Bring? The 2014 Amendment of the Administrative Litigation Law of PRC*, U. PA. ASIAN L. REV., no. 1 2018, 137, 189 (2018) (arguing that "the Amendment of the Administrative Litigation Law has achieved the results . . . that legislators desired and administrative litigation in China is embracing the best ever period in its history"); Alex L. Wang, *Climate Change Policy and Law in China*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 635, 641 (Kevin R. Gray, Richard Tarasofsky & Cinnamon P. Carlarne eds., 2016) (stating that "China has developed an extensive policy and law framework on the books for addressing climate change" and that "[o]fficial reports and third-party analysis suggest that these efforts have helped China to avoid billions of tons of greenhouse gas emissions"); ANGELA HUYUE ZHANG, HIGH WIRE: HOW CHINA REGULATES BIG TECH AND GOVERNS ITS ECONOMY 131–32 (2024) (describing China's new Data Security Law and Personal Information Protection Law); Mark Jia, *Authoritarian Privacy*, 91 U. CHI. L. REV. 733, 785–91 (2024) (analyzing cases implementing the Personal Information Protection Law).

185. Hao Jiang, *The Making of a Civil Code in China: Promises and Perils of a New Civil Law*, 95 TUL. L. REV. 777, 778 (2021); Siyi Lin, *Looking Back and Thinking Forward: The Current Round of Civil Law Codification in China*, 52 INT'L LAW. 439, 441–55 (2019).

186. Yueduan Wang, *Overcoming Embeddedness: How China's Judicial Accountability Reforms Make Its Judges More Autonomous*, 43 FORDHAM INT'L L.J. 737, 740 (2020); Zhang & Ginsburg, *supra* note 12, at 331–36.

187. *See* Zhiqiong June Wang & Jianfu Chen, *Will the Establishment of Circuit Tribunals Break Up the Circular Reforms in the Chinese Judiciary?*, 14 ASIAN J. COMPAR. L. 91, 107 (2019) (explaining that "the problem of local protectionism remains one of the principal reasons for the

"case law" meant to improve adjudicative consistency;[188] new rules on standing and legal aid that have empowered state-approved NGOs in public interest litigation;[189] improvements to a centralized procedure for resolving legislative and constitutional conflicts;[190] and an expanding legal consciousness among the populace at large.[191] All of these developments are of course subject to important qualifiers in terms of their reception and implementation. But taken together they suggest that theories that minimize law tend to underserve a major part of the story.

For these reasons, a number of pluralist theorists have sought to reconcile competing monist theories through the use of multiple parameters. Ling Li suggests that both sides in recent debates would probably at least acknowledge "that the Chinese legal system consists of both a law-based order and a political order."[192] Shucheng Wang sees legal and extra-legal aspects of China's system as "two sides of the coin, as both work to solidify China's authoritarian regime by strengthening authoritarian legality and

establishment of the circuit tribunals"); Susan Finder, *What Is the Impact of the SPC's Circuit Courts?*, SUPREME PEOPLE'S CT. MONITOR (June 10, 2020), https://supremepeoplescourtmonitor.com/2020/06/10/what-is-the-impact-of-the-spcs-circuit-courts/ [https://perma.cc/LQY5-SC5F] (explaining the ways in which Chinese circuit courts guide the lower courts, including judgments, rulings, and internal conferences); Zhiyu Li, *Specialized Judicial Empowerment*, 32 U. FLA. J.L. & PUB. POL'Y 491, 502–05 (2022) (discussing the specialized IP, financial, and Internet courts in China, which have a "stricter" criteria for judicial appointment and seek to promote "the efficiency and quality of adjudication"); Jia, *supra* note 99, at 599–601, 609 (2022) (noting the generally higher qualifications of judges appointed to China's IP and financial courts).

188. Benjamin M. Chen, Zhiyu Li, David Cai & Elliott Ash, *Detecting the Influence of the Chinese Guiding Cases: A Text Reuse Approach*, 32 A.I. & L. 463, 463–64 (2024); Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, 217 CHINA Q. 121, 123 (2014); Note, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2213–14 (2016).

189. *See* Yueduan Wang & Ying Xia, *State-Sponsored Activism: How China's Law Reforms Impact NGOs' Legal Practice*, 49 LAW & SOC. INQUIRY 451, 452 (2024) (finding based on fieldwork with sixteen NGOs that some have "expanded their legal operations, policy influence, and domestic funding sources . . . owing largely to new state policies under the umbrella of 'law-based governance'").

190. *See* Changhao Wei, *Reining in Rogue Legislation: An Overview of China's Invigoration of the "Recording and Review" Process*, MADE IN CHINA, May–Aug. 2021, at 48, 52–54 (arguing that the substantive and procedural reforms in Chinese legislature's recording and review system have become the legislature's main vehicle for advancing constitutional review); Keith J. Hand, *Constitutional Supervision in China After the 2018 Amendment of the Constitution: Refining the Narrative of Constitutional Supremacy in a Socialist Legal System*, ASIAN-PAC. L. & POL'Y J., 2022, at 137, 148 (describing reforms to the constitutional supervision process).

191. Zhang & Ginsburg, *supra* note 12, at 377 ("As a number of sociological studies have shown, consciousness over law and rights among the general population has grown dramatically over the past thirty years . . . ."); *cf.* Susan H. Whiting, *Authoritarian "Rule of Law" and Regime Legitimacy*, 50 COMPAR. POL. STUD. 1907, 1911 (2017) (describing "China's promotion of legal consciousness" as a "state project").

192. Li, *supra* note 3, at 491.

increasing the resilience of the CCP's authoritarian politics."[193] Ji Li describes the literature on Chinese courts in the following way:

> For some, Chinese courts act in a relatively fair, professional, neutral, and legalistic manner. Yet for others, Chinese judges are biased, obedient to the ruling party, unprofessional, and corrupt. The frustrating truth is that, after decades of research, judicial behavior in China remains a proverbial elephant to a group of blindfolded men.[194]

Li's response was to reconceptualize courts and litigants based on a theory of power relations with "more explanatory capacity than the other theories on judicial actions in China."[195] Fu's work on legal dualism has made similar points about the literature:

> Like the proverbial elephant that was touched by a blind man, Chinese law, reflecting Chinese political and socio-economic realities, takes different shapes. It is highly compartmentalized, and depending on where it is touched, one finds expanding gaps where law is largely irrelevant; legal traps where a thin legal veil tries to cover political repression; and legal practices of varying levels of institutionalisation but largely compatible with counterparts in any mature legal system. Focusing on the stability imperative and the resulting repressive and preventative measures, one sees a clear authoritarian revival and an enhanced Chinese exceptionalism; but by shifting attention to routine legal practices and institutional building, one sees commonalities, compatibilities, and convergences of Chinese law in a global context.[196]

Fu's solution was, like other pluralist theorists, to develop a multi-construct theory to accommodate these growing complexities.

One gets the sense that these authors see various monist theories as unpersuasive not just individually, but also collectively, *because* of their level of theorization. But by giving up on the idea of monism, these authors suggest, pluralists give themselves a little more breathing room. Suddenly, one does not have to sacrifice order for law, law for order, party for state, state for party, populism for professionalism, and so on. Monists may not all disagree with this proposition. As later explained, many monist theorists seem principally focused on contesting other monist theories, such that the terms of the debate to them might be something like: What single simple construct can explain Chinese law best?[197] But single constructs have their natural limits when it comes to complex phenomena; Clarke, even in forcefully advocating for a monist theory, at one point acknowledges the

193. WANG, *supra* note 99, at 3.
194. Li, *supra* note 13, at 105.
195. *Id*. at 122.
196. Fu, *supra* note 3, at 4 (citations omitted).
197. *See infra* Part V.

possibility that "a single paradigm . . . may not be useful" given the "diversity . . . across institutions" and "within institutions" in China.[198]

Finally, a related disadvantage of monist theory is that it is susceptible to subtler epistemological difficulties that can further inhibit explanation. In other fields, this is sometimes referred to as a "single-factor fallacy," where the search for an "all-encompassing variable . . . for understanding the development of complex entities" fuels confirmation bias.[199] Although one is vulnerable to confirmation bias regardless of the level of theorizing—the choice of a theoretical course may naturally predispose someone to favoring information that confirms that course—confirmation bias is a special concern with single-parameter theories. If a single construct can explain essentially everything, one is more likely to ignore other evidence or to dismiss genuine empirical contradictions as trivial or to give them implausible interpretations. This is the flipside of one of monism's analytic benefits discussed earlier: Just as monist theory can yield creative re-interpretations of old facts, it can also lead to dubious interpretations of contrary facts to keep the castle standing. At worst, a scholar wielding monist theory is akin to someone holding Maslow's hammer, surveying a landscape where every undulation resembles a nail.

Alford made a similar but subtler point when he criticized the use of "grand theory" in comparative law.[200] His concern was that using broad conceptual frameworks for "structuring" comparative study could skew the questions that are asked and the constructs into which evidence is sorted.[201] On this view, Jerome Cohen was mistaken for using a due process framework for understanding pre-revolutionary Chinese criminal law, just as Victor Li erred by focusing too much on legal informality as the sole object of interest.[202]

One might disagree with the explanatory account on several grounds. First, there is the idea that simple explanations are more likely to be correct than complex ones—a proposition that is often referred to as Ockham's razor.[203] But Ockham's razor stands for a narrower proposition: One should

198. Clarke, *supra* note 1, at 552–53 (writing that "even the attempt alone to apply a single paradigm to replace that of legality involves some of the same possibly unjustified assumptions that applying the paradigm of legality did" because one might not be able to fairly assume that "the institutions in question form a coherent whole and operate in a distinct manner").

199. Peter V. Paul, *Single-Factor Fallacies: The Lure and Tyranny of Simple Explanations*, 166 AM. ANNALS DEAF 429, 429 (2021).

200. Alford, *supra* note 35, at 950.

201. *Id.*

202. *Id.* at 950–52.

203. The proposition is attributed to logician William of Ockham but is more commonly spelled "Occam's razor." Philip Ball, *The Tyranny of Simple Explanations*, ATLANTIC (Aug. 11, 2016), https://www.theatlantic.com/science/archive/2016/08/occams-razor/495332/ [https://perma.cc/M7VT-JXYP].

prefer a simpler explanation only if two competing theories have the *same* predictive power.[204] As a decisional rule, it has little relevance to general comparisons between theories whose predictive or explanatory powers are unequal or unclear.

Second, one might say that theories like legal dualism are empirically wrong. For example, some have argued that there is a lot of extra-legal influence even in commercial cases, or that legal dualism falsely "presupposes that the Party . . . can judiciously distinguish ordinary and extraordinary cases."[205] The point though is not to endorse any particular pluralist theory, nor any particular version of dual-state theory—there is, after all, no single dual-state theory of Chinese law; every scholar to embrace it has conceptualized it differently and rarely in full alignment with Fraenkel's version. The point rather is that it is generally possible to explain more with more, and that theories that see multiple constructs in Chinese law are structurally advantaged as such. This does not mean that monist theories are *wrong*. No theory is 100% correct; one can claim that the rule of mandates or governmentality explains *more* of Chinese law than any other monist theory. But it is to say that there are general tradeoffs between monist and pluralist forms of theorization.

V. Implications

Recognizing these tradeoffs has several conceptual implications. For theorists of Chinese law, an initial payoff is greater appreciation for a larger set of qualities relevant to theory building and assessment. For example, one compelling criticism of "messy middle" versions of legal dualism is that they are harder to falsify. If legal dualism can be reduced to a statement that there is marked variation in legal compliance between political and non-political cases, then legal dualism is probably true, and most of those who disagree with legal dualism might end up coming around to it.[206] But such a claim is in practice hard to falsify, and so may not be particularly generative.[207] This is not to say all pluralist theory is "bad" despite being "right," but it is to say

204. *See id.* (stating that "as a tool for distinguishing between rival theories, Occam's razor is only relevant if the two theories predict identical results but one is simpler than the other—which is to say, it makes fewer assumptions").

205. Zhang, *supra* note 122, at 594.

206. *See* Hendley, *supra* note 99, at 218 (identifying the "spectrum" of legal dualism as including the prerogative sector, the normative sector, and the "messy middle").

207. This is not to say that legal dualism is never falsifiable. China did not have a dualist legal system in the Fraenkelian sense during the Cultural Revolution given the system's then lack of any semi-autonomous legal institutions. Hungdah Chiu, *The Judiciary in Post-Cultural Revolution China*, *reprinted from* Proceedings of the Fifth Sino-American Conference of Mainland China (June 9–11, 1976), at 106–10, https://www.ojp.gov/pdffiles1/Digitization/44585NCJRS.pdf [https://perma.cc/2LTB-3RKC].

that we might be thinking more about theoretical qualities beyond consistency with known findings.

Recognizing the monist-pluralist divide can also add clarity to the terms of current debates. Reading between the lines, most monists in the field seem to see other monist theories as competition. He describes governmentality as a rival to order maintenance;[208] Ng argues for policy implementation over rule by law;[209] Clarke sees legality-based theories as inferior to order maintenance.[210] With some exceptions,[211] these theorists do not engage much pluralist theory, suggesting that the terms of their debate are something like: How do we best explain Chinese law through a unitary concept? In contrast, many pluralists explicitly discuss why monist theories are only partially correct in order to motivate their move to multiple constructs.[212] But it's possible that monists simply aren't interested in more schematic theories or models, and that dualist critiques of monist theories are therefore changing the terms of the debate when they point to monism's explanatory deficits. At the same time, if monists are indeed committed to mono-conceptual accounts of Chinese law, they may want to say more about the value of limiting the terms of the debate as such.

A second set of analytic payoffs revolves around what mode of theory we should aspire to in the field. For any one scholar, this question is first an individual one, personal to one's disciplinary and methodological perspectives. But because theorists are not self-contained atoms but participants in a larger conversation, we should also care about what is good for the scholarly community as a whole. To that end, a theoretical heterogeneity can be helpful; the marketplace of ideas works better when diverse ideas are in contention. Yet we should be careful not to theorize for its own sake, to merely repackage old ideas in new garbs. Helpful new theories might seek to better address explanatory gaps left open by previous theories, or they may build on a series of new empirical findings that point to new theoretical directions. The best theories will help us see aspects of the legal system in new light. Further, whether one is committed to monism or pluralism, there is something to be said for theories that contain more precisely defined constructs that lend to operationalization and testing.[213]

208. He, *supra* note 76, at 5.

209. Ng, *supra* note 40, at 811–15.

210. Clarke, *supra* note 1, at 552, 554–55.

211. *See* CLARKE, *supra* note 124, at 11 (disagreeing with the idea that China's legal system resembles a dual state). But even here, Clarke's focus is not on advancing "order maintenance," it is to show why dual-state concepts don't apply. *See id.* ("Whether [order maintenance] is the best [principle] is . . . beside the point here.").

212. *See supra* text accompanying notes 192–196.

213. *See* Gieseler et al., *supra* note 6, at 8 ("A good theory is *precise*, with clearly defined concepts and operationalizations that allow for little stretching or subjective interpretation."); Li, *supra* note 13, at 107–08 (discussing his theory's amenability to testing and falsifiability).

This is especially relevant given the empirical turn in Chinese legal studies.[214] At a time when theory-testing capabilities are at a historic high, it helps to foster more theories conducive to falsification.[215]

Recognizing the monist–pluralist divide may also inform future theoretical developments. In the current moment, monist and pluralist theories of Chinese law each face distinct challenges. For monists, there is something of an existential question posed by the movement to legal dualism: Has the Chinese legal system become so complex that no single-parameter theory can satisfyingly explain it? Even if unitary constructs worked reasonably well enough in earlier stages of Chinese legal development, when there were fewer legal disputes, fewer legal entitlements, and a simpler economy, maybe Chinese law has changed too much, too quickly for monist theorizing to carry the same explanatory weight today. To effectively rebut these concerns, monists may need to show that the system has still retained its fundamental character despite these new changes, or that these changes are so complete and unidimensional that an entirely new construct is warranted.

For legal dualists, especially those who cleanly divide the legal system between just two spheres, a challenge may come from the prospect of even more pluralistic theories of Chinese law.[216] In between political cases implicating regime-security and non-political cases of law-based adjudication are cases of extra-legality that don't seem to easily fit within the prerogative and normative spheres.[217] Leaders may act extra-legally to "insulate favored entrepreneurs" from national laws,[218] for instance, or individual judges may ignore laws to improve litigant satisfaction.[219] Some of these examples are implicitly sanctioned to such a degree that they are not well modeled as an immature or underdeveloped normative state; that judges stretch or ignore laws to make parties happy is plausibly a feature, not a bug, of the system. And yet such cases are distant enough from core regime-security concerns, as manifested in the Party-state's treatment of dissidents

214. *See Empirical Turn in Chinese Legal Research—Challenges, Strategies, and Solutions*, *supra* note 15 (highlighting this turn).

215. For leading examples of recent empirical work on Chinese law, see generally Zhuang Liu, *Does Reason Writing Reduce Decision Bias? Experimental Evidence from Judges in China*, 47 J. LEGAL STUD. 83 (2018); Rachel E. Stern, Benjamin L. Liebman, Wenwa Gao & Xiaohan Wu, *Liability Beyond Law: Conceptions of Fairness in Chinese Tort Cases*, 11 ASIAN J.L. & SOC'Y 1 (2023); and Chen et al., *supra* note 188.

216. Indeed, a rigid dualist framework can resemble monist theory in its theoretical virtues and flaws when compared to pluralist theories with more fluid internal categories.

217. Hendley, *supra* note 99, at 218.

218. *Id.* at 222.

219. *See* Liebman, *supra* note 10, at 200 (explaining that Chinese courts often "ignore legal rules or innovate in the interstices of unclear law" to ensure that plaintiffs receive compensation in tort cases).

or certain ethnic groups, that they seem ill-suited to inhabiting the prerogative sphere.[220] Is the move then to create a third category, perhaps to distinguish mundane social stability concerns or public policy goals from core political security interests? What of parsimony then?

Another question is how these theories should relate to larger normative trends and pressures. Current theorizing in mainland China has sought not just to describe, but also to defend, recent legal–political changes.[221] Jiang Shigong, for example, has endorsed political developments under Xi such as concepts like party rule of law and socialist rule of law.[222] He argues that a recent tendency to "fetishize[] legal dogma and institutional reforms" associated with Western rule of law has led to an unwarranted demonization of "rule of man" and "the key historical function of leaders and great people, political parties and the masses."[223] For scholars like Jiang, monist theories have a natural appeal. Not only do they enable easy engagement with other competing monist theories in an emerging arena of geopolitical–ideational contestation, they also have heuristic and prismatic properties that give the impression of conceptual coherence. If one can define a new Party rule of law based on assumptions of Party benevolence, one can more easily reconcile the seeming contradictions between "party leadership" and "ruling the country according to law."[224]

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220. *See* Fu & Dowdle, *supra* note 99, at 67–69, 71 (discussing the Chinese Party-state's treatment of dissidents as classically part of the prerogative sphere).

221. *See, e.g.*, Chris Buckley, *"Clean Up This Mess": The Chinese Thinkers Behind Xi's Hard Line*, N.Y. TIMES (Sept. 7, 2021), https://www.nytimes.com/2020/08/02/world/asia/china-hong-kong-national-security-law.html [https://perma.cc/5R5U-K32Z] (reporting a trend among some Chinese legal academics to defend the Party-state's recent hardline policies); Ryan Martínez Mitchell, *Chinese Receptions of Carl Schmitt Since 1929*, 8 PENN ST. J.L. & INT'L AFFS. 181, 244–50 (2020) (describing the rise of political constitutionalists in China who are "skeptical of Anglo-American style separation of powers").

222. *See* Jiang Shigong (强世功), *Cong Xingzheng Fazhi Guo dao Zhengdang Fazhi Guo (从行政法治国到政党法治国–党法和国法关系的法理学思考)* [*From Administrative Rule of Law to Party Rule of Law*], ZHONGGUO FALÜ PINGLUN (中国法律评论) [CHINA L. REV.], 2016, http://fzyjs.chinalaw.org.cn/portal/article/index/id/375.html [https://perma.cc/VPC4-YKC6] (describing the relationship between party law and state law); Pils, *supra* note 3, at 365–67 (describing how Jiang Shigong has "developed a theory of the 'Party Rule of Law,'" characterized by "a successful, historical merger of Party and State," and that operates with "greater efficiency" than Western systems and is "better able to deal with corruption and power abuse" than the Soviet Union); Sebastian Veg, *The Rise of China's Statist Intellectuals: Law, Sovereignty, and "Repoliticization,"* 82 CHINA J. 23, 38–43 (2019) (discussing Jiang's work and its connection with Xi); *see also* Larry Catá Backer, *Jiang Shigong* (强世功) *on "Written and Unwritten Constitutions" and Their Relevance to Chinese Constitutionalism*, 40 MOD. CHINA 119, 120 (2014) (analyzing Jiang's work).

223. Jiang Shigong, *Philosophy and History: Interpreting the "Xi Jinping Era" Through Xi's Report to the Nineteenth National Congress of the CCP* (translated by David Ownby, Reading the China Dream), OPEN TIMES, Jan. 2018, https://www.readingthechinadream.com/jiang-shigong-philosophy-and-history.html [https://perma.cc/G52P-HVE4].

224. Jiang, *supra* note 222.

Although the high theories examined here are generally not engaged in justificatory studies, works in positive theory can likewise have normative implications. Monist theories about law have played no small role in shaping interventions in the real world, including in the many global rule-of-law promotion efforts popularized last century.[225] In the current geopolitical environment, we should be especially mindful of how monist theories might be misappropriated or abused.[226] While monist theories have appealing heuristic properties that facilitate communication to non-experts, they are also conducive to soundbiting and partisan manipulation. In their parsimony, monist theories can come off as normatively charged and can more easily confirm the political priors of their audiences. This is not to discourage monist theories from being conveyed to political decision-makers. But in so doing, scholars might be careful to note exceptions, uncertainties, and other complexities that tend to be assumed in scholarly debates but ignored or overlooked elsewhere.

A similar note of caution ought to attend invocations of high theories in the courtroom. In a variety of disputes, judges are asked to assess the fairness of Chinese legal proceedings or of China's legal system in determining whether to enforce a Chinese judgment or to dismiss a suit to a more convenient Chinese forum.[227] Here, too, monist theories present a special risk. There is an inherent tension between the simplifying assumptions of general theories and the fact-specific demands of case analysis. Yet it remains tempting, especially for resource-constrained judges, to gravitate towards monism's heuristic advantages, even when called to render accurate (and not merely parsimonious) assessments about foreign laws and practices.[228]

Finally, there is no reason why these general observations on theoretical quality and their tradeoffs should end at China's borders. Comparative inquiry can not only test the broader applicability of these principles, but it can also reveal parallel insights about other systems. In an age of democratic erosion, scholars have applied many of the theories surveyed here to other jurisdictions. For example, several recent works have discussed dual-state

225. *See* William P. Alford, *Exporting "The Pursuit of Happiness,"* 113 HARV. L. REV. 1677, 1708 (2000) (reviewing THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD (1999)) (arguing that "those shaping and executing democracy promotion programs embrace a more nuanced appreciation of the uses to which law may be put").

226. *See generally* Jia, *supra* note 16 (describing how the U.S.–China rivalry has "reprised familiar normative frameworks" that are reminiscent of past wartime developments).

227. *See* Donald Clarke, *Judging China: The Chinese Legal System in U.S. Courts*, 44 U. PA. J. INT'L L. 455, 484–85, 491–92 (2023) (discussing cases where a party moves for dismissal on the grounds of forum non conveniens, "arguing that the case is more appropriately heard in a Chinese court").

228. *See* Jia, *supra* note 47, at 1734 (arguing that accuracy is the primary goal underlying Federal Rule of Civil Procedure 44.1, which governs interpretation of foreign law).

theories in relation to Turkey, Russia, Egypt, Chile, Hong Kong, and Singapore.[229] Monist theories like rule by law are also commonly used to describe legal developments in other countries.[230] Applying certain pluralist theories to these jurisdictions may result in testability challenges, just as applying monist theories may entail greater explanatory gaps. The analytic costs and benefits of these modes of theorizing are not limited to just the Chinese case.

Monist theories about the American legal system can also be analyzed under this framework. Consider rule of law as a monist theory of American law. Like monist theories of Chinese law, rule of law conveys something true and important about the American legal system.[231] Despite signs of backsliding,[232] the American legal system continues to have a largely independent judiciary, public officials and agencies that respect legal dictates, and a robust legal culture.[233] But there are also works that have complicated this narrative. Scholars of judicial politics, for example, have contended that "ideology and partisanship" can be a strong predictor of judicial outcomes, even after controlling for "personal and professional differences."[234] Scholars writing on law and race, to take another example, have argued that racial biases have structurally undermined basic legal fairness in American law.[235] There are many other complicating narratives, of course, but these two alone will illustrate the point.

One might take these other arguments as bases for supporting another monist theory, something like "the rule of political ideology" or "the rule of

229. Csaba Győry & Nyasha Weinberg, *Emergency Powers in a Hybrid Regime: The Case of Hungary*, 8 THEORY & PRAC. LEGIS. 329, 337 (2020) (listing studies that apply dual-state concepts to Singapore, Russia, Egypt, Chile, Argentina, and South Africa before analyzing Hungary); Serdar Tekin, *The Dual State in Turkey*, EUR. J. TURKISH STUD., 2022, at 1, 2, 4; Chan, *supra* note 99, at 100 (applying dual-state concepts to Hong Kong and China).

230. *E.g.*, William Partlett, *Mr. Putin's "Rule-by-Law State,"* BROOKINGS (June 19, 2012), https://www.brookings.edu/articles/mr-putins-rule-by-law-state/ [https://perma.cc/DKD7-PJLQ].

231. *See* Mortimer Newlin Stead Sellers, *The Rule of Law in the United States of America*, 70 AM. J. COMPAR. L. i26, i26 (2022) (discussing the United States' imperfect commitment to the rule of law).

232. For an assessment of risks, see Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 165 (2018).

233. The World Justice Project ranked the United States 26th out of 140 nations in its 2022 Rule of Law Index. *WJP Rule of Law Index: United States*, WORLD JUST. PROJECT, https://worldjusticeproject.org/rule-of-law-index/country/2022/United%20States/ [https://perma.cc/DB2R-EDTU].

234. Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 242 (2019) ("Multiple studies have documented that judges appointed by Republicans decide cases differently than do judges appointed by Democrats . . . .").

235. *See Introduction*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (examining the relationship between "a regime of white supremacy and its subordination of people of color" in America "and professed ideals such as 'the rule of law' and 'equal protection'").

racism."[236] Such an approach would have familiar analytic benefits. A theory that American law is fundamentally about partisan or ideological interests is parsimonious, internally coherent, provocative, and has proven to be generative from the extensive body of social science research that has sought to test this proposition.[237] Likewise, a theory that American law is inherently racist is economical, internally consistent, provocative, easily communicated, and has inspired countless scholars to re-interpret familiar events through the prism of race.[238] And just as legal dualists have bemoaned the explanatory deficits of monist theories of Chinese law, common criticisms of American "monist theories" have likewise centered on their perceived explanatory gaps. Scholars have contended that arguments about politicized American judges can only explain so much.[239] Similarly, a common criticism of critical race theory is that racism is not the whole story; Daniel Farber has argued that "[i]f you only look at the evidence on one side of the [critical race] thesis it begins to look persuasive; but when you look at the evidence as a whole, I think you see a much more complex picture."[240] Farber's comments could easily have been made by pluralists of Chinese law in describing monist theory. On the other hand, if one were to construct a pluralist theory of American law—one that conceptualized law, politics, and race as separate constructs or parameters—a detractor could point to new concerns relating to parsimony, coherence, falsifiability, and generativity.

It may help to think about monist theories of Chinese law the way some outside these fields think about monist theories of American law—not as

236. To be sure, critical race theories are not solely explanatory theories like the ones addressed here; they are motivated by a broader critical, normative project and have distinct methodological toolkits. *See* Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology*, 2016 WIS. L. REV. 443, 445 (summarizing some of the methodological debates). But even critical theories entail high-level descriptive claims about the American legal system, pointing to racism as the foundational feature of American law. For a helpful account of critical race theory claims, see Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1442 (2016).

237. *See* Harris & Sen, *supra* note 234, at 243–46 (summarizing the literature and its historic development); Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideology and the Study of Judicial Behavior*, *in* IDEOLOGY, PSYCHOLOGY, AND LAW 705, 705–23 (Jon Hanson & John Jost eds., 2012) (summarizing various "theor[ies] of judging" and analyzing their challenges and methods).

238. It has also led to the use of new methodologies within the field to test longstanding claims. *E.g.*, Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 FORDHAM L. REV. 2953, 2957 (2015); Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1490–91 (2004).

239. *See, e.g.*, CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 5, 133, 145 (2006) (finding that, despite "often significant" differences in voting patterns between Republican and Democratic judicial appointees, "the rule of law imposes its discipline even on the most contested issues," such that appointees agree more often than not).

240. Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T.M. COOLEY L. REV. 361, 376 (1998).

comprehensive theories about everything, but as a prism through which new and important insights can be gleaned. Whether or not order maintenance is "correct," it can help us see past seemingly modernized legal institutions to where stability imperatives continue to matter, just as critical theories can help us look behind formal black-letter justifications to see underlying pathologies of power. Likewise, theories about rule by law or legality can give us an affirmative account of why parts of the Chinese legal system have trended towards more legal-professionalism over time, just as rule of law does reasonably well in accounting for certain elements of the American legal system. At minimum, monist theories allow us to see an aspect of a legal system we would otherwise miss, even if we disagree over how much they explain.

In the end, there is no perfect theory of Chinese law, just as there is no perfect theory of American law. That doesn't undermine the search for better theory. But it may discipline how we frame and understand the theoretical frameworks that we have developed. And it could lead us to consider more deeply what we are predisposed to see—and to miss—at various points of conceptual design.