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WHEN ARE THERE MORE LAWS? WHEN DO THEY MATTER? USING GAME THEORY TO COMPARE LAWS, POWER DISTRIBUTION, AND LEGAL ENVIRONMENTS IN THE UNITED STATES AND CHINA

Ji Li[†]

Abstract: In several recent cases, the Supreme People's Court of China ruled that local police owe a positive duty to protect individual members of the general public. In strong contrast, the United States Supreme Court declared in two police nonfeasance cases that such duty did not exist under the Federal Constitution. This is counterintuitive, because one would expect that in a liberal democracy where the judiciary is independent and powerful, judges would impose higher standard on local law enforcement officers. One possible explanation is that law does not matter in a developing country such as China, so laws are drafted and interpreted in favor of citizens for the purpose of window-dressing. But if law does not matter at all, why are some proposed laws drafted numerous times before passing the legislature? A conceptual game theory model is able to resolve both the empirical puzzle and the theoretical one. In addition, this interactive model can be applied to explain a broad range of issues in law and politics. The theory is illustrated by the judicial politics of bankruptcy law in China, the making of bankruptcy law in Vietnam, the Chinese law on governmental liability, the American law on police nonfeasance, and changes in the governmental liability law in South Korea.

I. INTRODUCTION

The goal of this paper is to explain the relationship between laws on the books and power politics from a comparative perspective. The seed for this research is an empirical puzzle that springs forth from a comparison of governmental liability law on police nonfeasance between China and the United States. The following two cases, both of which center on police inaction, trigger the theoretical question.

In the first case, the plaintiff is a young woman who wanted to break off her relationship with a man after learning he was already married. The man threatened violence and the woman sought police protection several times. Unfortunately, no assistance was provided. A thug hired by the man threw acid on her face, deforming her and blinding her in one eye. The court found no tort liability for the police's failure to provide specific protection to

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a member of the public from harm done by another member of the public and dismissed the case.¹

In the second case, the plaintiff is a businesswoman who managed a gift shop. There was a motel across the street. Early one morning, disturbing noises woke two guests staying in the motel. They suspected a burglary at the gift shop, and informed the motel manager. After a cursory inspection, the motel manager was certain of a robbery at the gift shop. The manager called the local police department twice and reported the ongoing crime. No police officer was dispatched. After about twenty minutes, the thief left with his booty. Thereafter, the store manager filed a complaint with the police department but got no response. After the business owner filed a lawsuit, the court found the police department liable for failure to protect the property of a member of the public and awarded damages equal to half of the total loss borne by the plaintiff.²

One of these two cases was decided in a democracy with arguably the most sophisticated judicial system in the world, and the other in an authoritarian regime where a functional legal institution barely existed three decades ago. For the uninitiated, a reasonable assumption is that the second case was decided in a democratic setting with a better and more independent judiciary. The decision in the first case seems to substantially favor the unresponsive police department, therefore it must be from a country with little governmental accountability and weak courts. This intuition is wrong, however. The first case was decided in the United States,³ the second in China.⁴ The former is a liberal democracy, and the latter an authoritarian state with a weak judiciary.

In this article, I attempt to resolve this apparent contradiction. I contend that the power distribution of potential litigants, professional norms, and judicial independence determine how laws are applied and the costs associated with their application, which exerts significant impact on the way laws are drafted, legislated, and interpreted. I argue that this theory is more powerful than extant approaches in explaining the link between power politics and law-making.

This article proceeds as follows. Section II surveys American and Chinese jurisprudence on official nonfeasance. Section III discusses extant theories and shows that they are insufficient to explain some empirical

¹ See *Riss v. City of New York*, 22 N.Y.2d 579 (N.Y. 1968).

² *Yin Chenyan v. the Public Security Bureau of Lushi County*, SUP. PEOPLE'S CT. GAZ., Issue 2, 2003, at 36 (People's Court of Lushi County, Dec. 12, 2002) LAWINFOCHINA (last visited Feb. 5, 2007).

³ See *Riss*, 22 N.Y.2d 579.

⁴ See *Yin Chenyan*, SUP. PEOPLE'S CT. GAZ., Issue 2, 2003, at 36.

puzzles. Section IV provides the interactive theory, my game theory model and examines two scenarios when different payoffs are assigned. Section V presents empirical evidence from United States, China, Vietnam, and Korea that supports the interactive theory. Section VI concludes the article.

II. THE COUNTERINTUITIVE CONTRAST REFLECTS DIFFERENCES IN LAW

This section provides a survey of American and Chinese jurisprudence on official nonfeasance, showing that the cases described above accurately reflect the differences in law between these countries. These differences can only be adequately considered with knowledge of comparative police nonfeasance laws in the United States and China. To be more specific, what are the laws on governmental liability in police nonfeasance cases in the two countries? In the United States, the general rule is that a municipal corporation is not liable for injuries caused by police nonfeasance absent statutes prescribing exceptions to government immunity.⁵ Some courts have upheld claims against municipal corporations when a special relationship was established between the police and the plaintiff.⁶ A state court in New York specified the four elements of such special relationships:

(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.⁷

Only when these four elements exist may a plaintiff prevail in a suit against the municipal corporation for police nonfeasance. In cases related to emergency phone calls, if the caller is not the victim, the last two conditions are not satisfied. Therefore, it is almost certain that absent statutory provisions, state courts in the United States will find for the municipal corporation in a case like *Yin Chenyan v. Police Department of Lushi County*.

Federal courts hold a similar view. Under the *Federal Tort Claims Act*, the United States is found liable:

⁵ Licia A. Esposito Eaton, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R. 5th 273 (2005).

⁶ See *id.*

⁷ See *Cuffy v. City of New York*, 69 N.Y.2d 255, 260 (N.Y. 1987) (citations omitted).

for injuries resulting from a failure to provide police protection, where the decision not to provide this protection (1) was made by an agent of the United States performing a “discretionary” function or duty within the scope of his employment under 28 U.S.C.A. § 2680(a), and (2) was the proximate cause of the injuries complained of.⁸

Because the burden of proof of foreseeability is on the plaintiff, prevailing in a public tort case on police inaction is a daunting task.

In general, the standard for governmental immunity has been set by the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*,⁹ where an abused child sued the county government for failure to provide protection against his abuser.¹⁰ He claimed the Due Process Clause of the United States Constitution imposed on the State an affirmative duty to protect the petitioner.¹¹ The Court held that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors,”¹² though it suggested that state tort laws might impose a positive duty of police protection.¹³ *DeShaney* has been the controlling case since 1989. In 2004, the Supreme Court granted certiorari in a similar case arising from the Tenth Circuit.¹⁴ In *Town of Castle Rock, Colo. v. Gonzales*, the plaintiff had a restraining order issued by the local court against her husband.¹⁵ Although she presented it to the police and requested assistance enforcing it several times in the same day, the police failed to respond.¹⁶ The plaintiff’s three children were murdered by her husband during this time.¹⁷ In the suit against the local government, the plaintiff’s lawyer raised a procedural due process claim, in addition to the substantive due process claim that has been rejected by the Court in *DeShaney*. However, the Supreme Court, in a 7-2 opinion, held that due process clause did not entitle respondent a property

⁸ Allan L. Schwartz, *Liability of United States Under Federal Tort Claims Act for Injuries Resulting from Failure to Provide Police Protection*, 22 A.L.R. Fed. 903 (2001) (footnote omitted).

⁹ 489 U.S. 189 (1989).

¹⁰ *Id.* at 191.

¹¹ *See id.*

¹² *Id.* at 258.

¹³ *Id.* at 201-202.

¹⁴ *Gonzales v. City of Castle Rock*, 366 F. 3d 1093 (10th Cir. 2004), *rev'd sub nom*, *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796 (2005).

¹⁵ 545 U.S. 748, ___, 125 S. Ct. 2796, 2801 (2005).

¹⁶ *Id.* at 2801-2802.

¹⁷ *Id.* at 2802.

interest in police enforcement of the restraining order against her husband, thus maintaining its overall position on the issue.¹⁸

China, unlike the United States, is a civil law country; precedents do not control as much as they do in a common law country. Nevertheless, the Supreme People's Court regularly publishes typical cases that function as clarifications of existing statutes. Since no specific statutes exist on governmental official nonfeasance liability, the Supreme People's Court created the doctrine from scratch by publishing a few cases that had broadly interpreted extant laws. The first one concerns a villager in Sichuan Province who sued the township police claiming that their failure to take action against his neighbor, who suffered from a serious mental disorder and repetitively harassed him, contributed to an injury incurred while trying to escape from the neighbor.¹⁹ The People's Supreme Court heard the case because there was not a clear doctrine providing any remedy for official nonfeasance such as police inaction. The Court opined that Public Security Bureaus had a positive duty to protect citizens and they should be held liable for the injury and damage due to their nonfeasance, if their action could have prevented the injury. This decision was promulgated as an official legal interpretation in 2001.²⁰

Later the Court went even further by publishing *Yin Chenyan v. Police Department of Lushi County*, in which the county court found the local police department liable for property damage due to police inaction.²¹ As discussed above, there was no special relationship between the plaintiff and the police department.²² The person who made the emergency call was not the victim and the damage was inflicted by a third party actor. Given the facts of the case and extant statutes in China that were silent about government liability for police nonfeasance, it is surprising the Supreme People's Court's clearly signaled that local police, especially emergency call departments, owe a positive duty to protect the general public who resort to their assistance through emergency calls.

In sum, the comparison between the current laws in China and the United States indicates that, counter-intuitively, the law ostensibly provides better protection to Chinese citizens against government officials than their counterparts in America.

¹⁸ *Id.* at 2810.

¹⁹ Kevin J. O'Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China*, THE CHINA JOURNAL, Jan. 2004, at 92, 92.

²⁰ *Id.*

²¹ *Yin Chenyan v. the Public Security Bureau of Lushi County*, SUP. PEOPLE'S CT. GAZ., Issue 2, 2003, at 36 (People's Court of Lushi County, Dec. 12, 2002) LAWINFOCHINA (last visited Feb. 5, 2007).

²² *Id.*

The development of China's administrative law regime in which the Supreme People's Court published these two decisions provides background critical to understanding the import of the decisions. The current Chinese Constitution provides that "citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law."²³ Unlike in the United States, however, the Chinese Constitution is not directly enforceable "unless there are statutes that clearly mandate the courts to do so."²⁴

No concrete administrative law existed until 1987, when the "drafting of an Administrative Litigation Law (ALL) commenced."²⁵ The law was passed two years later and gave citizens a legal basis to sue government officials.²⁶ This legal reform is significant given that China has had more than a thousand years of autocracy.

Administrative law legislation grew quickly in the 1990s. The Standing Committee of the People's Congress passed the State Compensation Law in 1994, which was followed by the Administrative Penalty Law, the Administrative Supervision Law, and the Administrative Reconsideration Law in 1996, 1997, and 1999 respectively.²⁷ In 2003, the People's Congress passed the Administrative Licensing Law, which was regarded as a landmark law that facilitated the withdrawal of the state from the market.²⁸ All these administrative laws stipulate reasonably well the power of the government and the remedies for the abuse of power by government officials.

Section I presents two cases of official nonfeasance with counterintuitive results. This section surveys American and Chinese jurisprudence on official nonfeasance in which the two cases are embedded, but this context alone fails to fully explain the counterintuitive outcomes, and the puzzle remains. The highest court in the United States, a liberal democracy, when faced with the balancing of various interests and constitutional doctrines, decided twice against citizen victims in government nonfeasance cases. In contrast, the highest court in China, a one-party regime, created legal rights against official nonfeasance from scratch. What

²³ Art. 41, Chapter 1, P.R.C. Constitution. English translation is available at <http://english.peopledaily.com.cn/constitution/constitution.html> (last visited January 7, 2007).

²⁴ Xixin Wang, *Suing the Sovereign Observed from the Chinese Perspective: The Idea and Practice of State Compensation in China*, 35 GEO. WASH. INT'L L. REV. 681, 682 (2003).

²⁵ RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 398 (2000).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Randall Peerenboom, What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China, 27 MICH. J. INT'L L. 823, 841 (2006).

explains the dramatic differences? Before presenting my theory, I review in Section III extant theoretical approaches to relevant empirical questions.

III. EXTANT THEORIES ARE INSUFFICIENT TO EXPLAIN THE EMPIRICAL PUZZLE

Many legal scholars and social scientists have spent time exploring legal reform in China, drawing two main conclusions. Some argue that the Chinese government acts sincerely in promoting the rule of law, while others take a dismissive view of the current legal reform in China.²⁹ Neither theory adequately explains the actual outcomes of lawmaking and application within China.

Fully aware of the benefits of ruling the country according to the law, the Chinese Communist Party ("CCP") built an administrative law regime and allowed the People's Supreme Court to indicate its preference for broad interpretation of the laws. Although few predict that China will achieve the type of rule of law embedded in a liberal democracy, some see China as being "in transition from an instrumental rule-by-law legal system in which law is a tool to be used as the Party-state sees fit to a rule of law system where law does impose meaningful restraints on the Party, state and individual members of the ruling elite."³⁰

Randall Peerenboom notes that plaintiffs have a much higher rate of success in administrative litigations in China than in Japan, Taiwan, or the United States.³¹ Although he admits that a conclusion cannot be drawn without further studying the merits of cases, he argues that "clearly the courts are not just a rubber stamp; they do have some authority."³² Peerenboom sees an evolution of the Chinese social and political system, in which an increasingly dynamic civil society demands a better legal institution. In response to this demand, the CCP supplies the laws, which the judiciary, motivated by both external and internal incentives, interprets and applies assiduously.³³ This series of movements feeds back into the growth of the civil society, and the cultivation of a more active legal culture.

²⁹ See Benjamin Liebman, *Legal Aid, Lawyers, and Legitimacy in China*, in RAISING THE BAR 318 (William P. Alford ed., forthcoming 2007); PEERENBOOM, *supra* note 25, at 398; HONGYING WANG, *WEAK STATE, STRONG NETWORKS, THE INSTITUTIONAL DYNAMICS OF FOREIGN DIRECT INVESTMENT IN CHINA* (2001).

³⁰ Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 190 (2001).

³¹ *Id.* at 217.

³² *Id.*

³³ *Id.* at 163-164.

Besides the figures showing the increase of administrative cases and the high winning rates for citizens, however, Peerenboom provides insufficient evidence to convince readers that the administrative laws on the books are being enforced to any meaningful extent. In fact, there is solid evidence that new laws are not effective in restraining government officials.³⁴ For instance, in the last few years, the letter and petition system, which is a formal but allegedly ineffective channel for individuals to protest against the abuses of government officials, has received a growing number of complaints.³⁵ If administrative laws are better enforced, why would more citizens resort to the letter and petition system for protection and dispute resolution? Moreover, even if an authoritarian state ties its own hands for a short time in order to add credibility to its commitment to the rule of law, what in theory can prevent it from renegeing, especially when its legitimacy is threatened?

In contrast to the evolutionists, some scholars take a dismissive view of the current legal reform in China. Hongying Wang argues that China is a society built on networks where the law does not matter. Even though the laws on the books look good, Chinese courts cannot apply them in many situations, mainly due to their institutional weakness.³⁶

Woo provides a list of factors that restrain judicial power:

Judges are typically drawn from the area where they reside, and . . . the budget for each court is determined by the local government where the court sits. Local allocation of funds for judicial services . . . has also rendered courts dependent on the whims of local ties and relationships.³⁷

In addition, Alford doubts the real impact of the progress China has made in creating formal rules and institutions.³⁸

Many scholars even question the validity of studying the rule of law in a non-democracy. Moustafa points out that “[t]he vast majority of political scientists and public law scholars assume that democracy is a prerequisite

³⁴ See O'Brien, *supra* note 19, at 76.

³⁵ Zeng Zhiquan, *She Song Xin Fang Wei He Sheng Er Bu Jiang (Why Does Litigation-Related Letter and Petition Increase?)*, available at <http://jdzol.com.cn/qiye/shownews.asp?NewsID=8782> (last accessed on April 27, 2006).

³⁶ See Wang, *supra* note 24.

³⁷ Margaret Y. K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 163, 170 (Univ. of Wash. Sch. of Law, Asian Law Series No. 14, 2000).

³⁸ William Alford, *The More Law, The More...? Measuring Legal Reform in the People's Republic of China*, in *HOW FAR ACROSS THE RIVER?: CHINESE POLICY REFORM AT THE MILLENNIUM* 122, 130-33 (Nicholas C. Hope, Dennis Tao Yang & Mu Yang Li eds., 2003).

for the judicialization of politics.”³⁹ And because of this assumption, there has been “an almost total neglect of the study of judicial politics in authoritarian settings.”⁴⁰

In sum, according to the dismissive view, the reason China has ostensibly more binding administrative law than the United States is that laws do not matter in the former; they are simply a window dressing.

Although this argument has some merits, it over-simplifies the situation. If laws were just for show, one would expect to see today’s China equipped with well-drafted laws of substantial sophistication in all areas. This argument cannot explain why the government spent years revising the drafts of certain laws, in order to get them through the legislature, e.g. the new bankruptcy law. Moreover, the argument cannot explain why in the last decade or so, the ruling party has started paying attention to the construction of an administrative regime.

In short, existing theories either give an oversimplified explanation that laws do not matter in China, or an ill-supported conclusion that the country is moving steadily towards the rule of law. I contend in this paper that an interdisciplinary approach focusing on power distribution will shed more light on the interplay between changes in legal codes and domestic politics. Although for a long time few scholars have put democracies and non-democracies together when it comes to the study of judicial politics, recent scholarship has moved toward interdisciplinary research and started to explore the relationship between the commitment to laws on the books and political structure. Garrett and others employ a game theory model to explain the strategic decision-making process of the European Court of Justice.⁴¹ They argue that if the Court anticipates strong resistance from member states, it will avoid rendering an adverse decision.⁴² Thus, the extant laws have been correlated with the perceived state interests and the institutional structure of the European Union.⁴³ Based on extensive data analysis, Hathaway argues quite convincingly that a country’s decision to sign a human rights treaty is determined to a great extent by the estimated costs of and probability of compliance.⁴⁴ As a result, non-democracies that have weak internal legal enforcement systems may be more likely to sign a

³⁹ Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883, 884 (2003).

⁴⁰ *Id.*

⁴¹ See generally Geoffrey Garrett, R. Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT’L ORG 149 (1998).

⁴² See *id.* at 174.

⁴³ See *id.*

⁴⁴ See Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1838-39 (2003).

treaty than a democracy that enjoys the rule of law, even though the latter's record of human rights protection is much better than the former's.⁴⁵ Although both Garrett and Hathaway focus on international judicial politics, and the unit of analysis in their studies is the individual state, their theories relate to the question this paper attempts to answer. That is, the way laws on the books are drafted, legislated, and interpreted is influenced by the probability that they will be applied and the associated costs, which is further determined by professional norms, judicial independence and authority, and the power distribution of potential litigants.

IV. AN INTERACTIVE THEORY PROVIDES A BETTER EXPLANATION OF JUDICIAL POLITICS

This section presents a game theoretic model that I believe better explains the empirical puzzle discussed in Section I and II. I create this simplified game structure to model the interaction among various actors in the drafting, interpretation, legislation and enforcement of laws. Different payoffs will be assigned when the game is applied to different legal environments. Before delving into the more technical discussion, I briefly describe the model in plain English.

The game illustrates my argument that legal environment and the power distribution of potential litigants implicated by a contemplated law determine how that law is drafted, interpreted, and legislated. For example, suppose a drafted law or a new legal interpretation comes to the legislature, and the legislators need to decide what to do about it. To simplify the argument, I assume that only those who will be affected by the legal change will react in the legislature. If the law is against one legislator's constituency, will he or she oppose the draft or interpretation? Since resistance tends to be costly, the legislator's decision depends on the costs of noncompliance, which is further related to the level of law enforcement.

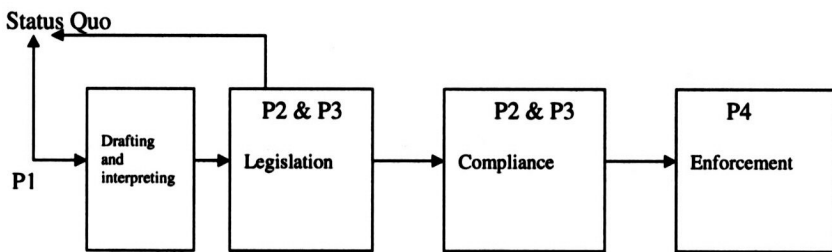
In a strong rule of law environment, e.g. the United States, laws are expected to be enforced. So the calculation is easy. The constituency the drafted law or interpretation disfavors will oppose it to the extent that the cost of resistance is lower than the cost of noncompliance. But in a country with a weak judiciary, laws are enforced in only two situations: (1) when they extend the interests of the powerful; and (2) when the implicated constituencies are equally powerful.

Therefore, in a weak rule of law environment, a drafted law or legal interpretation favoring the politically weak constituency will go through the

⁴⁵ *Id.*

legislature because the politically powerful constituency will not oppose it, believing that the costs of noncompliance are low due to the ultimate lack of enforcement. That is why the highest court in China was able to create legal rights against official nonfeasance from scratch. Whereas, a contemplated law that implicates the interests of two equally powerful constituencies will not be enacted without a series of compromises. This explains why the drafted bankruptcy law in China took many years to be approved by the Congress, leaving a saga of trading of interests. I will present more empirical evidence for the theory in Section IV.

Graph 1. The Conceptual Game Setup.



There are four players in this game. Player 1 (“P1”) represents those who draft or interpret laws. They are normally composed of distinguished legal scholars or judges of the highest court. Player 2 (“P2”) and Player 3 (“P3”) are those whose behaviors will be governed by the drafted or interpreted law. I assume they take adversarial positions in a suit that falls under the jurisdiction of the law. Player 4 (“P4”) refers to those responsible for the application of the law. They are normally composed of local judges.⁴⁶

A. *Stage 1*

The way the law is drafted and interpreted is a variable. P1 is faced with a set of choices. He could select status quo. He could also choose to make the law more sophisticated. Once deciding to change the status quo, he then chooses between a sophisticated law favoring P2 and a sophisticated law favoring P3.

⁴⁶ For the sake of simplification, I assume P2 and P3 are the only legislators that matter in this game.

B. Stage 2

If P1 chooses to make the law more sophisticated, the game progresses to its second stage, where the law is gauged by those whose interests are potentially involved. P2 and P3 will fall under the jurisdiction of the law. Therefore, at stage two, each of the two players makes a choice between resisting the law and not resisting the law.⁴⁷ The two players have their own political power. If the resistance trumps the efforts of P1, the law fails, and the game ends at status quo. Otherwise the law is promulgated and set for enforcement.

C. Stage 3

P2 and P3 are faced with the new law and the choice between compliance and noncompliance.

D. Stage 4

After P2 and P3 have acted, P4 makes a choice between enforcing the law and not enforcing the law.

Payoffs for the players vary. Everything else being equal, P1 wants to make the law more sophisticated. By doing so, P1 increases judicial authority and prestige. But if the draft or interpretation fails, P1 incurs costs, such as wasted time and human capital and damage to judicial power. In short, P1 makes his choice based on the perceived probability that the draft or interpretation will trigger resistance and the institutional power of the resisting player.

At stage two, P2 and P3 take a close look at the draft or interpretation and decide whether or not to resist it. There are costs associated with resistance at this stage, for example, the cost of gathering political support to stop the proposed legal change. Therefore, as strategic actors, P2 and P3 look ahead to later stages and estimate the subsequent costs they will incur when the law is enforced, which should be the probability of enforcement times the sum of the benefits and costs. If for one player the future costs are higher than the costs of resisting at stage two, he will resist at this stage,

⁴⁷ The resistance is a simplification of all the efforts used by P2 or P3 to oppose the proposed change. It may include vetoing the draft or interpretation, amending the constitution, threatening to change the judicial institutions, to name just a few. The concrete form of resistance depends on the political structure of the country in discussion.

provided that his efforts will nullify the draft or interpretation. Otherwise, he will allow the draft or interpretation to be put into effect.

When the law is set for application, P2 and P3 make a choice between compliance and noncompliance. Since the change is assumed to be in favor of one of the two players, it is often the other player that makes the actual choice. For example, if the legislature in China passes a bankruptcy law that gives higher priority to secured credit instead of workers' compensation, secured creditors who are typically state-owned banks and other financial institutions, and workers' unions will decide whether or not to comply with the new law. Since the law favors the banks, it is the unions that make this calculation. They can choose not to comply by, among other things, seizing the assets of the debtor or blocking the resale of the collaterals. In the game, the decisions of P2 and P3 vary according to the sum of costs and benefits of compliance, and the expected level of enforcement. For instance, if the costs are high and the expected enforcement level is low, they are better off not complying.

At stage four, P4 chooses between enforcing the law and not enforcing it. The costs of enforcement depend on a variety of factors such as legal professionalism, litigants' relative institutional power, and judicial authority. Presumably, in a rule of law environment where the local courts are more powerful and independent, there are more incentives for legal enforcement. This is also true in a context where the litigants are of similar institutional power and the courts play a more neutral role.

Depending on the payoffs present, backward induction reveals several possible outcomes of the game. At the enforcement stage, P4's decision is based on the general institutional environment and the relative power distribution between P2 and P3.

Table 1. The Enforcement Decision by Player 4.

	Vertical Power Relationship Between Litigants ⁴⁸	Horizontal Power Relationship Between Litigants ⁴⁹
Strong Rule of Law	<i>Enforce</i>	<i>Enforce</i>
Weak Rule of Law	<i>Not Enforce If Law Favors The Less Powerful</i>	<i>Enforce</i>

⁴⁸ In this paper, vertical power distribution describes the situation where one of P2 and P3 controls significantly more legislative power and resources than the other.

⁴⁹ In this paper, horizontal power distribution describes the situation where P2 and P3 control similar legislative power and resources.

As shown in Table 1, in a strong rule of law environment, the professional norms are strong; the judiciary is powerful and independent. P4 has an incentive to enforce the law, and it matters little how power is distributed between the litigants.

In a weak rule of law environment, however, P4's decision depends on the power distribution between the litigants. If P2 and P3 are both powerful actors, the court⁵⁰ can have a say even if its institutional power is weak. In this horizontal power distribution, the court can function as a tiebreaker between P2 and P3. But if the power distribution between P2 and P3 is vertical, that is, one player is significantly more powerful than the other, then the court's decision turns on which party the law favors. If the law favors the more powerful, the court will not hesitate to enforce it. But if the law favors the less powerful, then the court is in a feeble position to enforce it.

At the compliance stage, P2 and P3 make a choice between compliance and noncompliance. Their decision at this stage turns on the outcome at the enforcement level. As we have seen, in a strong rule of law context, the law is to be enforced. So P2 and P3's decisions turn on the difference between the cost of compliance and the cost of noncompliance. In a weak rule of law context, we get a similar outcome if P2 and P3 enjoy relatively equal political power. If, however, P2 has more institutional power than P3, and if the law favors P3, then both P2 and P3 know that P4 will not enforce the law due to the substantial costs. With this expectation in mind, P2 will choose noncompliance. It is trivial that P3 will choose compliance, or at the least be indifferent between the two choices, since the law favors him.⁵¹

Going one step backward to the legislation stage, P2 and P3 make a choice between resisting and not resisting. Again, their decisions depend on the outcomes at the subsequent stages. In a strong rule of law context, the reasonable expectation is that the law will be enforced, and compliance probably is the better choice for P2 and P3. In that case, their decision at the legislation level turns on the probability of successfully blocking the draft or interpretation, and the cost of compliance. In other words, P2 or P3 will choose to resist if and only if:

⁵⁰ P1 is often legal scholars, officials in Beijing, or judges of the highest court; here the court refers to the local or regional adjudicative body.

⁵¹ I assume that the cost associated with compliance is lower than that associated with noncompliance if the law favors the party.

$$\begin{aligned} & (\text{probability of successful blocking}) * (\text{cost of compliance}) \\ & \geq (\text{cost of blocking}) \end{aligned}$$

The lower the cost of blocking, the higher the probability of successful blocking, and the higher the cost of compliance, the more likely the condition is satisfied, and the more likely P2 or P3 will choose to resist.

The same applies to the situation where there is weak rule of law, but horizontal power distribution between P2 and P3. If one of the players successfully blocks the draft or interpretation, then the model reverts to status quo. Since P2 and P3 take adversarial positions under the proposed law, there is no prisoners' dilemma problem for resisting the draft or an interpretation.⁵²

In a weak rule of law context, if the law favoring the weaker player is not expected to be enforced against the more powerful one, the latter has no incentive to resist at the legislative stage.

Going back to the first stage, drafting and interpreting, P1 makes a choice among maintaining status quo, making a more sophisticated draft or interpretation favoring P1, or making a more sophisticated draft or interpretation favoring P2. Holding other factors constant, P1 wants to change the status quo and make a law that brings the judiciary more prestige and power. If the draft or interpretation is successfully blocked, however, P1 suffers the waste of time and resources. If the draft or interpretation goes through the legislative stage, P1 gets the credit for it.⁵³ Therefore, P1's decision turns on the probability of P2 and P3's choosing to resist. If P1 expects the draft or interpretation to be successfully blocked by one player, then he is better off either choosing status quo, or making the law favoring this player, based on the context. Ultimately, P1's decision turns on the outcomes in all the subsequent stages and the payoffs determined by the context of the game.

Below are two game trees that illustrate the scenarios that will be discussed in the empirical evidence section.

⁵² For an introduction of prisoner's dilemma, see Douglas Baird, Robert Gertner & Randal Picker, *GAME THEORY AND THE LAW* (1994). Generally, the dilemma describes a situation in which two prisoners are charged with a crime for which the prosecutor lacks sufficient evidence to convict. Given the model's conditions, the game theory result of the dilemma is such that the best choice for either of the prisoners is to confess, no matter what the other one does, though collectively, it is better for both to choose not to confess.

⁵³ In the model, I simplify the relationship between the judiciary and the legislature. I use the verb "block" to represent a wide range of legislative acts that have the effect of nullifying or modifying the effect of a legal interpretation. Such acts may take the form of modifying extent statutes or amending the constitution. The form depends on the political structure. In China, for instance, the People's Congress can intervene and veto a Supreme Court interpretation.

Variables:

- | | |
|---|-------------------|
| F2: Draft or Interpretation Favoring P2 | C: Compliance |
| F3: Draft or Interpretation Favoring P3 | NC: Noncompliance |
| SQ: Status Quo | E: Enforce |
| R: Resist | NE: Not Enforce |
| NR: Not Resist | |

Payoffs:

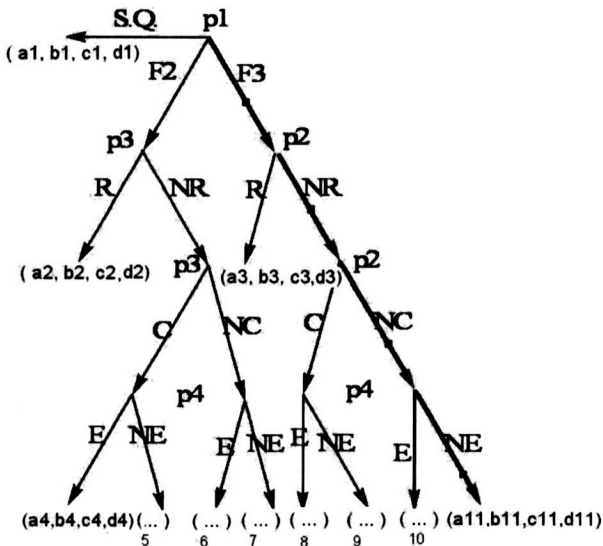
- | | |
|-------|-------|
| P1: a | P2: b |
| P3: c | P4: d |

1. Scenario I

- (1) Weak Rule of Law Context;
- (2) Vertical Power Distribution with P2 Being More Powerful;
- (3) P1's Preference: $F3 > F2 > S.Q.$

Plus the following conditions of payoffs:
 $a_{11} > \text{Max} (a_1, a_2, a_4, a_5, a_6, a_7);$
 $b_{11} > \text{Max} (b_3, b_8, b_9);$
 $d_{11} > d_{10}.$

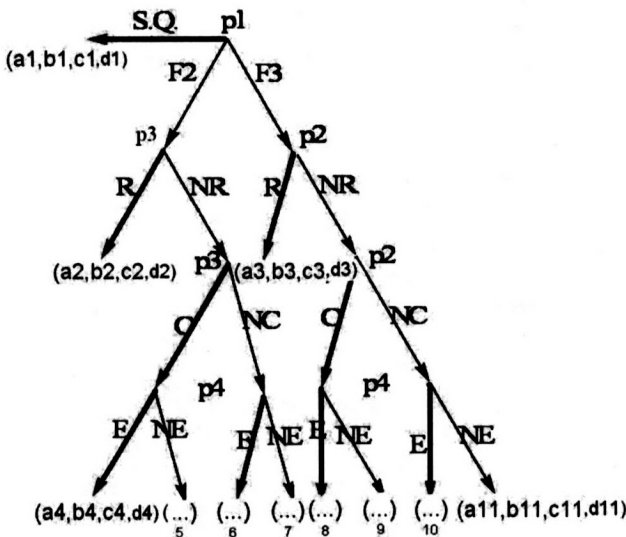
Game Tree 1.



2. Scenario II

- (1) weak rule of law context & horizontal power distribution; or, strong rule of law context;
 - (2) (probability of successful blocking) * (cost of compliance) \geq (cost of blocking) satisfied;
 - (3) Player 1's preference: $F2 < F3 > S.Q.$
- plus the following conditions of payoffs:
- $a1 > \text{Max}(a2, a3)$;
 - $b3 > b8 > b10$;
 - $c2 > c4 > c6$;
 - $d4 > d5$; $d6 > d7$; $d8 > d9$; $d10 > d11$.

Game Tree 2.



V. EMPIRICAL EVIDENCE SUPPORTS THE INTERACTIVE THEORY

This section presents five empirical comparisons of different laws, countries, and regimes that support the interactive theory discussed in the last section. First, while holding the subject of law constant, an analysis is made of how the variation in power distribution and legal authority affects the substance of the law. The reason that China seems to have more restrictive laws against police nonfeasance is that local officials did not



expect the law restraining the government to be enforced. Second, the differences between the making of comprehensive bankruptcy and administrative laws in China support the contention that the written law is a variable of its expected enforcement, which is further determined by the power distribution between potential parties. Third, a comparison of the making of insolvency law in China and in Vietnam shows that unlike China, Vietnam established a set of comprehensive bankruptcy codes in a short time because the codes were less likely to be enforced in Vietnam. Fourth, the politics behind the police liability law in the United States illustrate how power distribution in a rule of law context determines the way the United States Supreme Court interprets the American Constitution. Last, the changes in the governmental liability law in South Korea after the country experienced political transformation show that the legal code may favor the more powerful when the rule of law is more consolidated.

A. *The Supreme People's Court of China Favored Broad Interpretation of Governmental Liability Law*

In this subsection, I discuss the preference of the Supreme People's Court of China for a broad interpretation of governmental liability law. I use this empirical case to show that, as my model predicts, the distribution of political power of potential litigants implicated by a legal change, plus the weak rule of law environment, explains why citizens in China are ostensibly better protected by the law against official nonfeasance than their American counterparts.

In this empirical case, Player 1 is the Supreme People's Court. Scholars generally agree that judges tend to maximize the institutional power of the judiciary when possible. As a group, judges share certain interests, which include promoting judicial independence, influence, and authority.⁵⁴ Most scholars believe or assume that courts want to protect their legal autonomy from political bodies.⁵⁵ This is true even in an authoritarian regime such as China, where judges of the Supreme People's Court make efforts to promote the rule of law, though the efforts are constrained.

The leaders of the Court have received legal education at prestigious law schools in China and abroad. The current president of the Court, Xiao Yang, graduated from one of the best law schools and was once head of the

⁵⁴ Karen Alter, *Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice*, 52 INTERNATIONAL ORGANIZATION 121, 129-130 (1998).

⁵⁵ Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES 75 (2003).

Ministry of Justice.⁵⁶ During his term, the ministry initiated a nationwide legal-aid system in China. A 1998 report said that “lawyers engaging in legal aid work had handled 70,677 cases, and responded to more than 431,000 requests for legal information in 1997.”⁵⁷ Xiao and other officials held the view that establishing a legal aid system was a prerequisite to China developing a mature legal system.⁵⁸ In 1999, the Supreme People’s Court published the “Outline of Five-Year Reform” that aimed at promoting the power of judiciary by taking concrete measures such as “implementing public trials,” “enhancing the independence of judicial panels,” and “publishing court judgments.”⁵⁹

In China, legal specialists are usually responsible for drafting new laws. Like their peers sitting in the Supreme Court, these specialists normally favor a stronger and more independent judiciary. Wang comments that “Chinese legal academics are increasingly vocal in their calls for changes to China’s legal system”⁶⁰ A community of legal specialists has emerged, as their number keeps growing. The community’s “particularized expertise supports powerful dynamics of group identity, poses significant challenges for the regime’s control over the content and direction of legal reform.”⁶¹

Player 2 refers to government officials whose behavior falls under the jurisdiction of the drafted or interpreted law. They can resist the law at the People’s Congress, or do it at the local level when it is applied. Although the legislature in an authoritarian regime tends to be regarded as a rubber-stamp institution, it functions well as a bargaining forum among different power groups within the regime. If compromise cannot be reached, a proposal made by one group may very well be struck down by another. Player 3 refers to citizens who may be victims in police nonfeasance cases. Since China is essentially an authoritarian state, citizens are only weakly represented in the national legislature. Finally, Player 4 refers to judges of local and regional courts. They choose between applying the law and not applying it according to the interpretation or the guidelines of the Supreme People’s Court.

⁵⁶ See official resume of Xiao Yang, available at http://news.xinhuanet.com/ziliao/2002-03/01/content_295423.htm (last visited Feb. 18, 2007).

⁵⁷ Benjamin Liebman, *Legal Aid and Public Interest Law in China*, 34 *Tex. Int’l L. J.* 211, 212 n.5 (1999).

⁵⁸ *Id.* at 222-23.

⁵⁹ Liming Wang, *The Achievements and Prospects of Court Reforms in China*, 1 *FRONT. LAW CHINA* 3-4 (2006).

⁶⁰ Liebman, *supra* note 29.

⁶¹ Pitman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 *LAW & SOCIAL INQUIRY*, 465, 482 (2004).

For the reasons given below, officials are better off complying with the interpretation at the higher level and resisting the law at the local level. And local judges, due to the weak rule of law environment and the power distribution, choose not to apply the law.

Institutionally, local courts are dependent on local governments. The chief judge of a local court is appointed by a small group of leaders of the local government, which also controls a huge proportion of the expenses of the courts, including judges' salaries.⁶² The quality of local courts is generally low.⁶³ The majority of local judges do not have a college education or any formal training in law:⁶⁴

A 1998 study of nine basic-level courts (the lowest level) in a major provincial city revealed that only three percent of the judges had a bachelor's degree in law. The "great majority" had held other types of jobs in the court administration such as bailiff, clerk, or driver before being promoted to the rank of judge.⁶⁵

As a consequence, local judges in China do not share strong professional values or norms. In other words, they do not assign a high value to the duty of protecting the politically less advantaged, or following the order of the higher court. Moreover, the media is fully controlled by the state. For fear of revenge, the local press rarely reports negatively about local officials.⁶⁶ In short, heavy institutional reliance, in addition to the lack of professionalism and media monitoring, naturally lead to the lack of judicial authority of local courts. The following empirical evidence illustrates the severity of local judicial reliance. Beginning in 2002, an intermediate court in Zhejiang Province experimented with transferring jurisdiction in administrative cases. With the approval of the intermediate court, a case filed in town A will be adjudicated by the local court in town B, with town A and B in the same jurisdiction of the intermediate court. In the year before the experiment, government officials lost only 13% of all lawsuits. When administrative cases were transferred to a different jurisdiction, the

⁶² Donald Clarke, *China's Legal System and the WTO*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 107 (2003).

⁶³ William P. Alford, *Tasseled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, THE CHINA QUARTERLY, Mar. 1995, at 22, 36-37.

⁶⁴ *Id.* at 31.

⁶⁵ Clarke, *supra* note 62, at 108.

⁶⁶ See Benjamin Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 34-35 (2005).

percentage jumped to 64.4%. Yet the characteristics of the cases did not change significantly.⁶⁷

In a dispute with government officials, P3 citizens are disadvantaged by their weak political status. In China, local officials are normally appointed by higher-level CCP secretaries. Due to the absence of a meaningful electoral process, these officials are not held accountable to local residents. Therefore, the power relationship between the victims in official malfeasance or nonfeasance cases and the responsible government agencies, is often vertical. This imbalance of power is mirrored in the courts. Besides the institutional reliance of local courts and the subsequent biases against citizens, victims in administrative cases are also disadvantaged in terms of the legal resources available to them. Though the Ministry of Justice has set up a nationwide legal aid system, which was intended to be composed of quasi-independent organizations, the program has "concentrated in economically developed urban areas."⁶⁸ In addition, local officials can use various means to keep citizens from learning about the laws and regulations that they deem threatening.⁶⁹ Although some argue that the growth of media in China ameliorates the problem of information control, it is also recognized that once an issue is considered by the party as damaging to its legitimacy, the media will remain quiet.⁷⁰

In administrative cases not related to police inaction, local governments have additional ways to bypass the law. The Communist Party and party officials in China are not subject to administrative litigation, even though the party always has the final say in major policies, local or national.⁷¹ This party immunity sometimes allows local authorities "to deflect lawsuits."⁷² Abstract administrative acts are not reviewable either. As a result, local judges "can only [maneuver] around a handful of so-called 'concrete administrative acts,' and dare not undertake big moves on the numerous general actions based on 'policies.'"⁷³

In sum, given all these institutional features, the costs of noncompliance with the law are very low for local government officials. Meanwhile, the expected low level of compliance, the high level of

⁶⁷ Duan Hongqing, *Deng dai zui gao fa yuan chai qian si fa jie shi*, *Caijing*, June 7, 2004, available at <http://finance.sina.com.cn/g/20040607/1238799895.shtml> (last visited Feb. 18, 2007).

⁶⁸ Benjamin Liebman, *Legal Aid and Public Interest Law in China*, 34 *Tex. Int'l L. J.* 211, 214 (1999).

⁶⁹ Liebman, *supra* note 29.

⁷⁰ See Liebman, *supra* note 66, at 122-23.

⁷¹ O'Brien & Li, *supra* note 19, at 80.

⁷² *Id.*

⁷³ *Id.*

institutional reliance, rampant corruption, and the low level of professionalism all counsel local courts not to enforce the law when local officials are the defendants. Certain features of the judicial system afford local courts “the choice of accepting or declining a case. This power is somewhat akin to the institution of summary judgment in its gate-keeping function, but quite unlike it in that it is not governed by any consistent set of principles.”⁷⁴ Local judges often decline to adjudicate a case if substantial interests of local government are at stake. Even if the court accepts a case, it is very difficult for the plaintiff to win without resorting to non-legal means.⁷⁵ Consequently, the law is widely regarded as a “frail weapon” that has not been very effective.⁷⁶ In short, the best choices at the local level are for P2 government officials not to comply with the law, and for P4 local judges not to enforce the law. In addition, the low costs at this level reduce the incentive for P2 to resist the drafting or interpreting of the law at the central level. Since the law is aimed at restraining government officials, P3 citizen representatives at the National People’s Congress are not motivated to block it. Expecting weak resistance, P1, the Supreme People’s Court, pushed the envelope by signaling its preference for the legal interpretation that favors victims of official nonfeasance. To the Court this is a better choice because justices are motivated to maximize judicial authority and get credit for establishing legal restraints on the authoritarian state⁷⁷ (see Game Tree 1).

The evidence thus far appears to endorse the argument that laws do not matter in China, and therefore are easy to make. This argument oversimplifies the issue, however. Laws matter as a label of legitimacy, especially when they are used by the politically powerful to further their interests, or when they regulate the relationship between parties of similar political status.⁷⁸ When there is horizontal power distribution between the litigants, i.e., Player 2 and Player 3 have similar institutional capacity, even a weak court can function as a tiebreaker by enforcing the law. As illustrated earlier, in such a context, Players 2 and 3 make their calculations the same way as if in a strong rule of law environment. The high cost of compliance

⁷⁴ Clarke, *supra* note 62, at 109.

⁷⁵ See Bing Gan, *Guangxi gao yuan wei he zan bu shou li 13 lei an jian*, Ren min wang, Aug. 24, 2004, available at <http://unn.people.com.cn/GB/14748/2733920.html> (last visited Feb. 18, 2007) (Provincial high courts in China normally have internal rules regarding the general types of cases lower courts should not accept. One such rule was revealed by the media in 2004. It contained thirteen types of cases, most of which involve the substantial interests of local governments).

⁷⁶ O’Brien & Li, *supra* note 19, at 76.

⁷⁷ See *infra*, Game Tree 1.

⁷⁸ See *infra*, Table 1.

will motivate the player whom the law disfavors to choose to resist at the legislative stage.⁷⁹ For this reason, some laws, in contrast to the administrative laws, have only passed the Chinese legislature after more than ten years of drafting and redrafting. This is the case with the making of a new bankruptcy law in China.

B. The Making of a New Bankruptcy Law in China Shows the Shortcomings of the Over-Simplified Theory that Laws in China Do Not Matter

The making of a new bankruptcy law in China shows the shortcomings of the over-simplified theory that legal change in China progresses at a rapid rate because the laws are not applied. Like the administrative law discussed in Section I, the new bankruptcy law will be applied in a weak rule of law environment. My model posits that the drafting process took more than ten years because of the horizontal power distribution of the potential litigants.

When a law is proposed and drafted, if the power distribution between Player 2 and Player 3 is relatively horizontal, the model predicts the law will be applied at a higher level. If the cost of compliance is high, the player whom the law disfavors will strongly resist the draft at the legislative stage. As a consequence, the draft will not pass as easily as any of the administrative laws.

From 1949 to 1986, no bankruptcy law existed because of the planned economy. In 1986, the Law of the People's Republic of China on Enterprise Bankruptcy (Trial Implementation) was passed by the legislature for the purpose of increasing efficiency of state-owned companies, and only applied to state-owned enterprises.⁸⁰ Five years later, the People's Congress approved the PRC Civil Procedure Law, "with Chapter XIX applying to the bankruptcy of [non-state-owned] enterprises with legal person status."⁸¹ A few other Chinese laws also contain clauses that touch on the issue of bankruptcy. Chapter VIII of the PRC Company Law stipulates liquidation

⁷⁹ In the game theoretical setup, at the Legislation Stage, the player whom the law disfavors will resist the law if and only if: (probability of successful blocking) * (cost of compliance) \geq (cost of blocking).

⁸⁰ See Zhonghua Renmin Gongheguo qi ye po chan fa (shi xing) [Enterprise Bankruptcy (Trial Implementation)] art. 2, Ch. 1 (1986) (P.R.C.), available at <http://www.scsdaj.gov.cn/dac/pdfbak/zx145119861202.pdf> (last visited Feb. 18, 2007).

⁸¹ Charles Booth, *Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam*, 18 COLUM. J. ASIAN L. 93, 94 (2004).

procedures.⁸² Article 71 of the PRC Commercial Bank Law provides that a commercial bank can be declared bankrupt if permission of the Banking Regulatory Commission is granted.⁸³ The laws that compose China's insolvency regime are "short and incomplete."⁸⁴ Thus, "it should not be surprising that there are many inconsistencies as well as gaps and omissions" in these laws.⁸⁵ This problem is further exacerbated by the fast-growing economy, which changes significantly the forms of business organization and the performance of state-owned enterprises ("SOEs"). The Supreme People's Court has needed to issue numerous interpretations to meet the demand of a fast growing market economy.⁸⁶

In response to the inadequacy of the trial bankruptcy law, the Chinese government began a review of the Bankruptcy Law as early as in 1994, and a comprehensive draft was completed in 1995. The national legislature did not pass it at that time. Since then, a number of drafts have been written and circulated for comments. Some drafters complained of the delay in the legislature after eight years of drafting.⁸⁷ There was much speculation that the law would have passed in 2004,⁸⁸ but it was not until August 27, 2006 that the Chinese People's Congress enacted the new Corporate Bankruptcy Law.⁸⁹ Why was this process so different from the making of administrative law discussed earlier? The interactive theory best explains the dramatic difference.

Holding other variables constant, the preferences of Players 1, 2 and 3 are the following: P1 prefers a more sophisticated bankruptcy law than status quo. P2 hopes to see a law promoting his interests. If this is not available, then status quo is preferred over a law favoring P3. For P3, the preference ranking is: a law favoring P3 > status quo > a law favoring P2.

The institutional context for bankruptcy cases is the same as that for administrative ones. The major difference is that Player 3 is not a powerless

⁸² See *id.* at 98. See also Zhonghua Renmin Gongheguo gong si fa [Company Law], Ch. X (2005) (P.R.C.), available at http://www.gov.cn/ziliao/flfg/2005-10/28/content_85478.htm (last visited Feb. 18, 2007).

⁸³ See Booth, *supra* note 81, at 99. See also Zhonghua Renmin Gongheguo gong shang ye yin hang fa [Commercial Bank Law] art. 71, Ch. 7 (passed 1995, amended 2003) (P.R.C.), available at <http://www.people.com.cn/GB/jingji/1040/2267854.html> (last visited Feb. 18, 2007).

⁸⁴ Booth, *supra* note 81, at 99.

⁸⁵ *Id.*

⁸⁶ Li Shuguang, *Bankruptcy Law in China: Lessons of the Past Twelve Years*, 5 HARVARD ASIA QUARTERLY (2001), available at <http://www.asiaquarterly.com/content/view/full/95140/>.

⁸⁷ Yang Ye, "No Bankruptcy After Eight Years, Drafter Complains," *Economic Monthly*, June, 2002.

⁸⁸ "New Bankruptcy Law Is Coming," *China Economic Weekly*, Vol. 42, 24 (2004).

⁸⁹ *China Enacts New Bankruptcy Law*, BBC NEWS, August 28, 2006, <http://news.bbc.co.uk/2/hi/business/5291910.stm>.

citizen, but institutional creditors, mainly state-owned banks. Player 2 represents business enterprises and their workers' unions, both backed by local governments. In the making of a new bankruptcy law, unlike administrative laws, any deviation from the status quo may benefit one player at the expense of the other. Therefore, both Player 2 and Player 3 may have incentives to resist the law when it is drafted. Also, in China, the group of creditors is led by state-owned banks that are politically powerful in the legislature. They have the institutional strength to put up significant resistance to the drafting and passage of a law that is perceived to be against their interests. In addition, the small number of national banks reduces the costs of collective action and makes the resistance at the higher level more consistent and powerful.⁹⁰ In other words, both the probability of successful blocking and the cost of compliance are high. Therefore, it is more likely for the banking sector to choose "Resist" at the legislative stage when the draft law is perceived to be against their interest and the enforcement level is high.

Unlike in the United States, there are no specific bankruptcy courts in China. Judges dealing with such issues are members of the local courts (P4). They are not necessarily any more professional, independent, or corruption-proof than their peers presiding over administrative cases.

In an administrative case, the defendant is normally a government official. Plaintiffs, either unorganized citizens or companies, are in a politically disadvantaged position under the authoritarian political system, both at the local level and in the legislature. For the reasons discussed above, the administrative laws, when used by this politically weak group, do not pose serious challenges to the local government. As a result, the laws largely remain unused. In contrast, a new bankruptcy law is expected to regulate parties of relatively similar political powers.

A bankruptcy case usually involves a company and a group of creditors. In China, the former almost always has the support of the local government and the latter are often led by state-owned banks. The close symbiosis of local government and local business in China has been well documented.⁹¹ A widely held view on the dramatic economic development in China is that local governments

⁹⁰ For basic ideas of the collective action problem, see generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

⁹¹ See, e.g., Andrew G. Walder, *Local Governments as Industrial Firms: An Organizational Analysis of China's Transitional Economy*, 101 AM. J. SOC. 263 (1995); Jean C. Oi, *Fiscal Reform and the Economic Foundations of Local State Corporatism in China*, 45 WORLD POL. 99 (1992); Jiahua Che & Yingyi Qian, *Insecure Property Rights and Government Ownership of Firms*, 113 Q. J. ECON., 467 (1998).

treat enterprises within their administrative purview as one component of a larger corporate whole. Local officials act as the equivalent of a board of directors and sometimes more directly as the chief executive officers. At the helm of this corporate-like organization is the Communist Party secretary.⁹²

Due to this symbiosis,

if investments are made wisely, local governments can meet expenses, keep a portion of the extra tax revenues (at the townships and county levels) and enjoy larger amounts of extra-budgetary non-tax revenues . . . [T]hat has made township and village enterprises such a lucrative source of income for local governments and why they are so enthusiastically promoted.⁹³

In other words, the incomes of the officials at these levels are "directly affected by the performance and growth of their rural enterprises."⁹⁴

As discussed earlier, local courts have strong incentives to cooperate with local governments to further their interests. Expecting green lights from the judges, local governments often coordinate with bankrupt enterprises to over-compensate workers with the assets of the entity so that the laid-off employees will not be a financial burden.⁹⁵ Since employee settlement often left little money from the creditors, "state-owned banks, which are the main creditors of SOEs, are often hit hard by SOE bankruptcies."⁹⁶ Also, fraudulent bankruptcy, in which local governments help local enterprises evade debts with the protection of local courts, is widespread.⁹⁷ In these cases, the assets of bankrupt enterprises normally turn into properties of local government or corrupt government officials. As Li notes, "legal mechanisms to guarantee creditor's interests are weak at best."⁹⁸

The latest draft of the new bankruptcy law was intended to be uniformly applicable in par with the international standards. Agreement could not be reached on several key issues including the priority of the interest of secured creditors *vis a vis* workers' compensation, and the

⁹² Jean C. Oi, *The Role of Local State in China's Transitional Economy*, 144 CHINA Q. 1132, 1132 (1995).

⁹³ *Id.* at 1138.

⁹⁴ *Id.* at 1139.

⁹⁵ *Xin Po Chan Fa Jin Ru Zui Hou Jue Ze (New Bankruptcy Law To Be Decided)*, BUSINESS WEEKLY (China), April 18, 2005.

⁹⁶ *Id.*

⁹⁷ *Professor Li Shuguang Talked About New Bankruptcy Law*, CHINA ECONOMIC TIMES, Feb 8, 2002.

⁹⁸ *Id.*

appointment of bankruptcy administrators, who will be granted substantial power and discretion in managing bankruptcy under the new law. State-owned banks want the administrators appointed by a creditor's committee, and other groups want them appointed by the local courts. This is a strategic decision made by the banks to mitigate the influence of the local interests and the power of local courts. The concern of the creditors is that if the draft favoring more judicial discretion in bankruptcy cases were passed, the current collusions between local courts and local government would have additional legitimacy and would be more difficult to detect. With the bankruptcy administrator appointed by the creditor's committee, the power distribution at the local level will be more horizontal, and the enforcement of the law will be more neutral. The appointment issue is the most contentious one, and it has not yet been fully resolved.⁹⁹

In contrast to the governmental liability law, local governments cannot afford to ignore a draft insolvency law that is preferred by the banking sector and let it pass the legislature. This is due to the relatively strong political power of the national banks. Although local governments have the support of local courts, state-owned banks are powerful political institutions. Armed with a more favorable bankruptcy law, they can mount a meaningful challenge to local officials. As discussed earlier, one means is appointing a bankruptcy administrator from cities or provinces that are not under the influence of the local government. The banks could also use the law to impose pressure on higher-ranking regional and provincial judges or officials. In short, the distribution of political power on the two sides of the game is more balanced than the one in the administrative law context. Each party considers favorable legal code important. As a result, each party strongly resisted the passage of a drafted law that was perceived to be against their interests. Therefore, it took more than ten years for a new bankruptcy law to materialize in China.¹⁰⁰

Although the content of a draft law matters in that more sophisticated provisions tend to be better applied, since rights and obligations are clarified in more situations, the comparison between the drafting and interpretation of the insolvency law and the law on governmental liability in China shows that in a setting of a weak rule of law, the power distribution among potential parties to a case matters as much as the law itself. If the law is to be used by the politically weak against the strong, the probability of its real-world enforcement is low. If the law is to coordinate the relationship

⁹⁹ Booth, *supra* note 81, at 118-19.

¹⁰⁰ See *infra*, Game Tree 2.

between parties of similar political status, or be in favor of the politically strong, the probability of its enforcement is high. If that is the case, the party that will be disadvantaged by the law will have strong incentives to resist the law at an earlier stage, i.e. the legislative level, preventing it from being put into effect.

C. *The Making of Bankruptcy Law in Vietnam Supports the Interactive Theory*

This subsection discusses the recent process of making a comprehensive insolvency law in Vietnam, which has an institutional setup almost identical to China. The major difference between the two countries, which led to the swift legislation of a bankruptcy law in Vietnam, is that in Vietnam the bankruptcy law was not expected to be applied because the potential litigants have not developed distinguished group interests. As I will show, this empirical case supports the argument that legal environment and the distribution of political power explain how laws are drafted, interpreted, and legislated.

Vietnam and China resemble each other in many aspects relevant to this analysis. Both countries are ruled by communist parties, whose legitimacy depends largely on developing the national economy. Both countries are embedded in the Asian culture, in particular Confucianism. Both experienced foreign invasions and national liberation through military struggles in recent history. The institutional setups of the two countries are the same. All political powers, according to their constitutions, belong to a people's legislature,¹⁰¹ which is dominated by the communist party of each country.¹⁰² Both are carrying out export-oriented economic reforms, and the Vietnamese government copied many of the reform policies made by its Chinese counterpart.¹⁰³ The major difference is that Vietnam started its bankruptcy reforms about a decade later than China,¹⁰⁴ and the payoffs for each party in the game are different in Vietnam.

¹⁰¹ VIETNAM CONST. art. 4, (1992), translated at <http://www.isop.ucla.edu/eas/documents/VN-cons.htm#Chapter%20VI:%20The%20National%20As%20sembly> (last visited Jan. 23, 2007). Article 4 discusses the role of Communist Party in the State and society.

¹⁰² VIETNAM CONST. art. 4.

¹⁰³ Ronald J. Cima, *Vietnam's Economic Reform: Approaching the 1990s*, 29 ASIA SURV. 786, 793-94 (1989).

¹⁰⁴ See Brian Van Arkadie & Do Duc Dinh, *Economic Reform in Tanzania and Vietnam: A Comparative Commentary*, §1.0 (William Davidson Inst., Working Paper No. 706, 2004) (on file with Journal); Sonoko Nishitaten, *China's Special Economic Zones: Experimental Units for Economic Reform*, 32 INT'L & COMP. L.Q. 175, 175 (1983).

In Vietnam, as in China, some established legal professionals are dedicated to the promotion of judicial power.¹⁰⁵ However, authoritarian rule is more heavy-handed in Vietnam.¹⁰⁶ Although private business is blossoming, the government has more control of the national economy than its counterpart in China. Corruption is also more rampant, and the judiciary is virtually a tool of the party.¹⁰⁷ A World Bank study shows high levels of corruption in China, with more severe problems in Vietnam.¹⁰⁸ In Vietnam, court management and judge selection fall under the authority of Ministry of Justice.¹⁰⁹ Given all these factors, it is little surprise that the World Bank concludes that the rule of law is even weaker in Vietnam than in China.¹¹⁰

The differences in these factors, i.e. more state control of the economy, lower level of legal professionalism, less judicial independence, and more corrupt officials, determine that payoffs for P2 and P3 in Vietnam are not the same as in China. And as my model predicts, Vietnam has a more developed and unified bankruptcy law than does China.

Vietnam began drafting a bankruptcy law in 1992 "with the goal of creating a 'uniform, complete legal system.'"¹¹¹ It took less than two years

¹⁰⁵ Mark Sidel, *The Re-Emergence of Legal Discourse in Vietnam*, 43 INT'L & COMP. L.Q. 163, 170-171 (1994).

¹⁰⁶ According to annual reports by Freedom House on trends in political and civil liberty, Vietnamese citizens enjoyed less civil liberty than the Chinese in 1999-2000. The gap disappeared in 2000. From 2000 to 2004, the civil liberty scores for the two countries remained the same. Vietnamese citizens enjoyed more civil liberty than the Chinese in 2005. FREEDOM HOUSE, *FREEDOM IN THE WORLD (1972-2006)*, available at <http://www.freedomhouse.org/uploads/fiw/FIWA11Scores.xls>.

¹⁰⁷ See Penelope (Pip) Nicholson & Nguyen Hung Quang, *The Vietnamese Judiciary: The Politics of Appointment and Promotion*, 14 PAC. RIM L. & POL'Y J. 1, 10 (2005).

¹⁰⁸ Data generated from World Bank Data on Governance, available at <http://www.worldbank.org/wbi/governance/data> (follow "Interactive Web Access to Worldwide Governance Research Indicators Dataset" hyperlink; then follow "4. Download data in excel format", then choose China and Vietnam) (last visited Nov. 27, 2006).

Rule of Law	1996	1998	2000	2002	2004
China	0.50	0.35	0.42	0.28	0.41
Vietnam	0.55	0.94	0.77	0.47	0.60
Control of Corruption	1996	1998	2000	2002	2004
China	0.00	0.20	0.38	0.40	0.59
Vietnam	0.68	0.67	0.78	0.71	0.81

¹⁰⁹ Sidel, *supra* note 105, at 170.

¹¹⁰ World Bank Data on Governance, *supra* note 108.

¹¹¹ Charles Booth, *Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam*, 18 COLUM. J. ASIAN L. 93, 94-95 (2004) (citing VIETNAMESE MINISTRY OF JUSTICE, RESEARCH REPORT, ASSESSMENT, ANALYSIS, RESEARCH OF CURRENT STATUS TO RECOMMEND ON COMPLETION OF BANKRUPTCY LAW AND RELATED LEGAL PROVISIONS intro. (2002) [hereinafter VIETNAMESE BANKRUPTCY LAW RESEARCH REPORT]).

for the law to be enacted and implemented.¹¹² The law applied uniformly to both SOEs and non-SOEs. Booth believes that the Vietnamese law is “more expansive than the Chinese approach in that it applied to both legal person and non-legal person enterprises.”¹¹³ However, this seemingly comprehensive law was almost never utilized.¹¹⁴

Booth suggests four reasons for the dormancy of the law,¹¹⁵ and they all point to the tight control of SOEs by the state, lack of judicial autonomy, and the lack of awareness of the Vietnamese Bankruptcy Law. When the state directly manages the majority of the SOEs, courts are bypassed in insolvency issues. Judges in Vietnam “played the ‘central and decisive’ role in bankruptcy proceedings—from appointing the members of the trustee committee to chairing the creditors’ meeting,”¹¹⁶ but only seventy such cases were recorded from 1994 to 2002.¹¹⁷ Most of the insolvent SOEs either received subsidies or were dissolved directly by the state. As a result, local governments and local courts were not involved. In other words, the state protected the interests of creditors from predation by local officials. Meanwhile, given the ineffective court system, most of the private firms did not bother going through the legal process.¹¹⁸ Viewed through the theoretical framework of the paper, we see how low usage of a law led to its swift drafting and legislation.

To improve upon the 1993 law, the Vietnamese government drafted a new bankruptcy law in 2002. After much progress was made, the Vietnam Law on Bankruptcy was enacted in 2004.¹¹⁹ Booth compares five areas of the draft insolvency law in China, which finally passed the legislature on August 27, 2006, and the new bankruptcy law in Vietnam. Apart from some minor differences, both laws impress him as modern and comprehensive, much better than their previous versions. Not surprisingly, Booth sees more checks and balances built into the Chinese law, while the Vietnamese Law does not reflect such a compromise.¹²⁰

¹¹² *Id.* at 95.

¹¹³ *Id.*

¹¹⁴ *Id.* at 105.

¹¹⁵ *Id.* at 109.

¹¹⁶ *Id.* at 125 (citing VIETNAMESE BANKRUPTCY LAW RESEARCH REPORT, *supra* note 111, at Part 1, III, 1.5).

¹¹⁷ Vu Long, *Fishy Bankruptcy Stats Force the Issue of Reform*, VIETNAM INVESTMENT REVIEW, June 24, 2002, at 1, available at 2002 WLNR 10540442.

¹¹⁸ Vu Long, *Alter Bankruptcy Law to Nab Company Bosses*, VIETNAM INVESTMENT REVIEW, Jan 15, 2001, at 1, available at 2001 WLNR 8795799.

¹¹⁹ Booth, *supra* note 111, 96.

¹²⁰ Booth, *supra* note 111, at 125.

The comparison between the making of Vietnamese bankruptcy law and the Chinese bankruptcy law strongly support the argument that in a weak rule of law environment, laws are easy to make if they are not expected to be applied. This link between law making and law enforcement does not exist if the distribution of power between potential litigants is horizontal, as is the case with the Chinese bankruptcy law.

D. The Politics of the United States Supreme Court Opinions on Official Nonfeasance Support the Interactive Theory

The United States provides an application of the interactive theory in a strong rule of law context, where potential litigants of a contemplated legal change are more likely to resist legislation if they expect the change to have a negative impact when applied. Taking the resistance into consideration, those in the position to make the change will take great precaution to prevent legislation unfavorable to their position. As a result, laws on the books in strong rule of law countries may not look as favorable to state citizens as laws in countries with a weak legal environment.

Compared to China and Vietnam, the payoffs for each party in a strong rule of law country such as the United States are different in many ways. First, better rule of law means stronger legal professionalism and more judicial independence. The cost-benefit analysis for judges, P1 and P4, is different. American judges, more than their counterparts in China, adhere to the principles of following the law and doing justice. This is not to suggest that American judges are better individuals with higher levels of morality; they are simply embedded in a different institutional environment. Also, because of free media and better monitoring system, corruption is not as rampant in the United States as in China.

Empirical evidence shows that while state courts sometimes deviate from Supreme Court decisions,¹²¹ lower federal courts are largely consistent in applying federal law.¹²² P2s are also better-trained officials compared to those in China, and are subject to monitoring by free mass media, judicial review, and in some situations, a democratic electoral mechanism. Research has found that to federal bureaucrats, obeying the law is almost always

¹²¹ See Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. LAW J. 523, 537 (1995) (analyzing the frequency of state court application of three prominent U.S. Supreme Court takings cases).

¹²² See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 96 (1986) (analysis of seventeen federal court appellate decisions upholding deferential standard of review to legislative public use determinations as established in *Berman v. Parker*, 348 U.S. 26 (1954)).

considered the most desirable thing to do given the costs and benefits shaped by the institutions:

Federal government agencies complied with 93.2 percent of the Supreme Court's opinions and narrowly complied with 6.8 percent of opinions. Also, bureaucracies never defied nor evaded any of the Court's decisions, meaning that agencies never failed to incorporate at least some aspect of the Court's legal rules into their implementations. The agency responses that manifested narrow compliance did not flout the Court's authority but they interpreted its opinions in self-interested ways. . . . When the Court writes legal rules adverse to agency interests, government bureaucracies usually faithfully interpret and implement them.¹²³

Recent research also hypothesizes that government officials anticipate lower court decisions and change their actions accordingly.¹²⁴

Moreover, once the law is made, individuals are more likely to use it to protect their interests. Unlike in China, where victims of official nonfeasance are seriously disadvantaged both inside and outside the courtroom, the American legal system affords ordinary citizens relatively equal standing against government officials in front of a judge, both at the federal and the state level. In the last few decades, there has also been a dramatic movement towards greater legal consciousness and the assertion of legal rights.¹²⁵ As a result, a new Supreme Court decision will trigger more cases to be brought in lower courts against federal or state officials.

In addition, studies demonstrate that government officials make cost-benefit analyses.¹²⁶ Government agencies' compliance with the Court depends on the characteristics of the implementation environment, as such characteristics affect agencies' perceptions of the costs and benefits of how to respond to the Court.¹²⁷ If the cost of compliance is too high, they are better off resisting the law through other channels, for example through the legislature. Scholars observed that if powerful groups are hurt by Supreme

¹²³ James Spriggs, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50 POL. RES. Q. 567, 577-78 (1997).

¹²⁴ See Brandice Canes-Wone, *Bureaucratic Decisions and the Composition of the Lower Courts*, 47 AM. J. POL. SCI. 205, 205 (2003).

¹²⁵ See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM, THE AMERICAN WAY OF LAW* 44-58 (2001).

¹²⁶ Spriggs, *supra* note 123, at 573.

¹²⁷ *Id.*

Court decisions, they opt to resist through Congress.¹²⁸ If the Court expects strong resistance by officials at a higher level, it must consider the consequence of the legislature's reaction. After all, the judiciary relies on other institutions for its rules to be implemented.¹²⁹

This reliance suggests that if the legislature strongly opposes a ruling, the legislature can nullify it by changing the Constitution, making a new law that bypasses or partially reverses the court decision, or changing the institution of the Court.¹³⁰ Ignagni and Meernik demonstrate that Congress is usually successful when confronting the Court.¹³¹ Although their evidence is somehow compromised by the self-selection problem, which means Congress responds assertively only when its members expect to win in a battle against the Court, the overall evidence "does indicate that Congress is ready and capable of striking back at the Court when it deems necessary."¹³² Moreover, if confrontation with Congress is to be avoided, a rational Court will pay deference to state and local governments when they opt to protect their interests through the judicial channel.

Scholars have shown that not only did states and localities appear before the Supreme Court more often, they also won a higher proportion of their cases Importantly, they were victorious in 55% to 70% of all their Supreme Court cases since 1970. The only parties consistently doing better as appellants during the 36-year period were minorities, unions, and the federal government. The [state and local government] success rate as respondent was exceeded only by that of the federal government.¹³³

In short, in a strong rule of law environment such as the United States, laws are expected to apply. Studies have shown that the Court faces meaningful resistance from the legislators if the ruling is against the interest of their constituencies. To avoid a show-down, a rational Court will pay deference to state and local governments when possible.

Applying this reasoning to the laws on governmental liability for police inaction, once the court imposes a positive duty on the police to

¹²⁸ Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353, 359 (1994).

¹²⁹ Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1022 (2004).

¹³⁰ Ignagni & Meernik, *supra* note 128, at 354.

¹³¹ *Id.* at 367-68.

¹³² *Id.*

¹³³ Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POL. 1008, 1012 (1992).

protect individuals, the costs and benefits for implicated officials will change significantly. Law enforcement under such a rule would incur considerably higher costs. For instance, in New Jersey alone, the courts issued 34,698 and 36,071 temporary restraining orders in 1999 and 2000 respectively.¹³⁴ If the Supreme Court in *Town of Castle Rock* had found the failure to respond to the restraining order was a violation of procedural due process, significantly more victims of police nonfeasance would have a colorable constitutional claim. As a result of the increased threat of lawsuits, legislators representing the interest of law enforcement officers will resist through the legislature. Since state governments have substantial interests in this matter, they would react too. Anticipating strong resistance from state and local governments either in court or through Congress, the Supreme Court has declined the invitation to create a federal constitutional right for individuals to receive police protection.

In sum, because of the stronger rule of law environment in the United States, the full impact of the Court decision would, *inter alia*, substantially increase the costs for government officials, which makes them better off resisting the decision at the legislative level. Anticipating strong resistance from other branches and the high costs of confronting them, the Supreme Court opted not to tie the hands of the officials too tightly. To be more specific, the expected resistance would be too strong for the Supreme Court to make police inaction a constitutional violation. As a result, the Court has never upheld such a claim, either under the guise of substantive due process,¹³⁵ or as procedural due process.¹³⁶ The court notes that state legislatures are welcome to make such laws.¹³⁷

While laws against official nonfeasance are almost nonexistent in America, official malfeasance is subject to judicial punishment. Congress enacted the *Federal Tort Claims Act* in 1946 to check the tortious acts committed by the federal government.¹³⁸ Given the strong rule of law context, the statute reasonably contains a long list of provisions aimed at ensuring that federal officials are only liable for clear malfeasance and the federal government is not overburdened. Limits on the government burden include that the United States "shall not be liable for interest prior to

¹³⁴ RICHARD J. WILLIAMS, ADMINISTRATIVE OFFICE OF THE COURTS OF NEW JERSEY, REPORT ON THE PREVENTION OF DOMESTIC VIOLENCE ACT 5 (2001) (on file with Journal).

¹³⁵ See *DeShaney v. Winnebago County*, 489 U.S. 189, 196-97 (1989).

¹³⁶ See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 125 S.Ct. 2796, 2810 (2005).

¹³⁷ *Town of Castle Rock*, 125 S.Ct. at 2810; *DeShaney*, 489 U.S. at 202.

¹³⁸ James R. Levine, Note, *The Federal Tort Claims Act: A Proposal For Institutional Reform*, 100 Colum. L. Rev. 1538, 1540 (2000).

judgment or for punitive damages;”¹³⁹ sets the attorney fees to less than “25 per centum of any judgment rendered;”¹⁴⁰ and confers immunity to officials when they are exercising or performing a “discretionary function or duty on the part of a federal agency or an employee of the Government.”¹⁴¹ Fully aware of the potential resistance from federal officials through the legislature, the Supreme Court has been careful not to strictly interpret this “discretionary function.” It stipulates that to fall into the exception, a government act must “involve[] an element of judgment or choice” and “be ‘based on considerations of public policy’ or at least ‘susceptible to policy analysis.’”¹⁴² “This test has allowed the discretionary function exception to swallow much of the liability that the FTCA purports to create.”¹⁴³ The same rationale applies to the judicial politics of Section 1983, which “creates a cause of action for the deprivation of federal rights ‘under color of any statute, ordinance, regulation, custom, or usage, of any State.’”¹⁴⁴ In coordinating the relationship between the federal government and state governments, the Court is better positioned to assert more judicial authority. In *Monroe v. Pape*, the Court found a cause of action against thirteen police officers of the City of Chicago who violated the plaintiffs’ constitutional rights by breaking into their homes and mistreating them.¹⁴⁵ The Court held the city government could not be liable as Section 1983 lacked legislative intent to include municipalities.¹⁴⁶ This ruling triggered waves of litigation against state and local officials. Quite naturally, the Court in later opinions “attempted to stem the tide of litigation by developing jurisdictional limitations on these suits.”¹⁴⁷

In sum, the United States Supreme Court and the Supreme People’s Court of China, embedded in different contexts, took counterintuitive actions with regard to laws on police nonfeasance. With weak institutional power, low quality courts at the local level, unclear statutes, and powerful officials, the Chinese Supreme Court signaled its preference for broadly interpreting the laws on governmental liability and favored the rule that police officers

¹³⁹ Federal Tort Claims Act, 28 U.S.C. § 2674 (2006).

¹⁴⁰ *Id.*, § 2678.

¹⁴¹ *Id.*, § 2680.

¹⁴² Levine, *supra* note 138, at 1541 (citing *United States v. Gaubert*, 499 U.S. 315, 322, 323, 325 (1991)).

¹⁴³ *Id.*

¹⁴⁴ George Rutherglen, *Custom and Usage as Action under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 Va. L. Rev. 925, 925 (2003) (citing 42 U.S.C. § 1983 (2000)).

¹⁴⁵ *Monroe v. Pape*, 365 U.S. 167, 187 (1976).

¹⁴⁶ *Id.* at 191.

¹⁴⁷ Eric H. Zagrans, “*Under Color of*” *What Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 504 (1985).

owe a positive duty to protect individual citizens. In contrast, with strong institutional power, high quality federal courts at the circuit and district levels, flexible constitutional provisions, and more law abiding government officials, the United States Supreme Court dismissed the claim that the Due Process Clause of the Constitution affords any remedy to individual citizens who are victims of police nonfeasance. This counterintuitive contrast, if viewed from the game theoretic perspective discussed in Section III, is perfectly reasonable.

E. Changes in the Governmental Liability Law in South Korea Support the Interactive Theory

Recent changes to the governmental liability law in South Korea show, as predicted by the interactive theory, that a supreme court composed of a group of highly dedicated legal professionals, combined with vertical power distribution between potential parties, and weak rule of law can lead to ostensibly high level of judicial restraint on government officials. The interactive theory also predicts that once the legal environment improves, the court will relax the judicial restraint due to its costly application.

Since the ceasefire of the Korean War, South Korea has experienced one of the most remarkable political and economic transformations in human history. From a backward colony of Japan, South Korea grew into a powerful industrial country and joined the Organization for Economic Cooperation and Development after only three decades of development.¹⁴⁸ Soon after the war, the United States government set up a democratic polity in the southern peninsula. This government was short-lived. A military general took over the power and started an authoritarian rule that lasted for almost thirty years, which was interrupted only by military coups and assassinations. In the 1990s, however, South Korea went through a relatively peaceful democratization.¹⁴⁹ As the political institution transformed, so did the power allocation within the system. This transformation created an ideal test ground for the proposed theory. As noted earlier, the theory predicts that a group of highly dedicated high court judges, vertical power distribution of potential litigants, and a weak rule of law can lead to an ostensibly high level of legal restraint on government

¹⁴⁸ ROGER VAN HOESSEL, *NEW MULTINATIONAL ENTERPRISES FROM KOREA AND TAIWAN: BEYOND EXPORT-LED GROWTH* 41-49 (1999).

¹⁴⁹ Freedom House, an international organization promoting liberal democracy, awards South Korea similar scores as Japan and Spain in the organization's latest survey of political liberty and civil liberty worldwide. Available at <http://www.freedomhouse.org/template.cfm?page=275> (last visited Jan. 12, 2007).

officials. And when the contextual factors change, so do the ostensible legal constraints.

In general, Korean judges are more professional than their peers in China. The selection process is based purely on merit, reflected by passage of the bar examination. Records show that "from 1949 to 1980, in a thirty-year period, a total of only 1902 candidates passed the bar examination, an average of fifty-nine a year, for a population of 30 to 40 million people."¹⁵⁰ This reflects an average passage rate of one to two percent.¹⁵¹ In the last two decades, the number of legal professionals increased, but the change was slow.¹⁵² Many of the successful candidates graduated from the same elite law school, and all are trained for two years after the bar exam at the Judicial Research and Training Institute, which naturally strengthens the appreciation of a collective goal and solidifies professional norms.¹⁵³ As a result, judges are held by the society to higher intellectual and moral standards.¹⁵⁴ The best illustration of the professionalism of high court judges in Korea is their challenge, or self-sacrifice, to the authority of a military dictator. In 1971, the Supreme Court tested the limit of its power by holding Article 2 of the National Compensation Act unconstitutional.¹⁵⁵ The decision was later overruled by a Constitutional Amendment. All the justices who had agreed on the unconstitutionality of the law in the case were denied a second term.¹⁵⁶ This series of interaction between the Supreme Court of Korea and the authoritarian state illustrates the professional commitment of the judges, the institutional weakness of the Court, and the heavy rule of the state before democratization.

In the last three decades, Korea transformed from a military dictatorship into a liberal democracy. Throughout this period, as the power distribution of the actors changed, so did the payoffs of different strategies in this law-making game. A survey of the governmental liability law in South Korea reveals evidence that supports the hypothesis presented in this article. Given the high professional commitment of Korean judges, it was unexpected that its Supreme Court would go as far as its counterpart in China by preferring the rule that police officers owe a positive duty to

¹⁵⁰ Dae-Kyu Yoon, *Korea, in ASIAN LEGAL SYSTEMS* 162, 181 (Poh-Ling Tan ed., 1997).

¹⁵¹ *Id.*

¹⁵² *Id.* at 182.

¹⁵³ Jae Won Kim, *The Ideal and the Reality of the Korean Legal Profession*, 2 *ASIAN-PAC L. & POL'Y J.* 45, 49 (2001).

¹⁵⁴ *Id.* at 54-55.

¹⁵⁵ Won Woo Suh, *Governmental Liability in Korea, in COMPARATIVE STUDIES ON GOVERNMENTAL LIABILITY IN EAST AND SOUTHEAST ASIA* 9, 11 (Yong Zhang ed., 1999).

¹⁵⁶ Kun Yang, *Judicial Review and Social Change in the Korean Democratizing Process*, 41 *AM. J. COMP. L.* 1, 1-2 (1993).

individuals who ask for protection from third-party tortious acts. During authoritarian rule, however, the Court imposed high nominal standard on government officials. Until 1996, the Court had consistently held that “public official[s] [were] liable for compensation to the injured party even in cases of minor negligence.”¹⁵⁷ Yet this tight rule was loosened after the legal environment in the country improved qualitatively.¹⁵⁸ Suh notes that:

Changes have taken place in respect of the position of the court regarding the liability of the public official to compensate the injured party. . . .

[O]n February 15, 1996, the plenary body of the Supreme Court handed down a judgment to the effect that public officials will be liable for compensation only in cases of deliberate acts or of gross negligence.¹⁵⁹

In other words, the Supreme Court of Korea moved from more closely resembling the Supreme People’s Court of China to become more like the United States Supreme Court after the country democratized. This change is as predicted by the interactive theory. That is, a supreme court composed of dedicated legal professionals, vertical power distribution between potential parties, and weak rule of law can lead to ostensibly high level of judicial restraint on government officials. Once the legal environment improves, however, the court will relax the judicial restraint due to its costly application.

VI. CONCLUSION

*The more laws and orders are made prominent,
The more thieves and robbers there will be.*

Tao Te Ching v.57

William Alford, a Harvard law professor specializing in comparative law, cites these two lines in his article “The More Law, The More . . . ? Measuring Legal Reform in the People’s Republic of Law.”¹⁶⁰ He suggests that scholars drop the easy assumption that more legal codes lead to a better rule of law, and subsequently, more economic development. This article

¹⁵⁷ Suh, *supra* note 155, at 17.

¹⁵⁸ According to the annual reports by Freedom House, political rights and civil liberties have expanded in South Korea since 1972. FREEDOM HOUSE, FREEDOM IN THE WORLD (1972-2006), available at <http://www.freedomhouse.org/uploads/fiw/FIWAIScores.xls>.

¹⁵⁹ Suh, *supra* note 155, at 17.

¹⁶⁰ Alford, *supra* note 38, at 122.

suggests that Alford is partially right. There indeed exists a correlation between rapid legal reform and the weakness of law enforcement. Laws are easy to make when they are made to be ignored. A theory based solely on this simple correlation is incomplete, however, since even in a setting of weak rule of law, legal codes matter if they regulate the relationship between parties of similar political status.

In this article, I created a game that incorporated four players, one who drafts or interprets laws, two parties who are implicated by the legal change, real or contemplated, and one who enforces the law. By studying how the four players interact in the conceptual game setup when different payoffs are assigned, we can resolve more empirical puzzles and predict how laws change in response to changes in other factors such as the legal environment or the distribution of power of potential litigants. Empirical evidence from China, Vietnam, the United States, and South Korea support the interactive theory. The empirical evidence and the theory indicate that the real effect of significant changes in law is often limited when the judiciary is weak and when the power of potential litigants is unevenly distributed.