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Agility Over Stability: China's Great Reversal in Regulating the Platform Economy

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This Article develops the five-element HAPPY model to study Chinese regulation: the regulatory process is hierarchical, the top leadership is adaptable, the Chinese regulators are parochial, the firms are pliant and the Chinese public need to yelp to be heard. By focusing on China's great reversal in regulating the platform economy, I show that Chinese policy volatilities have stemmed from the hierarchical structure in which power is centralized among top leaders, who also suffer from a chronic deficit of information. I particularly highlight how favorable support from the top leadership, aggressive lobbying from tech firms, and the bureaucratic inertia of the regulators together contributed to a lag in regulating Chinese online platforms. When a crisis looms, the top leadership quickly mobilizes all administrative resources and propaganda to initiate a law enforcement campaign against tech giants. However, without strong judicial oversight, aggressive agency interventions create the risk of over-enforcement and administrative abuse. Thus far, China's reorientation of its policy control has significantly bolstered its regulatory capacity across various fronts including financial, antitrust, and data regulation. By exerting greater oversight over platform governance, the government has enhanced the bargaining power of the various platform participants in dealing with the platforms. The government's heavy-handed approach has also afforded it great leverage to nudge tech firms to prioritize developing cutting-edge technologies, and to steer them away from foreign stock markets, thus reducing reliance on the West for both technologies and capital. Despite the campaign's immediate impact, it remains to be seen whether it will bring about lasting changes, especially in light of the persistent lobbying from tech firms and the risk of regulatory capture. At the same time, the volatile policy swing has itself generated risks and uncertainties, which in turn could cause turmoil to domestic social and financial stability. As the rest of the world is similarly confronted with thorny questions about how to rein in Big Tech, China's experience with platform regulation could offer some lessons that inform the global policy debate. Although this Article focuses primarily on the platform economy, the HAPPY model has the promise to shed light on the complexity and dynamics in other areas of regulatory governance in China and beyond.

INTRODUCTION

China possesses one of the world's largest and most vibrant digital economies. Valued at six trillion dollars in 2020, the Chinese digital economy was second in size only to the United States', accounting for nearly forty percent of China's GDP.¹ China also accounted for more than half of the world's e-retailing in that same year, while Chinese companies accounted for more

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1. Yujie Xue, *China's Digital Economy Surges in 2020 Amid Pandemic, Making up Nearly 40 Percent of Country's GDP*, S. CHINA MORNING POST (Apr. 27, 2021, 6:00 PM), <https://www.scmp.com/tech/policy/>

than seventy percent of the global valuation of fintech businesses in 2019.² Alibaba and Tencent, two of China's most valuable publicly-listed tech companies, have emerged as global leaders in e-commerce, social media and fintech. Many observers believe that these two firms owe their successes not only to China's large consumer market but also to a supportive and nurturing environment created by the Chinese government.³ The "Great Firewall," which the Chinese government set up in the 2000s to block foreign rivals from accessing the Chinese market, shielded domestic players from foreign competition and facilitated the exponential growth of these Chinese national champions.⁴ Meanwhile, online platforms have pervaded every facet of Chinese life, resulting in both benefits and harms to Chinese consumers.⁵ Yet despite all these problems bubbling underneath the surface, Chinese regulators were slow to take a tough stance.⁶

Since October 2020, however, a regulatory storm has blown into the Chinese tech industry. Ant Group ("Ant"), the Chinese fintech company that was about to launch the world's largest initial public offering ("IPO"), was asked to cancel the IPO forty-eight hours before its debut.⁷ Ant is an affiliate company of Alibaba, China's largest e-commerce giant. Many western media outlets have framed this incident as an attack on Ant's founder Jack Ma, the flamboyant and outspoken Chinese entrepreneur who made a speech in Shanghai in late October 2020 criticizing China's financial regulation.⁸ The speech, according to those media, offended many senior Chinese leaders, leading to the eventual cancellation of Ant's IPO.⁹ Since then, Chinese regulation has spread like wildfire, affecting not only the fintech sector, but also

article/3131286/chinas-digital-economy-surges-2020-amid-pandemic-making-nearly-40-cent [https://perma.cc/46H9-2PWZ].

2. Longmei Zhang & Sally Chen, *China's Digital Economy: Opportunities and Risks* (IMF Working Paper WP/19/16).

3. *Id.*; see McKinsey & Company, *China's Digital Economy: A Leading Global Force* (Aug. 2017) [hereinafter McKinsey Report], <https://www.mckinsey.com/~/media/mckinsey/featured%20insights/China/Chinas%20digital%20economy%20A%20leading%20global%20force/MGI-Chinas-digital-economy-A-leading-global-force.ashx> [https://perma.cc/T7SY-B9HQ].

4. Anirudh Kannan, *Here's Why the Great Firewall of China Has Benefited the Country*, YP WEEKLY (Oct. 12, 2017, 3:52 AM), <https://www.scmp.com/yp/discover/your-voice/opinion/article/3066603/heres-why-great-firewall-china-has-benefited-country> [https://perma.cc/68Y9-RQT5].

5. See discussion *infra* part III.

6. See discussion *infra* part II.

7. Jing Yang & Lingling Wei, *China's President Xi Jinping Personally Scuttled Jack Ma's Ant IPO*, WALL ST. J. (Nov. 12, 2020, 12:56 PM), <https://www.wsj.com/articles/china-president-xi-jinping-halted-jack-ma-ant-ipo-11605203556> [https://perma.cc/25NJ-LMC7].

8. Ryan McMorro & Sun Yu, *The Vanishing Billionaire: How Jack Ma Fell Foul of Xi Jinping*, FIN. TIMES (Apr. 15, 2021), <https://www.ft.com/content/1fe0559f-de6d-490e-b312-abba0181da1f> [https://perma.cc/YV8C-85PY]; Henny Sender, *Jack Ma vs. the Party: Inside the Collapse of the World's Biggest IPO*, NIKKEI ASIA (Nov. 18, 2020, 6:23 AM), <https://asia.nikkei.com/Spotlight/Most-read-in-2020/Jack-Ma-vs.-the-Party-Inside-the-collapse-of-the-world-s-biggest-IPO> [https://perma.cc/82QW-JXWZ].

9. Yang & Wei, *supra* note 7.

social media, e-commerce, ride-hailing and food-delivery businesses.¹⁰ The State Administration for Market Regulation (“SAMR”), China’s antitrust authority, issued a set of new guidelines on the platform economy and initiated two high-profile investigations into Alibaba and Meituan, culminating in a record total fine of \$3.3 billion.¹¹ In July 2021, the Cyberspace Administration of China (“CAC”), China’s cybersecurity watchdog surprised investors by conducting a cybersecurity investigation into Didi Chuxing, two days after the company listed on the New York Stock Exchange.¹² The agency then followed up by promulgating a series of stringent data rules and regulations.¹³ This sudden regulatory shift gave the impression that the Chinese law enforcement was arbitrary, fueling speculation about factional conflict among Chinese political elites.¹⁴ Western commentators also viewed this incident as an example of the Chinese Communist Party’s (“CCP”) intent to ramp up control and influence over private firms in China.¹⁵ This Article aims to provide a more comprehensive and nuanced understanding of the driving forces behind China’s great reversal in regulating its tech firms. By targeting its superstar firms such as Alibaba and Tencent, China is actually following a global trend of reining in Big Tech. In the United States, public opinion has pressured regulators such as the Federal Trade Commission to tackle fake news and disinformation, fight infringements of privacy, and break up increasing concentration in the U.S. digital economy.¹⁶ After

10. Stephanie Yang, *China’s Tech Clampdown Is Spreading Like Wildfire*, WALL ST. J. (June 6, 2021, 11:51 AM), <https://www.wsj.com/articles/chinas-tech-clampdown-is-spreading-like-wildfire-11622971802> [https://perma.cc/4FQ9-FM5R].

11. Raymond Zhong, *China’s Tech Antitrust Campaign Snares Meituan, A Food Delivery Giant*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/10/08/technology/china-meituan-antitrust-fine.html> [https://perma.cc/PT3A-DBAB].

12. Lingling Wei & Keith Zhai, *Chinese Regulators Suggested Didi Delay Its U.S. IPO.*, WALL ST. J. (July 5, 2021, 2:43 PM), <https://www.wsj.com/articles/chinese-regulators-suggested-didi-delay-its-u-s-ipo-11625510600> [https://perma.cc/T8V4-C92L].

13. *Cyberspace Administration of China (CAC) Publishes Draft Regulations for Network Data Security Management*, ALLEN & OVERY (Nov. 26, 2021), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/cyberspace-administration-of-china-publishes-draft-regulations-for-network-data-security-management> [https://perma.cc/9HUQ-922B].

14. Lingling Wei, *China Blocked Jack Ma’s Ant IPO After Investigation Revealed Likely Beneficiaries*, WALL ST. J. (Feb. 16, 2021, 11:01 AM), <https://www.wsj.com/articles/china-blocked-jack-mas-ant-ipo-after-an-investigation-revealed-who-stood-to-gain-11613491292> [https://perma.cc/FX7S-XQ5K]; Barry Naughton & Jude Blanchette, *The Party Politics Driving Xi Jinping*, WIRE CHINA (Oct. 3, 2021), <https://www.thewirechina.com/2021/10/03/the-party-politics-driving-xi-jinping/> [https://perma.cc/CW2C-3Q5G].

15. Lingling Wei, *China’s Xi Ramps Up Control of Private Sector. ‘We Have No Choice but to Follow the Party.’*, WALL ST. J. (Dec. 10, 2020, 10:05 AM), <https://www.wsj.com/articles/china-xi-clampdown-private-sector-communist-party-11607612531> [https://perma.cc/5MFS-E88B]; Minxin Pei, *China’s Pro-Monopoly Antitrust Crusade*, PROJECT SYNDICATE (Dec. 31, 2020), <https://www.project-syndicate.org/commentary/alibaba-anti-monopoly-investigation-cpc-by-minxin-pei-2020-12> [https://perma.cc/YHE4-M5ZN]; Li Yuan, *What China Expects from Businesses: Total Surrender*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/07/19/technology/what-china-expects-from-businesses-total-surrender.html> [https://perma.cc/K6CK-A4AK].

16. See, e.g., Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035 (2018); see also Nir Grinberg et al, *Fake News on Twitter During the 2016 U.S. Presidential Election*, 363 SCIENCE 374 (2019); Dina Srinivasan, *The Antitrust Case Against Facebook: A*

years of lax antitrust enforcement, U.S. federal and state regulators recently brought a number of high-profile lawsuits against Google, Facebook, and Amazon.¹⁷ U.S. lawmakers are also introducing bills that could reshape the largest U.S. tech firms and force an overhaul of their business practices.¹⁸ The European Commission, even more interventionist than its U.S. counterparts, has launched investigations into major U.S. tech giants such as Google, Facebook, Amazon, and Apple.¹⁹ Unsatisfied with existing competition regulations, the Commission is introducing ex ante regulations to impose an extensive set of obligations and prohibitions on large online platforms.²⁰

The pendulum of Big Tech regulation has swung even faster in China. In a few short months, China has shifted from its previous lax and tolerant approach to a strict and aggressive one, becoming one of the most active and forceful jurisdictions in regulating the digital economy.²¹ What makes China exceptional, however, is not *why* it regulates, but rather *how* it regulates its tech firms. Indeed, China's volatile style of policymaking is deeply ingrained in its authoritarian governance system, where regulatory authorities need to adhere to central policy initiatives and administrative power is subject to few institutional constraints. As information transmission between the regulators and the top policymakers is not always efficient, the information lag leads to a policy control mechanism that fluctuates from very lax to very harsh enforcement.

To unravel the dynamics behind China's pendulum swing, I develop a theoretical framework that models Chinese regulatory governance as the outcome of the strategic interaction between four key players: the top leadership, the regulators, the firms, and the public. Although the top Chinese

Monopolist's Journey Towards Pervasive Surveillance In Spite of Consumers' Preference for Privacy, 16 BERKELEY BUS. L. J. 39 (2019); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).

17. John D. McKinnon, *These Are the U.S. Antitrust Cases Facing Google, Facebook and Others*, WALL ST. J. (Dec. 17, 2020, 3:17 PM), <https://www.wsj.com/articles/these-are-the-u-s-antitrust-cases-facing-google-facebook-and-others-11608150564> [<https://perma.cc/QHE7-3M4N>].

18. Dana Mattioli & Ryan Tracy, *House Bills Seek to Break Up Amazon and Other Big Tech Companies*, WALL ST. J. (June 11, 2021, 6:30 PM), <https://www.wsj.com/articles/amazon-other-tech-giants-could-be-forced-to-shed-assets-under-house-bill-11623423248> [<https://perma.cc/XYT5-7KTU>].

19. Eleanor M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 297, 297 (2019) (comparing US and EU antitrust cases against major U.S. Big Tech companies).

20. See Damien Geradin, *What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for A Digital Market Act?*, SOC. SCI. RSCH. NETWORK (April 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788152 [<https://perma.cc/8FGG-NRVX>]; see also Giorgio Monti, *The Digital Markets Act-Institutional Design and Suggestions for Improvement*, SOC. SCI. RSCH. NETWORK (March 5, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730 [<https://perma.cc/K7KE-XHXR>].

21. Sam Schechner et al., *China Joins Global Push to Rein in Tech Companies*, WALL ST. J. (Jan. 24, 2021, 5:30 AM), <https://www.wsj.com/articles/china-is-joining-the-global-push-to-rein-in-tech-giants-11611484200> [<https://perma.cc/M83E-S5MV>]; see also Stephanie Yang, *China's Tech Clampdown Is Spreading Like Wildfire*, WALL ST. J. (June 6, 2021, 11:51 AM), <https://www.wsj.com/articles/chinas-tech-clampdown-is-spreading-like-wildfire-11622971802> [<https://perma.cc/25E7-H62E>].

leaders are very powerful, they are generalists who lack specialized knowledge and have limited capacity to deal with specific regulatory issues. Therefore, most decision-making is delegated to the regulators who specialize in specific areas of regulation and are proximate to information sources. Chinese tech companies are adept at seeking favorable regulatory treatment by lobbying the top leadership and by seeking regulatory arbitrage among the various regulatory authorities. Meanwhile, public discontent against the exploitation of online platforms tends to be muted in China due to censorship and political control. When the top leadership promotes a national economic agenda to encourage innovation and entrepreneurship, Chinese regulators carefully toe the line and avoid taking timely and vigorous enforcement actions that may threaten growth in the tech sector. This bureaucratic inertia discourages information transmission from the regulators to the top leadership, leading to a serious regulatory lag. As public discontent mounts and a regulatory crisis spirals out of control, the top leadership intervenes to avoid threats to social stability. In response to the call from the central top leadership, Chinese regulators at all levels quickly react by taking an aggressive stance to tackle regulatory problems.

To be sure, this volatile style of Chinese policymaking is neither unique to the regulation of the tech sector nor to the Xi Jinping administration, although arguably the centralization of power under Xi may have exacerbated the volatility.²² Renowned China experts observed that volatile Chinese policymaking is rooted in the revolutionary era of the CCP, when Mao Zedong and other leaders often needed to deal with a highly uncertain and threatening environment during guerrilla warfare.²³ The evolving, complex, and large-scale features of the current platform economy present similar challenges to the CCP leadership, creating the demand for a fluid and flexible regulatory response. This authoritarian model of regulatory governance therefore has its distinct advantages and disadvantages. On the one hand, centralized political power without strong institutional constraints enables the Chinese top leadership to quickly mobilize various administrative resources and propaganda to rein in Big Tech. On the other hand, the bureaucratic constraints on professional autonomy undermine independent judgment at an early stage, resulting in a lax regulatory environment, which could lead to a regulatory crisis. Furthermore, when the government finally decides to act, there is a risk of administrative power abuse and over-enforce-

22. Xueguang Zhou, *Organizational Response to Covid-19 Crisis: Reflections on the Chinese Bureaucracy and Its Resilience*, 16 *MANAGEMENT & ORG. REV.* 473, 480 (2020) (noting that since 2010, there has been an accelerated trend of recentralization where the Chinese bureaucracy shifted towards a tight-coupling mode. The Chinese Communist Party reasserted its commanding role by strengthening party committees in all institutions and there is a much greater emphasis on the political loyalty of the cadres and their adherence to the top leadership). *See generally* XUEGUANG ZHOU, *THE INSTITUTIONAL LOGIC OF CHINESE GOVERNANCE: AN ORGANIZATIONAL APPROACH* (2017) (in Chinese).

23. SEBASTIAN HEILMANN & ELIZABETH J. PERRY, *MAO'S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE GOVERNANCE IN CHINA* 11–12 (2011) (observing the legacy of Mao on the policymaking in contemporary China).

ment due to the absence of a transparent enforcement process subject to judicial oversight. Yet, such a volatile policy style is likely to persist as it is deeply seated in China's political governance.

Thus far, some of the biggest beneficiaries of China's great reversal in regulating the platform economy have been administrative authorities, whose power and prestige have been significantly enhanced. The tightening regulations over Chinese tech giants have given these agencies the perfect opportunity to expand both their policy control and institutional capacity. This new policy change also occurs in tandem with a gradual shift of the Chinese government's priorities from fostering economic growth to addressing nationalism and maintaining social stability. Indeed, the Chinese government is cultivating mass support by exerting pressure on Chinese tech firms to lower prices for small merchants, drivers, and courier workers, and to improve welfare for their employees and contractors. Amid the heated Sino-U.S. tech war, the regulatory crackdown affords the Chinese government much greater leverage in steering its tech firms towards a more innovative path to stay competitive with the United States.²⁴ By imposing additional cybersecurity review requirements on data-rich Chinese tech firms seeking to tap into overseas capital markets, the Chinese government is also enhancing the appeal of domestic stock exchanges.²⁵ Chinese tech firms have quickly adapted to the shifting policy winds. After all, the alignment of their business plans with the top leadership's policy agenda is an important means of self-protection for Chinese tech firms. Although it is far from clear whether China's reorientation of its regulatory policies will lead to fundamental changes in the Chinese tech industry's competitive landscape and bring about lasting improvement in social welfare, it does appear to have restored some of the balance between innovation and regulation, which was lost during the years of rapid growth.

This Article is organized as follows. Part I proposes a theoretical framework for analyzing volatility in Chinese policymaking. Specifically, I identify five elements of China's authoritarian regulatory governance and explain how they account for a particularly dramatic pendulum swing in the context of regulating the platform economy. Part II explores how government support, firm lobbying, and bureaucratic inertia together contributed to a lax regulatory environment for Chinese tech firms in the past. Part III discusses how the Chinese policy pendulum swings by first examining how regulatory crises arise, then by tracing how the central government launched its current law enforcement campaign to rein in tech firms. Part IV explores the impact of China's great reversal in regulating the platform economy. The Article concludes with some broader thoughts on the implications of China's authoritarian regulatory governance.

24. See *infra* Section IV.D.

25. See *infra* Section IV.E.

I. THE HAPPY MODEL OF REGULATION

Sebastian Heilmann and Elizabeth Perry observe that policy volatility in China has its roots in the revolutionary past of the CCP, when the ever-changing circumstances caused it to adopt a guerilla policy style and adaptive governance.²⁶ In this Article, I seek to propose a new theoretical framework that includes not only the top leadership, but also the other important actors involved in the regulatory process: the administrative agencies that carry out the enforcement mandates, the firms that are targets for regulation, and the general public that engages with the firms. More specifically, I identify five main elements of China's authoritarian regulatory governance: *hierarchy*, *adaptability*, *parochialism*, *pliancy*, and *yelp*; I call this the "HAPPY" model of regulatory governance. In particular, hierarchy is used to describe the regulatory decision-making process, whereas the other features are used to describe the characteristics of each of the four key players in the regulatory process. Notably, hierarchy is the dominating feature as the other four features are somewhat endogenous to this first feature. The HAPPY model particularly focuses on how the information flows among different tiers of players as the lack of information hampers efficient regulatory decision-making, hence creating more policy volatility.

The first, and by far the most important, feature is that the Chinese regulatory decision-making process is very hierarchical. The policymaking process involves the interaction among players from four tiers of the Chinese polity. At the apex is the leadership in Beijing, which enjoys the highest authority and wields tremendous power. At the same time, the top leadership lacks the expertise to make concrete decisions and has limited energy to deal with specific regulatory issues. It thus delegates most of its decision-making power to the administrative agencies, which are situated at the second tier of the Chinese polity. These Chinese regulatory authorities at all levels are nested within China's vast bureaucratic machine, and they derive their legitimacy from the delegation of power by the central authority.²⁷ Because officials are evaluated through a top-down *nomenklatura* process, the whole bureaucracy is organized based on an upward accountability system.²⁸ Chinese regulators thus need to carefully tread the lines laid down by the top when carrying out their enforcement duties. Chinese firms are located at the third tier of the polity. They are not on an equal footing with the regulators due to the strong power imbalances between government and businesses in China. Although in theory companies have the opportunity to challenge

26. HEILMANN & PERRY, *supra* note 23, at 11.

27. See Zhou, *Organizational Response to Covid-19 Crisis: Reflections on the Chinese Bureaucracy and Its Resilience*, *supra* note 22, at 479.

28. *Id.* at 480; see also Sebastian Heilmann, *Regulatory Innovation by Leninist Means: Communist Party Supervision in China's Financial Industry*, 181 CHINA Q. 4 (2005); SUSAN SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA 348–49 (1993); YASHENG HUANG, INFLATION AND INVESTMENT CONTROLS IN CHINA 322–24 (1999).

government actions in court, few choose to do so.²⁹ Instead, businesses that are investigated tend to exhibit an unusual level of cooperation with the regulators.³⁰ Platform participants, here referring to members of the Chinese public that interacted with the platforms, are located at the bottom of the hierarchy. They have very limited channels to voice their dissatisfaction due to omnipresent censorship and suppression.³¹ However, when regulatory failures deteriorate into financial and social crises, Chinese regulators and the top leadership face pressures to act and intervene.

Second, the Chinese leadership is highly adaptable. Adaptability is part of the CCP's revolutionary tradition, which makes the Party highly resilient in meeting challenges in changing times.³² The contemporary Chinese leadership derives its legitimacy from three main sources: economic growth, social stability, and nationalism.³³ As such, Chinese policymaking has been flexible and pragmatic, constantly adjusting to changing domestic and international environments. After decades of rapid economic growth, China's economy has stalled since the financial recession in 2008.³⁴ The CCP at that time saw the development of the platform economy as a new engine for growth and an opportunity to rebalance the Chinese economy from an investment-led to a consumption-led model.³⁵ Burdened by high levels of debt and rising geopolitical tensions with the West, however, the Chinese government has placed a greater emphasis on social stability and nationalism in recent years.³⁶ Aggressive U.S. sanctions and restrictions on Chinese tech firms such as Huawei and ZTE have generated a "sputnik moment" for China, spurring a wave of Chinese investment in foundational science and

29. ANGELA HUYUE ZHANG, CHINESE ANTITRUST EXCEPTIONALISM: HOW THE RISE OF CHINA CHALLENGES GLOBAL REGULATION 68 (2021).

30. *Id.* A recent prominent example is Alibaba. Unlike US tech firms that are fighting tooth and nail with regulators in the United States and Europe, Alibaba thanked regulators after receiving a record fine of almost \$2.8 billion and vowed to improve compliance. See Matthew Brooker, *It's Easy to Make Tech Titans Kneel. Just Ask China*, BLOOMBERG (Apr. 15, 2021), <https://www.bloomberg.com/opinion/articles/2021-04-14/china-brought-alibaba-to-heel-fast-can-the-u-s-take-a-lesson-versus-facebook> [https://perma.cc/NFL4-5J2C].

31. Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 326, 326 (2013); Bei Qin et al., *Why Does China Allow Freer Social Media? Protests Versus Surveillance and Propaganda*, 31 J. ECON. PERSP. 117, 121 (2017).

32. HEILMANN & PERRY, *supra* note 23; see also Andrew Nathan, *China's Changing of the Guard: Authoritarian Resilience*, 14 J. DEMOCRACY 6 (2003).

33. Andre Laliberte & Marc Lanteigne, *The Issues of Challenges to the Legitimacy of the CCP Rules*, in THE CHINESE PARTY-STATE IN THE 21ST CENTURY: ADAPTATION AND THE REINVENTION OF LEGITIMACY 8 (Andre Laliberte & Marc Lanteigne eds., 2007).

34. Christopher Balding, *What's Causing China's Economic Slowdown*, FOREIGN AFFAIRS (Mar. 11, 2019), <https://www.foreignaffairs.com/articles/china/2019-03-11/whats-causing-chinas-economic-slowdown> [https://perma.cc/J9NT-HXQX].

35. REBECCA ARCESATI ET AL., MERCATOR INSTITUTE FOR CHINA STUDIES (MERICs), CHINA'S DIGITAL PLATFORM ECONOMY: ASSESSING DEVELOPMENTS TOWARDS INDUSTRY 4.0: CHALLENGES AND OPPORTUNITIES FOR GERMAN ACTORS 13 (2020), <https://merics.org/sites/default/files/2020-06/MERIC-SReportDigitalPlatformEconomyEN02.pdf> [https://perma.cc/J59M-KLND].

36. Susan Shirk, *Trump and China: Getting to Yes with Beijing*, FOREIGN AFFAIRS (Mar./Apr. 2017), <https://www.foreignaffairs.com/articles/2017-02-13/trump-and-china> [https://perma.cc/JN86-PZJE].

technologies to close the technological gap with the United States.³⁷ To be sure, adaptability does not mean that the top leaders can always react quickly to regulatory problems. As will be elaborated in Part II, information transmission from the regulators to the top leaders was initially very slow, making it difficult for the top leaders to make informed decisions during the early years of platform regulation.

Third, Chinese regulators tend to be very parochial. Power is fragmented within the Chinese bureaucracy.³⁸ Each regulatory agency is responsible for overseeing a specific area and officials are often deemed technocrats. Because there are often overlapping functions among agencies, Chinese regulators are in a relentless competition for policy control.³⁹ As such, Chinese regulators try to maximize their bureaucratic interests within their specific scope of responsibility by focusing on short-term and narrow objectives without considering the broader implications for the whole society. In the meantime, the sweeping anti-corruption campaign that President Xi's administration initiated since 2012 has created a chilling effect on Chinese government officials who become reluctant to take new initiatives for fear of making mistakes.⁴⁰ This inertia discourages information transmission from the regulatory authority to the top leadership, contributing to an information deficit at the top.⁴¹ As a result, many regulatory problems do not receive adequate attention from the top leadership until they begin to spiral out of control. When the top leadership intervenes, it mobilizes the entire bureaucratic machine, which then reacts with swift and aggressive legislative and enforcement actions. In the absence of judicial oversight of administrative action, administrative agencies have the tendency to over-enforce in order to expand their policy control.

Fourth, Chinese companies subject to regulation are very pliant. Despite power imbalances between government and businesses in China, Chinese businesses are not passive actors. Their pliancy thus lies in their acute ability to obey orders while still trying to shape the environment in their favor. Nurtured in the Chinese institutional environment, Chinese firms learn how to adapt to the authoritarian system by employing various intermediaries to

37. Li Yuan, *ZTE's Near-Collapse May Be China's Sputnik Moment*, N.Y. TIMES (June 10, 2018), <https://www.nytimes.com/2018/06/10/technology/china-technology-zte-sputnik-moment.html> [https://perma.cc/99WB-ZPFU]; Dan Wang, *China's Sputnik Moment*, FOREIGN AFFAIRS (July 29, 2021), <https://www.foreignaffairs.com/articles/united-states/2021-07-29/chinas-sputnik-moment> [https://perma.cc/53RF-VRXE].

38. See generally KENNETH G. LIEBERTHAL & DAVID M. LAMPTON, BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA (1992); Andrew C. Mertha, 'Fragmented Authoritarianism 2.0': Political Pluralization in the Chinese Policy Process, 200 CHINA Q. 995, 995–96 (2009). See also ZHANG, *supra* note 29, at 57–63.

39. ZHANG, *supra* note 29, at 57–63; see also SHIRK, *supra* note 28, at 142.

40. See generally Peng Wang & Xie Yang, *Bureaucratic Slack in China: The Anti-Corruption Campaign and the Decline of Patronage Networks in Developing Local Economies*, 243 CHINA Q., 611 (2020); Erik H. Wang, *Frightened Mandarins: The Adverse Effects of Fighting Corruption on Local Bureaucracy*, COMP. POL. STUD. (forthcoming).

41. Zhou, *supra* note 22, at 481.

seek favorable regulatory treatment. Crony capitalism is common as Chinese businesses share ownership stakes with political elites, effectively aligning the interests of the latter with the firms' own.⁴² Investment and support from political elites, as well as the revolving door between businesses and government, help Chinese companies lobby for favorable government policies, which shield them from regulatory intervention. Chinese tech firms are very good at seeking regulatory arbitrage. As illustrated by the example of Ant in Section II.B, the firm sought for regulatory arbitrage by labelling itself as a tech firm rather than a financial institution.⁴³ Ant innovates at a very rapid speed to take advantage of gaps in existing regulations in order to get ahead of the regulators. Ant also knows how to take advantage of the power fragmentation within the Chinese bureaucracy and appeals to the incentives of different bureaucratic departments. Ant further seized opportunities arising from the fast-changing geopolitical environment and worked them to its advantage. Knowing that it is costly to challenge administrative agencies, Chinese businesses usually acquiesce to regulatory demands and adapt their business plans to adhere to new policy agendas from the top leadership.

Fifth, platform participants in China, including the vast number of consumers, merchants, employees and contractors of these online platforms, need to yelp to be heard. As many of the transactions that occur online only involve small-value claims, consumers generally do not find it worthwhile to make formal complaints to the public institutions such as administrative agencies or courts. This phenomenon is not unique to China, but the situation is worsened in the Chinese context due to tight and pervasive media control and censorship.⁴⁴ China is thus distinguishable from liberal democracies, where civic associations and activists are often able to push forward institutional changes to regulate businesses.⁴⁵ Nevertheless, China's platform participants are not completely mute, especially when personal stakes are high. For instance, delivery workers who were not satisfied with delayed payments or work conditions can organize protests, with some of them resorting to extreme measures such as suicide to gain public attention.⁴⁶

42. MINXIN PEI, CHINA'S CRONY CAPITALISM: THE DYNAMICS OF REGIME DECAY 116–50 (2016) (explaining how officials cash in on their political power through immediate family members working in private businesses or partner with others in the private sector). See generally YUEN YUEN ANG, CHINA'S GILDED AGE: THE PARADOX OF ECONOMIC BOOM AND VAST CORRUPTION (2020) (observing the symbiotic relationship between corruption and performance in China's fiercely competitive political system).

43. Angela Huyue Zhang, *China's Regulatory War on Ant*, PROJECT SYNDICATE (Mar. 12, 2021), <https://www.project-syndicate.org/commentary/china-bureaucracy-regulatory-war-on-ant-group-by-angela-huyue-zhang-2021-03> [<https://perma.cc/6WVG6-6GAE>].

44. See King et al., *supra* note 31.

45. Marc Schneiberg & Sarah Soule, *Institutionalization as a Contested, Multi-level Process: The Case of Rate Regulation in American Fire Insurance*, in SOCIAL MOVEMENTS AND ORGANIZATION THEORY 122, 122 (Gerald Davis, Doug McAdam, W. Richard Scott & Mayer Zald eds., 2005).

46. *The Gig Economy Challenges China's State-Run Labour Unions*, ECONOMIST (Jan. 27, 2021), <https://www.economist.com/china/2021/01/27/the-gig-economy-challenges-chinas-state-run-labour-unions> [<https://perma.cc/TT95-HUB8>]; Alice Su, *Why a Takeout Deliveryman in China Set Himself on Fire*, L.A.

Despite its draconian media censorship, the top Chinese leadership is concerned with public demands and allows limited political participation.⁴⁷ This is primarily due to three factors: first, the top leadership needs to collect information from its citizens in order to curb agency problems.⁴⁸ Moreover, not all kinds of dissent can threaten the survival of the authoritarian regime.⁴⁹ These factors explain why the central government limits its censoring of politically sensitive information, which partly helps the government stay responsive to public discontent before it erupts into crises.⁵⁰ Furthermore, the Chinese government may tolerate or even provoke nationalistic sentiments in order to rally popular support and to enhance the legitimacy of its regulatory actions in matters relating to national security.⁵¹ But the Chinese leadership also recognizes that nationalism is a double-edged sword as it could also reveal the weakness of the regime and pose a threat to political and social stability.⁵² As such, the top Chinese leadership must strike a delicate balance between allowing public grievances to air and suppressing those that might be viewed as a threat to its rule.

The above five core features of Chinese regulatory governance affect and reinforce each other, resulting in regulatory outcomes that tend to favor agility over stability. As elaborated in Part II, the Chinese government was very supportive of the platform economy and introduced several policy initiatives to encourage innovation and entrepreneurship.⁵³ Chinese tech firms have been very adept at lobbying for favorable central policies, creating products that seemingly do not fall within existing regulation, and appealing to the interests of different bureaucratic departments that have regula-

TIMES (Feb. 8, 2021, 11:59 AM), <https://www.latimes.com/world-nation/story/2021-02-08/why-take-out-delivery-man-china-set-himself-on-fire> [https://perma.cc/FLB8-4K73].

47. See generally, e.g., Yongshun Cai, *Managed Participation in China*, 119 POL. SCI. Q. 425 (2004); Christopher Marquis & Yanhua Bird, *The Paradox of Responsive Authoritarianism: How Civic Activism Spurs Environmental Penalties in China*, 29 ORG. SCI. 948 (2018).

48. Jidong Chen & Yiqing Xu, *Why Do Authoritarian Regimes Allow Citizens to Voice Opinions Publicly?* 79 J. POLITICS 792, 792 (2017); see Qin et al., *supra* note 31, at 137.

49. See Qin et al., *supra* note 31, at 137.

50. See generally CHRISTOPHER HEURLIN, *RESPONSIVE AUTHORITARIANISM IN CHINA: LAND, PROTESTS, AND POLICY MAKING* (2016); DANIELA STOCKMANN, *MEDIA COMMERCIALIZATION AND AUTHORITARIAN RULE IN CHINA* (2013).

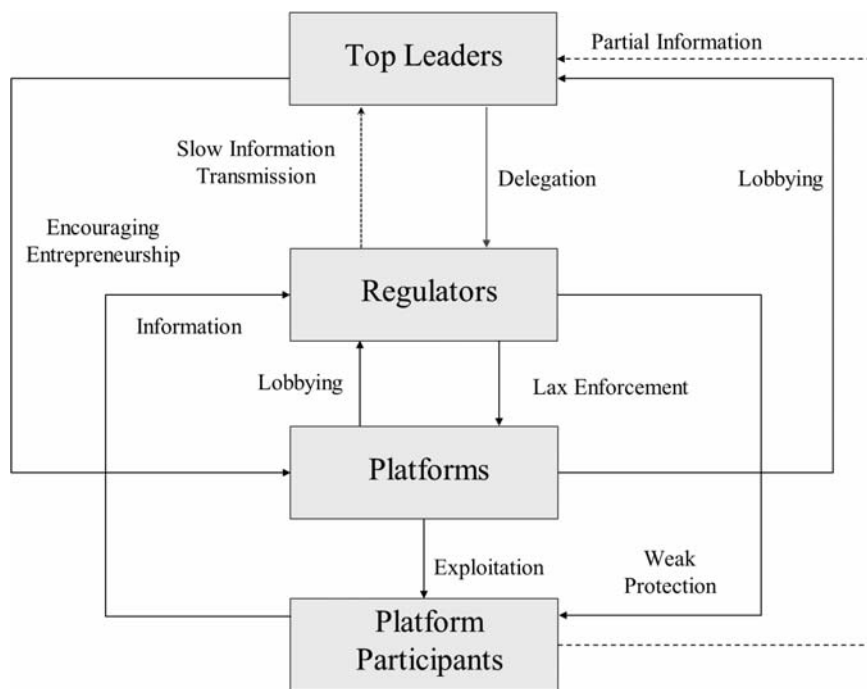
51. See, e.g., SUSAN L. SHIRK, *CHINA FRAGILE SUPERPOWER* 85 (2007); see also Stephen M. Walt, *You Can't Defeat Nationalism, So Stop Trying*, FOREIGN POL'Y (June 4, 2019, 10:12 AM), <https://foreignpolicy.com/2019/06/04/you-cant-defeat-nationalism-so-stop-trying/> [https://perma.cc/6CJ6-SABY] (observing that nationalism is a powerful and persistent force in many countries including China). See generally WENFANG TANG, *POPULIST AUTHORITARIANISM: CHINESE POLITICAL CULTURE AND REGIME SUSTAINABILITY* (2016).

52. Suisheng Zhao, *China's Pragmatic Nationalism: Is It Manageable?*, 29 WASH. Q. 131, 131–42 (2005) (arguing that the Chinese Communist Party ("CCP") uses pragmatic populism to rally political support, while also restraining nationalist sentiments that could jeopardize the stability of the regime); see Yinxian Zhang et al., *Nationalism on Weibo: Towards a Multifaceted Understanding of Chinese Nationalism*, 235 CHINA Q. 758, 760 (2018) (conducting research on Sina Weibo, China's largest social media platform, and found that "the majority of nationalists also profoundly criticized the government from a pro-democracy standpoint").

53. See *infra* Part II.

tory oversight over the tech sector. Given the overriding national agenda to promote innovation and entrepreneurship, Chinese regulators refrained from taking an aggressive stance to regulate the tech sector, despite increasing public complaints about platform exploitation. During this period, information about these emerging regulatory issues was transmitted very slowly from the regulators to the top leaders. (See Figure 1).

FIGURE 1: LAX ENFORCEMENT



In October 2020, Jack Ma made a controversial speech in Shanghai that provided scathing criticisms of Chinese financial regulation. As elaborated in Part III.B, this speech directly challenged the legitimacy of the Chinese financial regulation and offended many senior officials. At this point, regulators could no longer withhold information and reported the severity of the matter to the top leadership.⁵⁴ The top leadership reacted quickly by cancelling Ant’s IPO and mobilized a massive regulatory enforcement campaign.⁵⁵ Chinese administrative authorities at all levels then quickly responded by taking aggressive actions to regulate the tech sector.⁵⁶ By enhancing the welfare of the various platform participants, the Chinese top leadership is

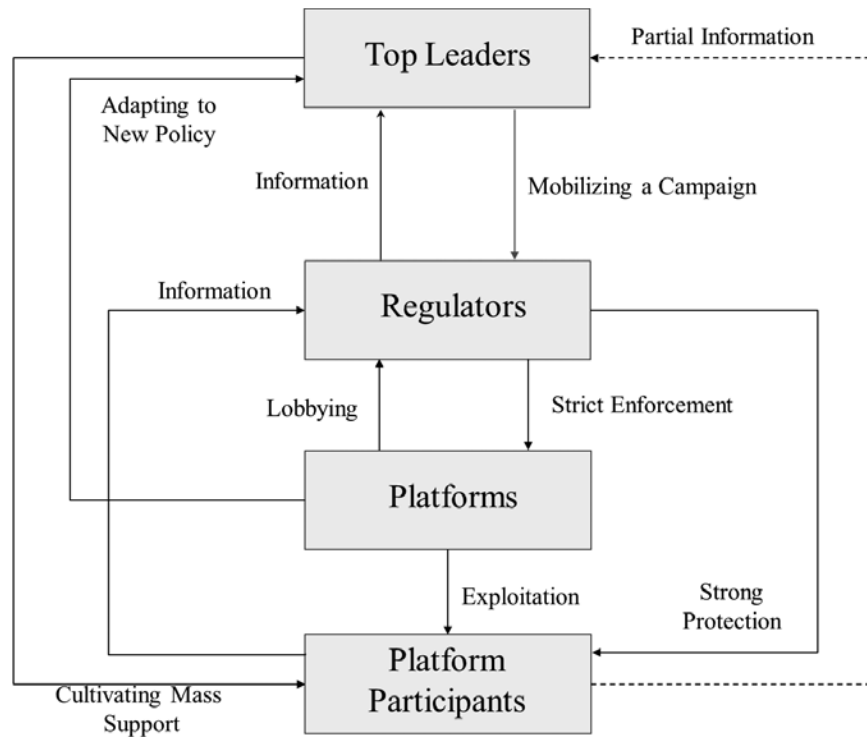
54. See discussion *infra* Section III.B.

55. *Id.*

56. See discussion *infra* Section III.C.

cultivating mass support.⁵⁷ Meanwhile, Chinese tech firms continue to lobby the regulators for lenient treatment, while reorienting their businesses to adapt to the new policy initiatives from the top leadership.⁵⁸ (See Figure 2).

FIGURE 2: STRICT ENFORCEMENT



Notably, this theoretical framework for studying volatility in Chinese policymaking is not only useful in explaining what has happened to the regulatory governance of the platform economy, but also potentially a wide range of governance issues in China. China’s handling of the COVID-19 crisis offers a case in point. Although China was able to successfully mobilize a national campaign to curb infections within months, it initially failed to control the virus before it spread widely within the country.⁵⁹ In Wuhan, the initial epicenter of the outbreak, doctors’ early warnings about the infectious disease were ignored or suppressed for weeks largely because local offi-

57. See discussion *infra* Section IV.B.

58. See discussion *infra* Section IV.D.

59. Drew Hinshaw et al., *What We Know About the Origins of Covid-19*, WALL ST. J. (July 23, 2021, 7:46 AM), <https://www.wsj.com/articles/what-we-know-about-the-origins-of-covid-19-11624699801> [<https://perma.cc/7YNT-P5R3>].

cials who were highly sensitive to political pressures withheld information in an attempt to ensure social and political stability.⁶⁰ This information lag resulted in a serious delay in controlling the virus before it became a global pandemic. It wasn't until the central leadership decided to make the information public that the whole nation took drastic and draconian measures to conduct self-quarantine and lockdown.⁶¹ Scholars have attributed the contrasting organizational responses during the two periods to China's tightly coupled political governance structure under Xi.⁶²

China's regulatory governance is therefore a departure from the western norm of regulation, which places greater emphasis on agency accountability, legal consistency, and due process.⁶³ A comparison with the United States is revealing. The Chinese bureaucracy is organized through a tightly coupled system in that different parts of the bureaucracy are connected and controlled through the nomenklatura system and are all responsible to the top leadership in Beijing.⁶⁴ By contrast, the United States is organized through a loosely coupled system with a clear delineation of authority between federal, state, and county governments.⁶⁵ As such, the U.S. Federal Government wields less power, and agencies tend to enjoy a higher level of independence, even if they remain susceptible to shifting policy winds in Washington. The freedom of the press in the United States also means that agencies are subject to more public scrutiny.⁶⁶ Moreover, U.S. regulatory authorities operate under close judicial oversight since their actions are frequently challenged in court, constraining their ability to over-enforce even when administrations try to tighten regulation.⁶⁷ This stands in contrast with the reality in China where agencies are rarely subject to judicial oversight.⁶⁸ As such, judicial review is an important constraint in preventing the policy pendulum from swinging too quickly in the United States.

60. See He Warned of Coronavirus. Here's What He Told Us Before He Died, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/world/asia/Li-Wenliang-china-coronavirus.html> [https://perma.cc/5L5V-USNF].

61. Raymond Zhong & Paul Mozur, *To Tame Coronavirus, Mao-Style Social Control Blankets China*, N.Y. TIMES (Feb. 15, 2020, updated Feb. 20, 2020), <https://www.nytimes.com/2020/02/15/business/china-coronavirus-lockdown.html> [https://perma.cc/DM6M-CCRE].

62. See Yuen Yuen Ang, *When Covid-19 Meets Centralized, Personalized Power*, 4 NATURE HUMAN BEHAVIOUR 445 (2020); see also Jin Li, *Cong Yiqing Kuosan Kan Zuzhi Kunjing* (从疫情扩散看组织困境) [The Organizational Dilemma in the Spread of Covid-19] (Mar. 17, 2020, 4:30 AM), <https://mp.weixin.qq.com/s/YLemsrHSPVpFhjVXn-zzzg> [https://perma.cc/U3UL-Z8V3] (China).

63. HEILMANN & PERRY, *supra* note 23, at 14.

64. Zhou, *Organizational Response to Covid-19 Crisis: Reflections on the Chinese Bureaucracy and Its Resilience*, *supra* note 22, at 474.

65. *Id.*

66. See Timothy Besley & Andrea Prat, *Handcuffs for the Grabbing Hand? Media Capture and Government Accountability*, 96 AM. ECON. REV. 720, 720 (2006).

67. For instance, despite great public pressures to regulate Big Tech, a U.S. federal judge decided to throw out the federal and state antitrust suits against Facebook in June 2021. See Cecilia Kang, *Judge Throws Out 2 Antitrust Cases Against Facebook*, N.Y. TIMES (June 28, 2021, updated Oct. 4, 2021), <https://www.nytimes.com/2021/06/28/technology/facebook-ftc-lawsuit.html> [https://perma.cc/6AJ7-SNZC].

68. ZHANG, *supra* note 29, 68-72.

II. WHY REGULATION WAS VERY LAX

Law is never complete as it cannot possibly anticipate all contingencies.⁶⁹ This is particularly the case for disruptive technologies such as online platforms, which have grown so rapidly that existing rules and regulations often fail to cover their innovative products or services.⁷⁰ Moreover, when a new product or service is introduced to the market, it takes time for industry participants and regulators to understand and assess its impact. Human beings have a cognitive limitation in foreseeing and estimating the risks that come with new products and services. As such, regulators often do not become aware of problems until they become serious. Even when the regulators become aware of the problems, it still takes time for the legislature and law enforcement agents to formulate a unified and coherent response. This lag in regulating online platforms is certainly not unique to China as countries such as the United States are similarly ramping up scrutiny over their tech giants. In the following discussion, I will explain how the HAPPY model of regulation has contributed to the regulatory lag in China, focusing particularly on the government support from the top leadership, the aggressive lobbying from the tech firms, as well as the bureaucratic inertia of the regulators.

A. *Government Support*

After decades of phenomenal expansion with a GDP growth rate averaging ten percent, the Chinese economy began to slow down after the financial recession in 2008.⁷¹ The top leadership, which, as suggested by the HAPPY model, is very adaptable, recognized the need for China to depart from its previous export-driven and investment-dependent model and prioritized innovation in its new economic blueprint.⁷² Indeed, online platforms have brought about tremendous efficiency for consumers by lowering transaction costs and reducing information asymmetry between buyers and sellers. It has created more employment opportunities for the Chinese labor force, despite the loss of jobs amid the disruption caused by digitalization.⁷³ In China, innovative financial products also offer an appealing investment opportunity in the volatile Chinese stock market. The Chinese government was therefore

69. See generally AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE* 3 (2007); see also Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 J. INT'L L. & POL. 931, 931-32 (2004).

70. See Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2016) (explaining how U.S. tech firms such as Uber and Airbnb try to take advantage of the legal grey area to lobby for favorable legal treatment).

71. *China GDP Growth Rate 1961-2021*, MACROTRENDS, <https://www.macrotrends.net/countries/CHN/china/gdp-growth-rate> (last visited Apr. 12, 2022).

72. ELIZABETH ECONOMY, *THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE* 95-97 (2018); see also *Xi Sets Target for China's Innovation* CHINA.ORG.CN (May 31, 2016), http://www.china.org.cn/china/2016-05/31/content_38568066.htm [<https://perma.cc/SFF5-USUQ>].

73. Zhang & Chen, *supra* note 2, at 9.

very supportive of the digital economy with the hope of moving the country up the technological ladder.⁷⁴

In 2015, the State Council unveiled the “Internet Plus” initiative, a five-year plan to upgrade traditional manufacturing and service industries by integrating them with big data, cloud computing, and other “internet of things” technologies.⁷⁵ The State Council also released five guidelines to implement the initiative, detailing policy support in various aspects such as cross-border e-commerce, commerce circulation, rural e-commerce, innovation, and entrepreneurship.⁷⁶ Recall that the first element of the Chinese regulatory process is that it is very hierarchical. Given the overriding national agenda to promote innovation, various central ministries and local governments quickly responded by issuing concrete guidelines and implementation measures.⁷⁷

Within the same year, the Ministry of Commerce formulated various action plans for implementing the “Internet Plus” initiative.⁷⁸ Sector regulators ranging from the Ministry of Agriculture to the financial regulators such as the People’s Bank of China (“PBOC”) were also busy promoting this initiative in their relevant sectors.⁷⁹ In the following year, the National Development and Reform Commission (“NDRC”) announced a three-year plan with the goal of building an artificial intelligence application market worth over RMB 100 billion.⁸⁰ Chinese tax departments further offered preferen-

74. See *infra* Part IV.

75. *China Unveils ‘Internet Plus’ Action Plan to Fuel Growth* CHINA DAILY (July 4, 2015), https://www.chinadaily.com.cn/bizchina/tech/2015-07/04/content_21181256.htm [<https://perma.cc/W6EF-F8G4>].

76. See CHINA INTERNATIONAL ELECTRONIC COMMERCE CENTER, 2015 REPORT ON E-COMMERCE IN CHINA 11 (2015) [hereinafter E-Commerce Report] (including the following guidelines: The Opinions on Striving to Develop E-commerce to Speed up the Cultivation of New Economic Driving Force, the Guiding Opinions on Promoting the Healthy and Rapid Development of Cross-border E-commerce, the Opinions on Promoting Online and Offline Interaction to Accelerate the Innovative Development, Transformation and Upgrading of Commerce Circulation, the Guiding Opinions on the Promotion of the Development of Rural E-commerce and the Opinions on Several Policy Measures for Vigorously Promoting Public Entrepreneurship and Innovation. These documents not only clarify the strategic orientation for the development of e-commerce, but also put forward specific policies and measures from such aspects as cross-border trade, commerce circulation, rural area, innovation, and entrepreneurship). To further stimulate entrepreneurship, the Chinese government established national venture capital funds for emerging industries, national development funds for small and medium-sized enterprises, as well as national funds for transforming technological achievements. Yongqi Hu, *Startups to Gain Government Funds*, CHINA DAILY (July 28, 2017, 7:13 AM), https://www.chinadaily.com.cn/business/2017-07/28/content_30275307.htm [<https://perma.cc/LHA9-RNJX>].

77. Irene Zhou, *Digital Labour Platforms and Labour Protection in China*, 39 (ILO Working Paper No. 11, 2020), https://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/—ilo-beijing/documents/publication/wcms_757923.pdf [<https://perma.cc/3MCT-LXML>] (summarizing a list of the government policies).

78. See E-Commerce Report, *supra* note 76, at 11.

79. *Id.*; see also *China Issues Guidelines on Development of Internet Finance*, HKTDC RESEARCH (Aug. 6, 2015), <https://hkmb.hktdc.com/en/1X0A34J5/hktdc-research/China-Issues-Guidelines-on-Development-of-Internet-Finance> [<https://perma.cc/STW5-VG8N>].

80. McKinsey Report, *supra* note 3, at 15–16.

tial tax schemes to encourage mass entrepreneurship and innovation.⁸¹ In July 2017, eight Chinese ministries jointly issued a guiding opinion to promote the sharing economy, which laid down comprehensive measures for market access, regulatory supervision, and the creation of a nurturing environment.⁸² Further, local governments responded to Beijing's call by issuing measures accelerating the development of e-commerce.⁸³ Local governments ran pilot programs to explore the implementation of the "Internet Plus" initiative in various sectors such as logistics, social security, health care, and other government services.⁸⁴ Government-sponsored incubators for startups also mushroomed in large cities such as Beijing and Shenzhen.⁸⁵

These government initiatives created a very supportive and favorable policy environment for Chinese tech firms. When Premier Li Keqiang addressed the Summer Davos Forum in 2017, he touted that "an accommodating and prudent regulatory approach towards new industries, new business forms, and models" had facilitated the healthy development of China's tech companies.⁸⁶ Indeed, for three consecutive years between 2018 to 2020, the annual government reports by the State Council advocated for a "tolerant and cautious" approach in regulating the Chinese platform economy.⁸⁷ Not surprisingly, Chinese regulators carefully toed the line by apply-

81. *Id.* at 16. State Taxation Administration of the People's Republic of China, *SAT Releases the Guidelines on Preferential Tax Policies for Mass Entrepreneurship and Innovation* (Apr. 26, 2017), <http://www.chinatax.gov.cn/eng/c101269/c2655318/content.html> [https://perma.cc/4FY9-RQ9P].

82. See Liyang Hou, *Sharing Economy in China: A National Report 2* (2018), <https://ssrn.com/abstract=3231976> [https://perma.cc/UAX5-7DPZ] (noting China's National Development and Reform Commission, Office of the Central Cyberspace Affairs, Ministry of Industry and Information, Ministry of Human Resource and Social Security, State Administration of Taxation, State Administration of Industry and Commerce, State Administration of Quality Supervision, Inspection and Quarantine, and National Bureau of Statistics jointly adopted the "Guiding Opinions on Accelerating the Development of Sharing Economy," NDRC High-Tech [2017] 1245).

83. See E-Commerce Report, *supra* note 76, at 31–34 (observing the policy measures promulgated by Fujian, Shanghai, Shandong, Jiangxi, Anhui, Hebei, Jiangsu, Hainan, Hunan, Liaoning, and Zhejiang provinces).

84. McKinsey Report, *supra* note 3, at 15–16.

85. *Id.* at 16; see also *Zhongchuang Kongjian 50 Qiang Gongbu, Zhongguo Yi Cheng Quanqiu Fuhuaqi Shuliang Zuiduo de* (众创空间50强公布, 中国已成全球孵化器数量最多的) [Top 50 Innovation and Startup Incubators Report: China Has the Most Incubators in the World], SOHU (Sep. 18, 2016, 12:30 PM), http://www.sohu.com/a/114536039_379992 [https://perma.cc/336Q-9MCQ] (China).

86. Full Text of Premier Li's Address at Opening Ceremony of Summer Davos, XINHUA NEWS (June 28, 2017, 9:54 AM), http://chinaplus.cri.cn/news/china/9/20170628/7117_2.html [https://perma.cc/8SL4-TFDG].

87. See Li Keqiang, *Report on the Work of the Government, Delivered at the First Session of the 13th National People's Congress of the People's Republic of China on March 5, 2018*, PEOPLE'S DAILY ONLINE (Apr. 3, 2018, 2:31 PM) <http://en.people.cn/n3/2018/0403/c90000-9445262.html> [https://perma.cc/8JFL-NJAB] ("We have taken extensive action under the Internet Plus Initiative, exercised accommodative and prudential regulation. . . ."); see also Li Keqiang, *Report on the Work of the Government, Delivered at the First Session of the 13th National People's Congress of the People's Republic of China on March 5, 2019*, CHINA.ORG.CN (March 16, 2019) http://www.china.org.cn/china/NPC_CPPCC_2019/2019-03/16/content_74578930.htm [https://perma.cc/3DLP-XZR6] ("We will continue accommodative and prudential regulation. . . ."); see also Li Keqiang, *Report on the Work of the Government, Delivered at the First Session of the 13th National People's Congress of the People's Republic of China on May 22, 2020*, STATE COUNCIL PEOPLE'S REPUBLIC CHINA (May 30, 2020, 7:17 AM), <http://english.www.gov.cn/premier/news/202005/30/con>

ing a relatively “light-touch” approach in regulating the Chinese digital economy.

Alipay, created by Alibaba to offer consumer-to-merchant money transfers on its e-commerce platform Taobao, is one firm that thrived under a supportive policy environment. Alipay provides escrow services for Taobao consumers, only releasing payments to sellers after buyers have received the goods they ordered. This important innovation resolved mistrust between transacting parties, facilitating Taobao’s exponential growth. However, third-party payment was a legal gray area in China. Jack Ma, the founder of Alipay, was even prepared to go to jail for launching this service.⁸⁸ But Ma’s gamble paid off. Alipay became widely popular and ultimately won endorsement from regulators. In 2010, the PBOC issued administrative measures on non-financial payment services and its implementing measures, retroactively recognizing the legal status of online payment platforms such as Alipay.⁸⁹ The following year, Alipay obtained a payment business license as one of the first non-financial institutions to conduct payment operations.⁹⁰

Yu’e Bao, an online money market fund introduced by Alibaba in 2013, offers another example. Yu’e Bao allowed Alipay customers to deposit the money left in their accounts to earn interest rates higher than those offered by banks.⁹¹ It soon became China’s largest online market fund, whose explosive growth surprised industry participants and stimulated new entrants from other tech firms such as Baidu and Tencent.⁹² Although Chinese financial regulators were under pressure to impose regulatory restrictions on Yu’e Bao, it was not until 2017 that the PBOC started to impose limits to regulate the fund.⁹³ In fact, the central bank was supporting the growth of Yu’e Bao during its early days as a means to push forward financial market liber-

tent_WS5ed197f3c6d0b3f0e94990da.html [https://perma.cc/4DW4-5TSX] (“To further unleash the creativity of various sectors, we will . . . continue accommodative and prudential regulation. . .”).

88. Lulu Yilun Chen & Coco Liu, *How China Lost Patience with Jack Ma, Its Loudest Billionaire*, BLOOMBERG BUSINESSWEEK (Dec. 22, 2020, 4:00 PM), <https://www.bloomberg.com/news/features/2020-12-22/jack-ma-s-empire-in-crisis-after-china-halts-ant-group-ipo> [https://perma.cc/295J-J2ET] (quoting Ma saying the following: “If someone has to go to jail, I’ll go.”).

89. Fei Jinrong Jigou Zhifu Fuwu Guanli Banfa (非金融机构支付服务管理办法) [Rule on the Administration of Payment Services Provided by Non-Financial Institutions] (Order No.2 [2010] of the People’s Bank of China, June 14, 2010, effective Sept. 1, 2010), <http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=134238> [https://perma.cc/TV67-8763] (China).

90. Alizila Staff, *Alipay Receives PBOC License*, ALIZILA (May 25, 2011), <https://www.alizila.com/alipay-receives-pboc-license/> [https://perma.cc/2559-JTXH].

91. For a good introduction of Yu’e Bao, see Moran Zhang, *Alibaba’s Online Money Market Fund Yu’e Bao: 8 Things You Need to Know*, INT’L BUS. TIMES (Mar. 11, 2014, 5:45 AM), <http://www.ibtimes.com/alibabas-online-money-market-fund-yue-bao-8-things-you-need-know-1560601> [https://perma.cc/U4NA-VS27].

92. Yue Zhang, *Wunian, 1.7 Wanyi Yu’e Bao Weibe Ji Shache?* (五年, 1.7万亿 余额宝为何急刹车?) [Why Did the Five-Year-Old Yu’e Bao Worth 1.7 Trillion Slow Down Its Pace?], 21JINGJI.COM (May 18, 2018, 11:38 AM), <https://m.21jingji.com/article/20180518/herald/77243fe42af8b8ed803ea9335bee44b5.html> [https://perma.cc/SA4M-7K8B] (China).

93. Shailesh Jha, *How Alibaba’s Yue Bao Unearthed ‘Hidden Treasure’ from Digital Wallets*, YOURSTORY (Aug. 2, 2018), <https://yourstory.com/2018/08/alibaba-yue-bao-unearthed-hidden-treasure-from-digital-wallets/> [https://perma.cc/GPF5-ZP5F].

alization.⁹⁴ This “invest first, get approval later” business model was also prevalent in China’s ride-hailing businesses. Despite their exponential growth in China, ride-hailing businesses such as Didi and Uber had operated in the legal gray area in their early years.⁹⁵ In 2016, the State Council issued a national policy on reforming and promoting the development of the taxi industry, offering favorable policy support for the ride-hailing platforms.⁹⁶ In the same year, seven Chinese central ministries including the Ministry of Transportation jointly issued interim measures regulating the ride-hailing businesses, effectively legitimizing their operations.⁹⁷

The enactment of China’s E-Commerce Law, a comprehensive legislation that regulates e-retailing, further illustrates the Chinese government’s support for the tech industry. During the legislative process of the law, Chinese tech firms lobbied top Chinese leaders including President Xi Jinping, Premier Li Keqiang, and Chairman Zhang Dejiang of the Standing Committee of the National People’s Congress, all of whom endorsed an open and participatory approach in drafting the law.⁹⁸ The tech industry was thus granted the opportunity to closely interact with academics and officials during the entire drafting process.⁹⁹ It is estimated that over 100 public conferences were held by the drafting entities, and the draft law went through an unprecedented four rounds of review by the National People’s Congress (“NPC”).¹⁰⁰ The law was finally passed in August 2018, after five years of

94. Allen T. Cheng, *Yu’e Bao Wow! How Alibaba Is Reshaping Chinese Finance*, INSTITUTIONAL INV. (May 29, 2014), <https://www.institutionalinvestor.com/article/b14zbky543md42/yue-bao-wow-how-alibaba-is-reshaping-chinese-finance> [https://perma.cc/V8KH-62FF].

95. Paul Mozur, *Didi Chuxing and Uber, Popular in China, Are Now Legal, Too*, N.Y. TIMES (July 28, 2016), <https://www.nytimes.com/2016/07/29/business/international/china-uber-didi-chuxing.html> [https://perma.cc/N6HT-8EWD].

96. Guowuyuan Bangong Ting Guanyu Shenhua Gaige Tuijin Chuzu Qiche Hangye Jianshang Fazhan de Zhidao Yijian (国务院办公厅关于深化改革推进出租汽车行业健康发展的指导意见) [General Office of the State Council Guidance on Deepening Reform and Promotion of the Healthy Development of the Taxi Industry], Guo Ban Fa [2016] No. 58, http://www.gov.cn/zhengce/content/2016-07/28/content_5095567.htm [https://perma.cc/A72R-34VB] (China).

97. Interim Measures for the Administration of Online Taxi Booking Business Operations and Services (Order No. 60 [2016] of the Ministry of Transport, the Ministry of Industry and Information Technology, the Ministry of Public Security, the Ministry of Commerce, the State Administration for Industry and Commerce, the General Administration of Quality Supervision, Inspection and Quarantine, and the Cyberspace Administration of China, July 27, 2016, effective Nov. 1, 2016) (China); see also Jianxue Wang, Junyu Chen & Chao Wang, *Xin Yetai Jianguan Xia de Wangyue Che: Jianguan Pian* (新业态监管下的网约车：监管篇) [Ride-bailing under Regulations for New Business Forms: Part on Supervision], CHINA L. INSIGHT (Mar. 4, 2019), <https://www.chinalawinsight.com/2019/06/articles/law-popularity/%E6%96%B0%E4%B8%9A%E6%80%81%E7%9B%91%E7%AE%A1%E4%B8%8B%E7%9A%84%E7%BD%91%E7%BA%A6%E8%BD%A6%EF%BC%9A%E4%B8%9A%E5%8A%A1%E8%BF%90%E8%90%A5%E7%AF%87/> [https://perma.cc/79VK-E7YR] (China).

98. See Jingting Deng & Pinxin Liu, *Consultative Authoritarianism: The Drafting of China’s Internet Security Law and E-Commerce Law*, 26 J. CONTEMP. CHINA 679, 686 (2017).

99. *Id.* at 685.

100. *Id.*

intensive debate among various stakeholders.¹⁰¹ The E-Commerce Law's polycentric, participatory, and collaborative drafting process stands in contrast with that of other areas of law; for example, the drafting process of the Cyber Security law took only one year and allowed only non-negotiated formalistic participation.¹⁰² Scholars ascribed the short drafting process of the Cyber Security Law to directives from the top leadership, who viewed internet security as an important safeguard for national security and sovereignty and explicitly suggested a short drafting process.¹⁰³ This further illustrates the hierarchical nature of the HAPPY regulation, in that the top leaders' directives can directly influence the legislative process of a particular piece of legislation.

B. Firm Lobbying

In the United States, scholars have attributed weak law enforcement against Big Tech to political contributions and lobbying expenditures.¹⁰⁴ However, unlike U.S. tech firms, which can contribute to campaigns and by extension, influence the political process, Chinese tech firms face a much more opaque lobbying process. Moreover, unlike state-owned firms, which enjoy bureaucratic ranks, Chinese tech firms have less direct means to lobby China's internal bureaucracy. That said, Chinese tech entrepreneurs are able to participate in politics through a variety of alternative channels.¹⁰⁵ The most straightforward channel is to take a part in the policy-making process itself. For instance, Jack Ma, the founder of Alibaba and Ant Group, has been a CCP member since the 1980s.¹⁰⁶ Some tech entrepreneurs serve in the NPC, China's top legislative body, or the Political Consultative Conference, the top advisory body (the two bodies are known collectively as the "two sessions"). For instance, top executives from large Chinese tech firms have actively participated in the two sessions and submitted proposals for

101. HOGAN LOVELLS, *A Game Changer? China Enacts First E-Commerce Law* (Sep. 2018), https://f.datasrvr.com/fr1/218/46285/Alert_Corporate_A_game_changer_-_China_enacts_first_e-commerce_law3.pdf [<https://perma.cc/5B4P-4ENV>].

102. See Deng & Liu, *supra* note 98, at 683–84.

103. *Id.* at 687.

104. THOMAS PHILIPPON, *THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS* 151, 261 (2019); see Luigi Zingales, *Towards A Political Theory of the Firm*, 31 J. ECON. PERSP. 113, 119 (2017).

105. See BRUCE J. DICKSON, *RED CAPITALISTS IN CHINA: THE PARTY, PRIVATE ENTREPRENEURS, AND PROSPECTS FOR POLITICAL CHANGE* 107–114 (2003); see also Gilles Guiheux, *The Political "Participation" of Entrepreneurs: Challenge or Opportunity for the Chinese Communist Party?*, 73 SOC. RSCH. 219 (2006); YUE HOU, *THE PRIVATE SECTOR IN PUBLIC OFFICE: SELECTIVE PROPERTY RIGHTS IN CHINA* (2019).

106. Arjun Kharpal, *Alibaba's Jack Ma Has Been a Communist Party Member Since the 1980s*, CNBC (Nov. 27, 2018, 12:37 PM, updated Nov. 28, 2018, 4:30 AM), <https://www.cnbc.com/2018/11/27/alibabas-jack-ma-has-been-communist-party-member-since-1980s.html> [<https://perma.cc/C6BS-KD9A>].

the digital economy.¹⁰⁷ Pony Ma, the CEO and founder of Tencent, reportedly submitted over fifty proposals to the NPC in the past decade.¹⁰⁸ Commentators note, however, that these proposals serve more “as gestures of fealty to the Communist government than real policy initiatives” because the NPC is a toothless rubber stamp parliament.¹⁰⁹ Yet other scholars have suggested that legislative membership signals a tech company’s political capital, which helps them receive preferential treatment and fend off property appropriation from the government bureaucracy.¹¹⁰

Recall that one of the elements of the HAPPY regulation is that Chinese tech firms are very pliant—they are not only obedient but also flexible and know how to work the environment to their favor. Given the limited influence they can exert through the formal lobbying channels, tech companies rely heavily on intermediaries to exert influence from behind the scenes. The first type of intermediary consists of political elites, who either have strong family connections with the top leadership at the central or local governments (for example, the princelings), or themselves enjoy high bureaucratic status at places such as the powerful Chinese SOEs or state sovereign funds. Because these politically connected investors can exert political influence over the legal process, I call them “political intermediaries.” These political intermediaries, many of whom work in private equity or venture capital, are often offered the opportunity to invest in tech firms at an early stage, thus allowing them to reap a bonanza later when the tech firms become public. Since any harsh regulatory interventions into tech firms will negatively impact investments made by political elites, regulatory authorities would be more reluctant to act against these firms, especially in the absence of a strong and clear policy signal from the top. This “ownership sharing scheme” effectively aligns the interests of Chinese tech firms with those of the political elites who can exert influence on the bureaucracy.

Ant Group, China’s largest fintech giant, is a prime example. One of the reasons why the CCP leadership decided to suspend Ant’s IPO was reportedly a growing unease towards Ant’s complex ownership structure. A central government investigation revealed that a group of well-connected Chinese political elite entities have invested in Ant, as well as China’s national pension fund and several large state-owned banks and investment companies.¹¹¹ Alibaba is another example. When Alibaba first went public in 2014, the *New York Times* ran a sensational report about investment from Chinese po-

107. Li Yuan, *The Uncomfortable Marriage Between China and Its Tech Giants*, WALL ST. J. (last updated Mar. 8, 2018, 10:47 AM), <https://www.wsj.com/articles/the-godfathers-of-chinese-tech-get-an-offer-they-cant-refuse-1520510404> [<https://perma.cc/4DYA-DVMS>].

108. Rita Liao, *What China’s Big Tech CEOs Propose at the Annual Parliament Meeting*, TECHCRUNCH (Mar. 5, 2021, 2:31 AM), <https://techcrunch.com/2021/03/04/two-sessions-2021-china-tech/> [<https://perma.cc/V4RT-RVN2>].

109. See Yuan, *supra* note 107.

110. HOU, *supra* note 105, at 157.

111. See Wei, *supra* note 14.

litical elites in the e-commerce giant.¹¹² As one analyst put it: “It would take, at this point, a seismic effort to topple an Alibaba. They’ve got so many different allies across so many different ministries.”¹¹³

The second type of intermediary is former government officials or academics, who are either hired as in-house staff, or are engaged or sponsored through academic or research organizations. As this type of intermediary mainly facilitates information exchange between firms and regulators, I call them “information intermediaries.” In the past few years, China’s largest tech firms, such as Tencent, Alibaba, Bytedance, Didi Chuxing, and Meituan have poached former regulatory officials and offered them generous payouts.¹¹⁴ Seeing little prospect for career advancement in their departments, many officials either move to positions in research centers or government relations departments at Chinese tech giants.¹¹⁵ Chinese academics, many of whom advise the government departments in drafting new laws or provide expert opinions for investigations, also play a very important role in facilitating this process.¹¹⁶ Given the lack of transparency in China’s legislative and enforcement processes, it is critically important for Chinese tech firms to have access to valuable information so they can gain first-mover advantage in shaping their responses to new policy developments.¹¹⁷ As information intermediaries are also legal experts in the relevant policy areas, they can help Chinese tech firms lobby against unfavorable legislative changes and obtain favorable treatment during ongoing investigations. However, it is also well-known that the revolving door can distort the incentives of regulators, resulting in regulatory capture.¹¹⁸

Thus far, information intermediaries have been particularly useful in helping Chinese Big Tech lobby for favorable laws. Scholars have observed that Chinese tech firm representatives were heavily involved in the drafting of the E-Commerce Law, and their opinions played a critical role in influencing the drafting process.¹¹⁹ The initial draft of the law, which was drafted by agencies with authority to oversee various aspects of the digital economy,

112. Michael Forsythe, *Alibaba’s I.P.O. Could Be a Bonanza for the Scions of Chinese Leaders*, N.Y. TIMES DEALBOOK (July 20, 2014, 8:16 PM), <https://dealbook.nytimes.com/2014/07/20/alibabas-i-p-o-could-be-a-bonanza-for-the-scions-of-chinese-leaders/> [https://perma.cc/4VYA-D5WK] (noting Alibaba’s deep political connection with some of the most powerful members of the CCP).

113. *Id.*

114. Sun Yu, *China Tech Groups Hire Ex-regulators to Fend Off Beijing’s Crackdown*, FIN. TIMES (Apr. 21, 2021), <https://www.ft.com/content/71daa106-259e-4dc2-b267-b0289177de1f> [https://perma.cc/NYL5-HJZ7].

115. *Id.*

116. ZHANG, *supra* note 29, at 106–07 (observing the close-knit group formed among lawyers, academics and regulators in China).

117. *Id.* at 105–06.

118. PHILIPPON, *supra* note 104, at 200–01; see Haris Tabakovic & Thomas Wollmann, *From Revolving Doors to Regulatory Capture? Evidence from Patent Examiners* (NBER Working Paper No. 24638, 2018), <https://ssrn.com/abstract=3185893> [https://perma.cc/XKS4-GDF2]. See generally Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1269 (2015).

119. Deng & Liu, *supra* note 98, at 686.

put more emphasis on regulation than development.¹²⁰ Internet companies lobbied aggressively against the early drafts and recruited support from academia by funding scholars' projects and conferences.¹²¹ Representatives from Alibaba and Tencent were also able to take advantage of informal channels to submit their reports on the E-Commerce Law to the top leadership, including President Xi and Premier Li, who endorsed the companies' view that the regulations should facilitate development.¹²² The law went through an unprecedented three rounds of public consultation. In the end, many rules that would have imposed stricter responsibilities on online platforms were either abandoned or significantly diluted in the final version.¹²³

Firm lobbying was similarly observed in the ride-hailing business.¹²⁴ In response to public complaints and inconsistent judicial treatment of drivers' legal statuses, the original version of the 2015 Interim Measures regulating the ride-hailing businesses included a strict legal requirement that companies must enter into labor contracts with their drivers.¹²⁵ This provision, however, was significantly diluted in the final version, leaving the online platforms with great freedom to sign different types of contracts with drivers.¹²⁶ As a consequence, ride-hailing companies continue shedding their liabilities by avoiding formal labor contracts with their delivery drivers.¹²⁷

Even during the current round of enforcement against Big Tech, Chinese tech companies appeared successful in fending off some unfavorable legislative proposals.¹²⁸ In November 2020, the Anti-Monopoly Bureau of the SAMR released draft antitrust guidelines on online platforms.¹²⁹ The guidelines included several provisions that could have reduced the burden of proof

120. *Id.*

121. *Id.*

122. *Id.* at 686, 690.

123. Michael Tan, *China's New E-Commerce Law – Good or Bad News for Business*, LEXOLOGY (Nov. 30, 2018), <https://www.lexology.com/library/detail.aspx?g=c872dc75-7e6d-49a6-ae31-fd8d5bba3a2e> [<https://perma.cc/C364-ZLUJ>]; see Deng & Liu, *supra* note 98, at 686.

124. See Mozur, *supra* note 95 (discussing the “invest first, get approval later” model in the fast-moving Chinese tech industry).

125. See Mimi Zou, *The Regulatory Challenges of ‘Uberization’ in China: Classifying Ride-Hailing Drivers*, 33 INT'L J. COMP. LAB. L. & INDUS. REL., 269, 285 (2017).

126. Wangluo Yuyue Chuzu Qiche Jingying Fuwu Guanli Zanzing Banfa (网络预约出租汽车经营服务管理暂行办法) [Interim Measures for the Administration of Online Taxi Booking Business Operations and Services] (promulgated by the Ministry of Transport, effective Nov. 1, 2016; rev'd by the Ministry of Transport, Dec. 28, 2019), art. 18, <http://en.pkulaw.cn.eresources.law.harvard.edu/display.aspx?cgid=9210c1d8fd1c9d47bdfb&lib=law> [<https://perma.cc/7DTA-X7CX>] (EN) (Lawinfochina) (stipulating that the platforms can sign different types of contracts or agreements with the drivers to ensure the protection of the rights and obligations of both the platforms and drivers).

127. Zou, *supra* note 125, at 286.

128. Raymond Zhong, *China Fines Alibaba \$2.8 Billion in Landmark Antitrust Case*, N.Y. TIMES (Apr. 9, 2021; updated Sept. 1, 2021), <https://www.nytimes.com/2021/04/09/technology/china-alibaba-monopoly-fine.html> [<https://perma.cc/484J-X6H6>].

129. See KING & WOOD MALLESONS, *10 Highlights of the Antitrust Guidelines for Platform Economy* CHINA L. INSIGHT (Nov. 18, 2020), <https://www.chinalawinsight.com/2020/11/articles/compliance/10-highlights-of-the-antitrust-guidelines-for-platform-economy/> [<https://perma.cc/ZJ2Z-YZQD>].

for the antitrust regulator in proving online platform dominance, making it easier for them to prosecute cases against the platforms.¹³⁰ For instance, the draft guidelines allowed regulators to avoid defining the relevant market in difficult cases.¹³¹ The draft also indicated that the possession of data could be used as a consideration in deciding whether a platform constitutes an essential facility.¹³² However, the final version of the guidelines removed all these controversial provisions, added many business justifications in considering abusive conduct, and gave more room for tech firms to defend themselves when they are subject to antitrust scrutiny.¹³³

C. Bureaucratic Inertia

As a result of strong government support and active lobbying from Chinese tech firms, Chinese regulatory authorities are averse to taking aggressive stances towards regulating Chinese tech giants. This inertia is also deeply ingrained in the HAPPY model of regulation.¹³⁴ All central ministries and local governments are part of China's vast bureaucracy that derives its legitimacy from the delegation of power by the top leadership in Beijing.¹³⁵ Because officials are evaluated through a Leninist-style nomenklatura process, the whole bureaucracy is organized on an upward accountability system.¹³⁶ This tightly-coupled organizational structure undermines the effectiveness and authority of local governance.¹³⁷ Recall that an essential element of the HAPPY regulation is that regulators tend to be parochial. In the face of an overall national economic agenda of fostering innovation and entrepreneurship and high uncertainty about the consequences of regulating innovation, Chinese regulatory authorities treaded cautiously by adopting lax rather than drastic actions against tech firms.

A good example can be found in the regulation of peer-to-peer (“P2P”) platforms that connect borrowers and lenders without the intermediation of banks. P2P platforms act as information intermediaries by gathering information, evaluating credit, and facilitating information exchange between

130. *Id.*

131. *Id.*

132. *Id.*

133. Jane Zhang & Iris Deng, *China Issues Final Version of Anti-Monopoly Guidelines as Beijing Moves to Rein in Big Tech*, S. CHINA MORNING POST (Feb. 8, 2021, 1:58 PM), <https://www.scmp.com/tech/policy/article/3120977/china-issues-final-version-anti-monopoly-guidelines-beijing-moves-rein> [https://perma.cc/9Y7E-HRP6].

134. See ZHANG, *supra* note 29, at 57–59 (discussing power fragmentation among regulating agencies and regulatory inertia). See generally KENNETH G. LIEBERTHAL & DAVID M. LAMPTON, *BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA* (1992) (introducing a model of “fragmented authoritarianism”).

135. Zhou, *Organizational Response to Covid-19 Crisis: Reflections on the Chinese Bureaucracy and Its Resilience*, *supra* note 22, at 479.

136. *Id.*

137. *Id.* at 481.

borrowers and lenders.¹³⁸ As the Chinese banking industry is dominated by state banks that prefer to lend to large state-owned firms, this form of business garnered strong demand from small private businesses that cannot get credit from big banks.¹³⁹ At the same time, because P2P platforms only facilitate lending but do not provide credit themselves, they are normally not viewed as commercial lenders.¹⁴⁰ Indeed, P2P activities were not covered in pre-existing financial regulations, nor was it clear which regulator had the authority to oversee this sector.¹⁴¹ Instead, they were subject to piecemeal rules scattered in different areas of commercial laws such as the Criminal Law, the Consumer Protection Law, the Securities Law, and the Supreme People's Court's judicial interpretation.¹⁴² This regulatory vacuum, however, enabled the P2P industry to grow exponentially.¹⁴³ It was not until 2015 that the State Council issued guiding opinions that laid down the regulatory blueprint to regulate internet finance.¹⁴⁴ And the China Banking Regulatory Commission finally tightened regulation by setting up a comprehensive legal regime to oversee the P2P industry in 2016.¹⁴⁵

Another example is China's regulation of the variable interest entity ("VIE") structure.¹⁴⁶ In a typical VIE structure, foreign investors acquire stakes in an offshore holding company, usually based in tax havens such as the Cayman Islands. The holding company then sets up a Chinese subsidiary, which signs contracts with a third-party company in charge of running the business and which then pledges to send profits to the Chinese subsidiary. Thus far, many Chinese tech firms have adopted a VIE structure to

138. Chuanman You, *Recent Developments of FinTech Regulation in China: A Focus on the New Regulatory Regime for the P2P Lending (Loan-based Crowdfunding) Market*, 13 *CAP. MARKETS L. J.* 85, 86 (2018).

139. Shen Wei, *Internet Lending in China: Status Quo, Potential Risks and Regulatory Options*, 31 *COMP. L. & SEC. REV.* 793, 795 (2015).

140. *Id.* at 800; see also You, *supra* note 138, at 93–94.

141. Wei, *supra* note 139, at 800; see also You, *supra* note 138, at 95–96.

142. See You, *supra* note 138, at 88.

143. Cheng Ding et al., *Lessons from the Rise and Fall of Peer-to-Peer Lending in China*, 22 *J. BANKING REG.* 133, 136 (2021) (observing that between 2011 and 2015, the number of P2P lenders grew from 50 to 2,595); see also Chao Deng & Xie Yu, *China's Once-Hot Peer-to-Peer Lending Business Is Withering*, *WALL ST. J.* (Feb. 2, 2020, 7:00 AM), https://www.wsj.com/articles/chinas-once-hot-peer-to-peer-lending-business-is-withering-11580644804?mod=article_inline [<https://perma.cc/FH7U-Y8DA>] (noting that the total volume of lending totaled almost \$100 billion in 2015, compared to \$34 billion in the United States).

144. Renmin Yinhang Deng Shi Bumen Fabu Guanyu Cujin Hulianwang Jinrong Jiankang Fazhan de Zhidao Yijian (人民银行等十部门发布关于促进互联网金融健康发展的指导意见) [Ten Ministries Including the People's Bank of China Published Guiding Opinions on Promoting the Healthy Development of Internet Finance], Dec. 14, 2015, http://www.gov.cn/zhengce/2015-12/14/content_5055119.htm [<https://perma.cc/3FT6-PU63>] (China).

145. Wangluo Jiedai Xinxi Zhongjie Jigou Yewu Huodong Guanli Zanzing Banfa Da Jizhe Wen (网络借贷信息中介机构业务活动管理暂行办法) 答记者问 [Press Release on the Interim Administrative Measures for the Business Activities of P2P Lending Information Intermediaries], Aug. 24, 2016, http://www.gov.cn/xinwen/2016-08/24/content_5102030.htm [<https://perma.cc/L6QV-MRH8>] (China).

146. For a comprehensive overview of the VIE structure, see Marcia Ellis et al., *The VIE Structure: Past, Present and Future - Part I*, H.K. LAW. (June 5, 2020), <http://www.hk-lawyer.org/content/vie-structure-past-present-and-future-%E2%80%93-part-i> [<https://perma.cc/7CBD-BSQY>].

circumvent a government restriction on foreign investment in the internet sector. Because VIEs operate in a legal grey area, none of the Chinese bureaucratic departments want to regulate VIEs for fear of legitimizing them.¹⁴⁷ As a result, tech giants such as Alibaba and Tencent have made hundreds of acquisitions without needing to notify the Chinese antitrust authority at all.¹⁴⁸ In fact, Alibaba and Tencent have become two of the largest investors in the Chinese digital economy, together owning most of the unicorns in the industry.¹⁴⁹ At the moment, Tencent is only second to Sequoia Capital, a Silicon Valley investment fund, in terms of the unicorns it has invested in.¹⁵⁰ It was not until late 2020 that the Chinese antitrust authority started to actively intervene in merger cases involving a VIE structure.¹⁵¹

While tech companies in China were met with limited regulatory obstacles over the past decade, complaints about their anticompetitive conducts, in the e-commerce especially, were prevalent. For example, JD.com, a fierce rival to Alibaba, filed a complaint with the Chinese antitrust regulator about the “choose one from two” exclusionary practices that Alibaba has implemented since 2015.¹⁵² The Chinese antitrust authority did not initiate any formal antitrust investigations, but opted for more lenient regulatory tools such as the Anti-Unfair Competition Law or the E-Commerce Law to deal with these complaints.¹⁵³ These laws lack teeth, as the maximum fines that can be imposed are rather low.¹⁵⁴ Firms therefore ignored regulatory demands and treated the penalties as a cost of doing business—they paid fines and continued with their exclusionary practices. Similar to the serious lag in intervening in mergers with a VIE structure, the Chinese antitrust

147. *Id.*

148. Amigo L. Xie et al., *Pre-Merger Control Filing in China Concerning Variable Interest Entity Structures*, K & L GATES (June 4, 2020), <https://www.klgates.com/pre-merger-control-filing-in-china-concerning-variable-interest-entity-structures-06-04-2020> [https://perma.cc/9ULJ-EKT6] (noting that the SAMR had not reviewed a merger filing for transactions involving a VIE structure until April 2020).

149. *Alibaba and Tencent Have Become China's Most Formidable Investors*, ECONOMIST (Aug. 4, 2018), <https://www.economist.com/business/2018/08/02/alibaba-and-tencent-have-become-chinas-most-formidable-investors> [https://perma.cc/LUL4-XH53] (noting that unicorns refer to startups valued over \$1 billion in China).

150. Li Yuan, *How China's Most-Hated Internet Company Decided to Play Nice*, N.Y. TIMES (June 2, 2021; updated Oct. 8, 2021), <https://www.nytimes.com/2021/06/02/technology/china-tencent-monopoly.html> [https://perma.cc/WL5N-SCXL] (noting that Tencent has invested in more than 800 companies as of 2019).

151. Natalie Yeung et al., *Changing Winds: VIE Deals Subject to Chinese Merger Control After All*, SLAUGHTER & MAY (Dec. 18, 2020), <https://my.slaughterandmay.com/insights/briefings/changing-winds-vie-deals-subject-to-chinese-merger-control-after-all> [https://perma.cc/JG7J-N4JD].

152. Angela Huyue Zhang, *Why Is China Cracking Down on Alibaba?*, PROJECT SYNDICATE (Feb. 2, 2021), <https://www.project-syndicate.org/commentary/chinese-government-alibaba-antitrust-investor-confidence-by-angela-huyue-zhang-2021-02> [https://perma.cc/9H8L-75H6].

153. *Id.*

154. *Id.*

regulator only began to escalate its actions by launching an antitrust investigation into Alibaba in late 2020.¹⁵⁵

III. HOW THE PENDULUM IS SWINGING TOWARDS HARSHNESS

The lax regulatory environment nurtured domestic tech giants to become tech goliaths, commanding attention and loyalty from a large population of Chinese users. While online platforms and digitalization bring about enormous benefits for the economy, they also generate unintended consequences and pose significant risks. Armed with troves of data, deep coffers, and an influence that spans many aspects of people's lives, these internet giants have become an important target for regulation in China. In the following discussion, I will first explore how growing public dissatisfaction with Chinese tech firms has been shifting the balance between innovation and regulation over the years. I then apply the HAPPY model of regulation to explain how Jack Ma's controversial speech in Shanghai eventually tipped the balance between innovation and regulation. Finally, I will use HAPPY to explain how China initiated a massive law enforcement campaign against the Big Tech firms since the debacle of Ant's IPO.

A. *Growing Public Complaints*

As Chinese tech firms expand and permeate many aspects of people's lives, they have also given rise to growing public concern about their excessive power. First, serious cases involving personal safety and financial stability issues started to emerge soon after the introduction of new platform products and services. Some of these incidents have triggered public uproar, posing a threat to social stability. Indeed, given the outsized influence of Big Tech, even a seemingly small probability of operational failures can generate strong regulatory repercussions. Take Didi Chuxing for example. In 2015, Didi launched Shunfengche, a "hitchhiking" service that matched car owners who were willing to offer a free ride to those needing a lift.¹⁵⁶ In a few years, problems started to emerge when a few female passengers using the Shunfengche service were raped and murdered by their drivers.¹⁵⁷ Although these incidents were infrequent, they triggered massive public up-

155. Jane Zhang & Celia Chen, *Alibaba Antitrust Investigation: What Is the "Picking One from the Two" Practice that Triggered an Official Probe?* S. CHINA MORNING POST (Dec. 24, 2020, 7:29 PM), <https://www.scmp.com/tech/enterprises/article/3115300/alibaba-antitrust-investigation-what-picking-one-two-practice> [https://perma.cc/V49G-SK7T].

156. Si Ma, *Didi Helps Migrant Workers Go Home*, CHINA DAILY (Jan. 19, 2017, 7:42 AM), http://www.chinadaily.com.cn/newsrepublic/2017-01/19/content_28004907.htm [https://perma.cc/WV2Q-6PP2].

157. Sui-Lee Wee, *Didi Suspends Carpooling in China After 2nd Passenger Is Killed*, N.Y. TIMES (Aug. 26, 2018), <https://www.nytimes.com/2018/08/26/business/didi-chuxing-murder-rape-women.html> [https://perma.cc/YTD4-B2V4].

roars, leading Didi to shut down the Shunfengche service.¹⁵⁸ Regulators from various major cities also tightened regulation, ordering Didi to overhaul its screening mechanisms for drivers and improve safety protection for passengers.¹⁵⁹ The series of scandals that erupted in the P2P industry offer another example. In 2015, Ezubao, one of China's largest P2P lenders, was found to be engaging in a Ponzi scheme.¹⁶⁰ As of January 2016, Ezubao had defrauded over 900,000 users who lost almost RMB fifty billion.¹⁶¹ Angry protests erupted in thirty-four Chinese cities.¹⁶² The collapse of Ezubao generated a domino effect, with almost fifty percent of the P2P platforms being identified as "problematic" with serious operational difficulties in 2016.¹⁶³ A series of subsequent regulatory crackdowns gave rise to another wave of scandals and defaults in 2018.¹⁶⁴ By late 2020, Chinese banking regulators had all but shut down P2P platforms.¹⁶⁵

Moreover, as online platforms serve as intermediaries connecting buyers and sellers, it is often not entirely clear what their legal responsibilities are with respect to conflicts arising from their platforms. As such, online platforms have the incentive to engage in excessively risky transactions without bearing any liabilities. Chinese regulators have grown increasingly wary of the risks of moral hazards associated with platform operations. Consider an example in the food delivery industry. Meituan and Ele.me, two major food delivery companies, have been criticized for using smart algorithms to set up routes and impose tight deadlines on delivery drivers, resulting in many traffic accidents.¹⁶⁶ As most of these drivers are crowdsourced couriers rather than full-time employees, they cannot receive social security benefits or compensation for work-related injuries.¹⁶⁷ The absence of formal legal protection for drivers resulted in many labor disputes, some of which escalated

158. *Id.*

159. Yue Wang & Robert Olsen, *China's Didi Chuxing Faces Intense Pressure Amid Public Anger over Second Passenger Death*, FORBES (Sep. 1, 2018, 4:45 AM), <https://www.forbes.com/sites/ywang/2018/09/01/chinas-didi-chuxing-faces-intense-pressure-amid-public-anger-over-second-passenger-death/?sh=237b08b97a6d> [<https://perma.cc/UJ4K-X2D4>].

160. *Ponzis to Punters*, ECONOMIST (Feb. 6, 2016), <https://www.economist.com/china/2016/02/06/ponzis-to-punters> [<https://perma.cc/WXJ2-N38W>].

161. *Id.*

162. *Id.*

163. See You, *supra* note 138, at 96.

164. Chong Koh Ping & Xie Yu, *China Hails Victory in Crackdown on Peer-to-Peer Lending*, WALL ST. J. (Dec. 9, 2020, 7:05 AM), <https://www.wsj.com/articles/china-hails-victory-in-crackdown-on-peer-to-peer-lending-11607515547> [<https://perma.cc/NG5V-M6F4>].

165. Frank Tang, *China's P2P Purge Leaves Millions of Victims Out in the Cold, With Losses in the Billions, As Concerns of Social Unrest Swirl*, S. CHINA MORNING POST (Dec. 29, 2020, 6:30 AM), <https://www.scmp.com/economy/china-economy/article/3115580/chinas-p2p-purge-leaves-millions-victims-out-cold-losses> [<https://perma.cc/L2EV-ML6V>].

166. Carol Huang, *Driven to Death? China Food-Delivery Services Criticised for Pressuring Drivers*, CAMPAIGN ASIA (Sep. 10, 2020), <https://www.campaignasia.com/article/driven-to-death-china-food-delivery-services-criticised-for-pressuring-drivers/463537> [<https://perma.cc/A9AM-ABD2>].

167. *Id.*; see also Yuan Yang & Ryan McMorro, *Chinese Courier Sets Fire to Himself In Protest Over Unpaid Alibaba Wages*, FIN. TIMES (Jan. 12, 2021), <https://www.ft.com/content/d6189ee8-9aea-41dd-a412-b8daba9caf2> [<https://perma.cc/L7US-82JY>]; Zou, *supra* note 125, at 286.

into strikes.¹⁶⁸ In one tragic instance, a driver who was not able to receive compensation protested by setting himself on fire.¹⁶⁹ These incidents generated a public outcry and heated debate in China about the liabilities of online platforms. Another example is micro-lending, a popular financial service introduced by Chinese fintech companies. For instance, Ant Group, China's largest fintech company, partnered with Chinese state-owned banks to extend microloans to hundreds of millions of small businesses and individuals.¹⁷⁰ According to Ant's IPO filing, banks extend almost ninety-eight percent of the loans.¹⁷¹ As Ant did not need to bear much of the risk of default, it generates concerns that Alibaba might engage in excessively risky lending. Indeed, Ant has been found to have employed deceptive tactics to induce young students to spend money on Taobao by conveniently borrowing through its microlending channels.¹⁷²

Furthermore, the Chinese digital economy has grown to be highly concentrated, giving rise to a whole host of antitrust and competition issues. In the past few years, Tencent and Alibaba have become China's most formidable competitors, operating like a duopoly in the Chinese digital economy.¹⁷³ Tencent is a mega entertainment firm with strong market positions that span across social media, music, and gaming. Alibaba is a conglomerate with its core business in e-commerce but also invests heavily in social media, entertainment, logistics, and cloud computing. Each of these two tech giants owns a few super-apps, which are highly popular apps that are not only have a vast number of users, but also provide access to countless "mini-programs" that can be launched instantly.¹⁷⁴ Over the years, the intense rivalry between Alibaba and Tencent has carved up China's tech sector into two competing ecosystems, each side blocking users from sharing content to

168. Zixu Wang, *In China, Delivery Workers Struggle Against a Rigged System*, SUPCHINA (Apr. 20, 2021), <https://supchina.com/2021/04/20/in-china-delivery-workers-struggle-against-a-rigged-system/> [<https://perma.cc/TP2K-EYLK>].

169. See Yang & McMorrow, *supra* note 167.

170. Nan Li & John Darwin Van Fleet, *Ant's Road to Redemption: How the Fintech Giant Can Save Itself*, SUPCHINA (May 18, 2021), <https://supchina.com/2021/05/18/ants-road-to-redemption-how-the-fintech-giant-can-save-itself/> [<https://perma.cc/UHF6-7T2J>].

171. *Id.*

172. *Id.*

173. *Alibaba and Tencent Have Become China's Most Formidable Investors*, ECONOMIST (Aug. 4, 2018), <https://www.economist.com/business/2018/08/02/alibaba-and-tencent-have-become-chinas-most-formidable-investors> [<https://perma.cc/F2XB-WCRJ>].

174. CALEB FOOTE & ROBERT D. ATKINSON, *Chinese Competitiveness in the International Digital Economy*, INFO. TECH. & INNOVATION FOUND. 4 (2020) ("WeChat, which was released in 2011 as a messaging service akin to WhatsApp (indeed, most major Chinese Internet firms started as copies of U.S. digital products or services), now has nearly 1.2 billion monthly active users and, as of early 2019, has 2.3 million mini programs—more than the 2.1 million apps on the App Store. WeChat mini programs had transactions worth \$115 billion in 2019, all moderated through Tencent's digital payment system WeChat Pay, which is accepted by 79 percent of small and medium-sized Chinese retailers. Alipay, owned by Alibaba affiliate Ant Financial, and led by Alibaba's founder Jack Ma, is a strong second with 647 million monthly users mid-2019, 401 million of whom used mini programs.").

the other's ecosystem.¹⁷⁵ For instance, users of WeChat couldn't open a link to a product from Taobao, and had to copy and paste the URL in a browser to access the content. Taobao, on the other hand, does not allow Tencent's WeChat Pay as a payment service. Because of the lack of interoperability between these two ecosystems, most new start-ups have no choice but to join either the Alibaba or the Tencent camp in order to survive.¹⁷⁶ To further entrench their own dominant positions, leading e-commerce firms such as Alibaba and Meituan also imposed restrictive conditions to force merchants to stay on their platforms.¹⁷⁷

Last but not least, once online platforms gain monopoly power, they can abuse their power by exploiting platform participants. By leveraging the vast amount of data collected from their consumers, Chinese e-commerce platforms can employ smart algorithms to price discriminate and extract more surplus from Chinese consumers. Meanwhile, Chinese tech giants have taken advantage of cheap labor in China to aggressively expand their businesses. Due to the high concentration of the Chinese tech industry, large online platforms can behave like a monopsony by exploiting their suppliers, contractors, and employees. Online platforms' dominant power over both upstream merchants and service producers and downstream consumers therefore could further exacerbate income inequality in China.¹⁷⁸ Indeed, top executives and engineers in Chinese Big Tech are rewarded with generous paychecks and lucrative options while the vast population of frontline workers such as delivery workers and ride-hailing drivers earn little.¹⁷⁹ In 2020, the Guangdong Restaurant Association publicly accused Meituan, a top food delivery app, of significantly increasing the commission for restaurants since the outbreak of the pandemic.¹⁸⁰ In response to the public uproar, Meituan

175. Louise Lucas, *Long Freeze Between Tencent and Alibaba Thaws*, FIN. TIMES (Apr. 30, 2019), <https://www.ft.com/content/c3402462-6728-11e9-a79d-04f350474d62> [<https://perma.cc/8DDV-3GXX>].

176. Wee, *supra* note 157.

177. Che Pan, *China's Antitrust Chief Declares Early Victory in Taming 'Pick One from Two' Practice in the Wake of Alibaba, Meituan Fines*, S. CHINA MORNING POST (Dec. 20, 2021, 5:30 PM), <https://www.scmp.com/tech/big-tech/article/3160450/chinas-antitrust-chief-declares-early-victory-taming-one-two-practice> [<https://perma.cc/BS8V-SGJY>].

178. Sonali Jain-Chandra et al., *Inequality in China—Trends, Drivers and Policy Remedies* (IMF Working Paper No. 18/27, 2018) (noting that China is now home to 878 billionaires, the highest number in the world); Nikki Sun, *China's Tech Boom Leaves Wide Rich-Poor Chasm*, NIKKEI ASIA (Sep. 18, 2018), <https://asia.nikkei.com/Spotlight/Asia-Insight/China-s-tech-boom-leaves-wide-rich-poor-chasm> [<https://perma.cc/FPJ3-L2LA>] (citing a 2016 study from Peking University, which found that the top one percent of the population controls one-third of the country's wealth while the bottom twenty-five percent holds less than one percent); see also Branko Milanovic, *China's Inequality Will Lead It to a Stark Choice*, FOREIGN AFFS. (Feb. 11, 2021), <https://www.foreignaffairs.com/articles/china/2021-02-11/chinas-inequality-will-lead-it-stark-choice> [<https://perma.cc/ND9L-TPE8>] (noting that China's Gini coefficient, which measures wealth and income distribution, was 0.47 in 2019, compared with 0.41 in the United States).

179. Yang & McMorrow, *supra* note 167.

180. Minghe Hu, *Meituan Refutes Claims Its Delivery Fees Are Hurting Restaurants Amid Coronavirus Downturn*, S. CHINA MORNING POST (Apr. 13, 2020, 7:30 PM), <https://www.scmp.com/tech/apps-social/article/3079644/meituan-refutes-claims-its-delivery-fees-are-hurting-restaurants> [<https://perma.cc/BC9M-QE7G>].

made some concessions and negotiated a deal with the association to lower its commission.¹⁸¹

B. *The Tipping Point*

Although regulatory tensions in the tech sector had been building up for many years, they had yet to tip the balance between innovation and regulation until mid-2020. In fact, the State Council's annual work report released in May 2020 continued to put an emphasis on applying a "cautious and tolerant" approach in regulating the platform economy.¹⁸² But one event directly triggered the dramatic reversal of China's regulatory approach. On October 24, 2020, Jack Ma made a highly controversial speech at the Bund Financial Summit in Shanghai. Ma scathingly criticized Chinese financial regulation, chiding state banks for operating with a "pawn shop" mentality.¹⁸³ He also referred to the Basel Accords, a set of agreements on banking regulation issued by the Basel Committee on Banking Supervision, as a "club for the elderly."¹⁸⁴ On November 3, 2020, the Shanghai Stock Exchange halted the IPO of Ant, citing changes in the regulatory environment.¹⁸⁵ The balance was then tipped decisively towards regulation. So how did Jack Ma's speech and Ant's mega IPO, which would have brought China tremendous pride, become the tipping point in regulating the Chinese platform economy?

The HAPPY model of regulation is helpful for us to understand the driving forces behind this Ant IPO debacle. First, the role Ant played in tipping the scales had much to do with the firm's pliancy. Similar to other Chinese tech firms, Ant is well-adapted to the weak institutions in China and knows how to navigate the complex regulatory environment and grow its business in the legal grey areas. Since its establishment in 2014, Ant has created many new financial products in microlending, insurance, and wealth management, none of which seem to fall within the existing regulatory framework. Although almost ninety percent of Ant's revenue is derived from financial services, Ant has been trying hard to label itself as a technology company.¹⁸⁶ This allowed Ant to seek arbitrage among different regulatory

181. Yuan Yang, *Should Super-Apps Share the Spoils with Restaurants?*, FIN. TIMES (May 5, 2020), <https://www.ft.com/content/44ad94b0-8e08-11ea-9e12-0d4655dbd44f> [<https://perma.cc/J9QT-P4BQ>].

182. LI KEQIANG, REPORT ON THE WORK OF THE GOVERNMENT (2020) ("To further unleash the creativity of various sectors, we will launch a new round of pilot reforms for making innovations across the board, build more innovation and entrepreneurship demo centers, continue *accommodative and prudential* regulation, and develop the platform economy and the sharing economy.") (emphasis added); *see also Full Text: Report on the Work of the Government*, XINHUA NEWS (May 30, 2020), http://english.www.gov.cn/premier/news/202005/30/content_WS5ed197f3c6d0b3f0e94990da.html [<https://perma.cc/G7LX-PBGX>].

183. Yang & Wei, *supra* note 7.

184. *Id.*

185. *Id.*

186. *See* Li & Van Fleet, *supra* note 170 (noting that six months before the IPO, Ant changed its name from Ant Financial to Ant Group to avoid regulatory scrutiny).

authorities and find room to grow and expand very quickly. Ant saw a good opportunity when the Trump administration threatened to delist many Chinese companies from the U.S. stock exchanges.¹⁸⁷ To lure Chinese tech firms back home to trade in China, China launched the Technology and Innovation Board (the “STAR market”), a new Chinese technology stock market similar to NASDAQ.¹⁸⁸ As Ant’s IPO debut could give a significant boost to the STAR market, the China Securities Regulatory Commission fast-tracked the listing process for Ant.¹⁸⁹ Ant’s IPO was highly oversubscribed, giving the firm a high valuation akin to a technology company rather than that of a bank.¹⁹⁰

The parochialism of the regulators also played a crucial role in contributing to the great reversal of regulation. Unlike other regulatory authorities that do not face many consequences from their regulatory failures, the PBOC is the lender of last resort and needs to bear the residual risk of bailing out troubled banks.¹⁹¹ Concerned about the risk of moral hazards, the PBOC has long been pressing for legislation to regulate Ant as a financial holding company. In 2018, the PBOC was already drafting regulations that proposed increased regulation of fintech companies via stricter capital reserve requirements and risk management rules.¹⁹² During the summer of 2020, the PBOC issued a spate of regulations, guidelines, and notices to try to curb excessive risk from digital finance.¹⁹³ Even after Ant filed for IPO, the PBOC issued draft guidelines indicating that it would regulate Ant and other fintech companies as financial holding companies.¹⁹⁴ During Ant’s IPO process, the PBOC and other financial regulators grew more alarmed as Ant’s high valuation as a tech firm rather than as a bank stoked fears of a bubble.¹⁹⁵ Indeed, Jack Ma’s controversial speech in Shanghai appeared to have been the entrepreneur’s last attempt to lobby for favorable regulatory treatment in anticipation of tightening regulation over his business.

187. Sun Yu & Tom Mitchell, *The Man Taking on Jack Ma Cements His Status as A Rising Star*, FIN. TIMES (Feb. 2, 2021), <https://www.ft.com/content/f44fae66-21c0-48ff-9dd7-bb85ec0e9cf2> [https://perma.cc/73LK-ATND].

188. Lingling Wei, *Ant IPO-Approval Process under Investigation by Beijing*, WALL ST. J. (Apr. 27, 2021, 10:00 AM), <https://www.wsj.com/articles/ant-ipo-approval-process-under-investigation-by-beijing-11619532022> [https://perma.cc/E5RQ-3Z92].

189. See Yu & Mitchell, *supra* note 187.

190. See Li & Van Fleet, *supra* note 170 (noting that the price-to-earnings ratio of tech firms are four times of that of banks).

191. See generally Daniel Rosen & Logan H. Wright, *Credit and Credibility: Risks to China’s Economic Resilience*, CTR. FOR STRATEGIC & INT’L STUD. (Oct. 3, 2018), <https://www.csis.org/analysis/credit-and-credibility-risks-chinas-economic-resilience> [https://perma.cc/6QS5-5KWV].

192. Stella Yifan Xie & Chao Deng, *China to Tighten Rules on Five Financial Giants*, WALL ST. J. (Nov. 3, 2018, 8:01 AM), <https://www.wsj.com/articles/china-to-tighten-rules-on-five-financial-giants-1541246489> [https://perma.cc/6QS5-5KWV].

193. Yang & Wei, *supra* note 7.

194. Stella Yifan Xie, *China’s New Financial Rules to Cover Jack Ma’s Ant Group*, WALL ST. J. (Sep. 13, 2020, 12:07 PM), <https://www.wsj.com/articles/chinas-new-financial-rules-to-cover-jack-mas-ant-group-11600013259> [https://perma.cc/GKD7-SGRK].

195. See Zhang, *supra* note 43.

Yet Jack Ma's speech backfired as it violated the taboo of directly challenging the authority and legitimacy of existing financial regulations. This reportedly infuriated senior Chinese leaders, who stepped out and voiced their displeasure with Jack Ma and Ant Group.¹⁹⁶ At this point, the regulators decided that they would no longer withhold any information and reported the matter to the highest level of Chinese leadership.¹⁹⁷ They also launched a media campaign against Ant. A few days after Jack Ma's controversial speech in Shanghai, *Finance News*, a newspaper affiliated with the PBOC, published commentaries for three days that rebutted Ma's Shanghai speech argument by argument.¹⁹⁸ These commentaries elaborated on the systematic financial risks posed by Ant and other fintech companies.¹⁹⁹ They also chided Ant for seeking regulatory arbitrage by trying to disguise itself as a technology firm, encouraging wanton consumption among young students, collecting excessive amounts of consumer data, and infringing personal privacy.²⁰⁰ They called for tightened control of market access, enhancement of consumer and data protection, and regulatory improvement.²⁰¹ These three commentaries presented a strong rebuttal to Jack Ma's speech; in publishing them, the PBOC appeared to seize the first mover advantage to shape public rhetoric around the case. The fact that the PBOC took such a high-profile approach in voicing dissent also demonstrates the resolution and determination of the central bank in trying to rein in Ant Group. It further provides strong evidence that the genesis of the law enforcement campaign was the regulatory tensions between Ant and the financial regulators.

As elaborated in Part II, the Chinese leadership is very adaptable and derives its legitimacy from economic growth, social stability, and nationalism. In recent years, the Chinese leaders have grown increasingly wary of opaque ownership structures and the regulatory arbitrage of non-financial institutions providing financial services.²⁰² In the aftermath of the financial

196. Yang & Wei, *supra* note 7.

197. *Id.*

198. Feiyu Zhang, *Guanyu Jinrong Chuangxin yu Jianguan de Ji Dian Renshi* (关于金融创新与监管的几点认识) [A Few Points Regarding Financial Innovation and Regulation], YICAI (Oct. 31, 2020, 7:24 PM), https://www.financialnews.com.cn/hg/202010/t20201031_204309.html [https://perma.cc/RDS9-WHZ2] (China); Yu Shi, *Zai Jinrong Keji Fazhan Zhong Xuyao Sikao he Liqing de Jige Wenti* (在金融科技发展中需要思考和厘清的几个问题) [A Few Questions That Deserve Clarification in the Course of FinTech Development], CAIXIN (Nov. 2, 2020, 10:48 PM), [https://perma.cc/36YK-7NNT] (China); Jueshuo Zhou, *Daxing Hulanwang Qiye Jinru Jinrong Lingyu de Qianzai Fengxian yu Jianguan* (大型互联网企业进入金融领域的潜在风险与监管) [Potential Risks for Big Tech to Enter the Financial Industry and the Regulations], FINANCIALNEWS.COM.CN (Nov. 2, 2020, 8:40 AM), https://www.financialnews.com.cn/gc/gz/202011/t20201102_204376.html [https://perma.cc/6Y8W-AA4J] (China).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*; see also Angela Huyue Zhang, *China's Regulatory War on Ant*, PROJECT SYNDICATE (Mar. 12, 2021), <https://www.project-syndicate.org/commentary/china-bureaucracy-regulatory-war-on-ant-group-by-angela-huyue-zhang-2021-03> [https://perma.cc/6RZR-HJFE]; Barry Naughton, *Xi's System, Xi's Men:*

fallouts involving HNA Group and Anbang Insurance Corp Co., as well as the fraud cases that have erupted in P2P lending, the central leadership implemented a series of organizational shakeups to exercise comprehensive oversight. In 2017, the central government created the Financial Stability and Development Commission headed by Vice Premier Liu He to coordinate the various financial regulators in order to ensure that new financial innovations do not fall through the cracks of traditional regulation.²⁰³ The next year saw a massive new government overhaul that further consolidated financial regulatory power by merging the banking and insurance regulators.²⁰⁴ And the PBOC took over the banking regulator's legislative functions, further solidifying its leading role in maintaining financial stability.²⁰⁵ Given the Chinese top leaders' sensitivity to any perceived risk to financial stability, it is not surprising that they took a decisive step to rescind Ant's IPO.²⁰⁶ On October 31, 2020, the Financial Stability and Development Committee headed by Liu He decided that all kinds of financial activities and similar businesses should be regulated in the same way, clearing the way for regulators to tighten their scrutiny of Ant.²⁰⁷ This message was further reiterated by the Politburo on December 11, 2020, when it declared "strengthening antitrust regulation and preventing the excessive expansion of capital" to be a top work priority.²⁰⁸ A massive law enforcement campaign then ensued, as elaborated below.

C. Law Enforcement Campaign

Sebastian Heilmann and Elizabeth Perry observe that policy volatility in China is partly derived from the adaptive governance by the CCP.²⁰⁹ Even though the bureaucracy has gained a more prominent role after Mao, Heilmann and Perry argue that top-down initiatives, interventions, and campaigns are still employed frequently to disrupt bureaucratic routines.²¹⁰ In particular, campaigns are a very powerful governance tool in the pocket of

After the March 2018 National People's Congress, 56 CHINA LEADERSHIP MONITOR (2018), <https://www.hoover.org/research/xis-system-xis-men-after-march-2018-national-peoples-congress> [https://perma.cc/S99G-3ZQQ].

203. Naughton, *supra* note 202.

204. *Id.*

205. *Id.*

206. Yang & Wei, *supra* note 7.

207. *Id.*

208. Shanghai Zhengquan Bao (上海证券报) [Shanghai Securities Journal], *Zhongyang Yizhou Liang Ti Qianghua Fan Longduan he Fangzhi Ziben Wuxu Kuozhang Dui Ziben Shichang 27 Zi Yaoqiu* (中央一周两提强化反垄断和防止资本无序扩张 对资本市场27字要求) [The Central Government Emphasized Reinforcing Antitrust Efforts and Preventing Capital From Expanding in a Disorderly Fashion Twice in a Week and Made a 27-word Request], EASTMONEY.COM (Dec. 18, 2020, 9:58 PM), <https://finance.eastmoney.com/a/202012181742994213.html> [https://perma.cc/97KM-8VW2].

209. HEILMANN & PERRY, *supra* note 23, at 11.

210. *Id.* at 14.

the CCP to overcome bureaucratic resistance and rigidity.²¹¹ They trace their roots to the revolutionary period, when mass mobilization (“yundong”) was a defining feature of Mao’s governance strategy.²¹² Although mass campaigns have largely vanished after Mao, the Chinese government continued to employ campaign techniques by mobilizing grassroots party networks along with propaganda blitzes intended to enlist mass support.²¹³

In the past, campaigns were deployed in a wide range of legal areas such as crime and punishment, anti-corruption, environmental protection, and financial regulation.²¹⁴ Since the debacle of Ant Group’s IPO, the Chinese central leadership has similarly resorted to a law enforcement campaign by mobilizing various legislative and administrative resources and propaganda to tighten regulation over Chinese tech firms. Recall that the most distinguishing feature of HAPPY regulation is that the regulatory decision-making process is very hierarchical. Upon receiving the clear signal from the top leadership to tighten regulation over the tech sector, regulators from different ministries have the strong incentive to demonstrate their loyalty by taking an aggressive stance to regulate these tech firms. The regulators’ responsiveness to the top leadership’s initiatives are perfectly consistent with their parochial bureaucratic interests as it can further help expand their policy control.²¹⁵ Similar to many previous law enforcement campaigns, the Chinese regulators hastily introduced a myriad of laws and regulations, while imposing legal sanctions swiftly and severely on Chinese tech firms.²¹⁶

On November 2, 2020, four financial regulators jointly released draft rules on microlending which required microlenders, among other things, to contribute at least thirty percent of the loans they fund jointly with their

211. See, e.g., Nicole Ning Liu et al., *Campaign-style Enforcement and Regulatory Compliance*, 75 PUB. ADMIN. REV. 85 (2015); Benjamin van Rooij, *The Campaign Enforcement Style: Chinese Practice in Context and Comparison*, in COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 217–37 (Francesca Bignami & David Zaring eds., 2016).

212. Xin Frank He, *Sporadic Law Enforcement Campaigns as a Means of Social Control: A Case Study from a Rural-Urban Migrant Enclave in Beijing*, 17 COLUM. J. ASIAN L. 121, 134 (2003) (noting that “during the revolutionary period, the CCP had to rely on mass movements and campaigns to implement its policies because it had no state institutions.”); see SHIPING ZHENG, *PARTY V. STATE IN POST-1949 CHINA: THE INSTITUTIONAL DILEMMA* 154 (1996).

213. Elizabeth J. Perry, *Mass Campaigns to Managed Campaigns: “Constructing a New Socialist Countryside,” in MAO’S INVISIBLE HAND* 50 (Elizabeth J. Perry & Sebastian Heilmann eds., 2011) (quoting Zhao Ziyang, the former general secretary of the CCP: “I specifically stated that The Third Plenum resolved that there would be no more mass campaigns. However, people are accustomed to the old ways, so whenever we attack anything, these methods are still used.”).

214. See, e.g., Susan Trevaskes, *Severe and Swift Justice in China*, 47 BRIT. J. CRIMINOLOGY 23 (2007); Peng Wang, *Politics of Crime Control: How Campaign-Style Law Enforcement Sustains Authoritarian Rule in China*, 60 BRIT. J. CRIMINOLOGY 422 (2019); BENJAMIN VAN ROOIJ, *REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE AND ENFORCEMENT: THEORY AND CASES* (2006); Duoqi Xu et al., *China’s Campaign-Style Internet Finance Governance: Causes, Effects, and Lessons Learned for New Information-based Approaches to Governance*, 35 COMPUT. L. & SEC. REV. 3 (2019).

215. See *supra* note 31.

216. See, e.g., VAN ROOIJ, *supra* note 214; see also Trevaskes, *supra* note 214.

partner bank.²¹⁷ This new rule was aimed at ensuring that microlenders such as Ant would have skin in the game, thus reducing the risk of moral hazards. On the same day, Jack Ma and a few executives of Ant were summoned for a meeting with four financial regulators.²¹⁸ About a week later, the antitrust authority of the SAMR released draft antitrust guidelines on the platform economy, which aimed to tighten the antitrust regulation of online platforms.²¹⁹ On December 26, 2020, four Chinese financial regulators invited Ant for an administrative interview.²²⁰ Seeing that Ant appeared slow to follow these directives, Chinese financial regulators invited thirteen fintech businesses including Ant for a second administrative interview in April 2021 and imposed more specific and stringent requirements.²²¹

Although the campaign was initially triggered by the regulatory tensions in the fintech sector, it quickly spread to many other sectors permeated by these large online platforms. Since much of the tech firms' influence derives from their possession of strong market power, antitrust became an important regulatory tool to discipline Chinese Big Tech. Since November 2020, the antitrust bureau at the SAMR began vetting a large number of past mergers and acquisitions involving VIE structures and penalized many that failed to disclose their transactions.²²² However, the fines that were imposed were relatively low as the statutory limit is only RMB 500,000; the authority also did not unwind any of the past deals.²²³ In July 2021, the SAMR blocked a merger between Huya and Douyu, the two largest live-streaming video game platforms in China.²²⁴ It also imposed remedies on the 2016 merger between Tencent Music and China Music Corporation, requiring Tencent Music to end exclusivity arrangements with global record label companies.²²⁵

217. UPDATE 1-*China Issues Draft Rules to Regulate Online Micro-Lending Business*, REUTERS (Nov. 3, 2020), <https://www.reuters.com/article/china-lending-idUSL1N2HP035> [<https://perma.cc/7FUF-T2UB>].

218. See Yang & Wei, *supra* note 7.

219. See KING & WOOD MALLESONS, *supra* note 129.

220. John Liu et al., *China Tells Ant to Return to Its Payment Roots, Places Curbs*, BLOOMBERG (Dec. 27, 2020), <https://www.bloomberg.com/news/articles/2020-12-27/china-asks-ant-to-return-to-origin-of-payments-service> [<https://perma.cc/BTX7-Y4YU>] (noting that the regulators imposed several directives on Ant: first, Ant was to disconnect its payment services from its microlending business; second, all of Ant's financial services were to be subject to strict capital requirements; and third, Ant should restructure as a financial holding company with Chinese walls to separate its payment services, banking, insurance and investment services to prevent conflicts of interest.)

221. See Li & Van Fleet, *supra* note 170.

222. Yin et al., *The Coming Wave of Stringent Enforcement Actions in China*, FRESHFIELDS BRUCKHAUS DERINGER (Mar. 19, 2021), <https://www.freshfields.com/en-gb/our-thinking/knowledge/briefing/2021/03/the-coming-wave-of-stringent-enforcement-actions-in-china-4425/> [<https://perma.cc/6MBQ-6XEX>].

223. *Id.*

224. Iris Deng, *China's Antitrust Regulator Blocks Tencent's US \$5.3 Billion Merger of Game Streamers Huya and Douyu in Landmark Antimonopoly Case*, S. CHINA MORNING POST (July 10, 2021, 6:00 PM), <https://www.scmp.com/tech/policy/article/3140625/chinas-antitrust-regulator-blocks-tencents-us53-billion-merger-game> [<https://perma.cc/38H4-EL5T>].

225. Yujie Xue & Iris Deng, *China Antitrust: Beijing Orders Tencent to End Exclusive Music Licensing Deals in a First for the Country*, S. CHINA MORNING POST (July 24, 2021, 10:53 AM), <https://www.scmp.com/tech/policy/article/3140625/chinas-antitrust-regulator-blocks-tencents-us53-billion-merger-game>.

In addition to active merger enforcement, the SAMR also initiated a few high-profile conduct investigations. On Christmas Eve of 2020, the SAMR announced an investigation into Alibaba for conducting a “choose one from two” business practice, the misconduct its competitor JD.com accused Alibaba of in 2015.²²⁶ The regulator concluded its investigation in four months and imposed a fine of almost \$2.8 billion on Alibaba.²²⁷ The lightning speed of the investigation was a sharp departure from previous practice in large dominance cases, which could take years to conclude.²²⁸ After the record fine on Alibaba, four central ministries including the SAMR summoned thirty-four tech firms for an administrative interview, requesting these firms to rectify their exclusionary conduct within a month.²²⁹ All these firms vowed to adhere to the regulatory demand by issuing public statements promising to improve legal compliance. In late April 2021, the SAMR launched another antitrust investigation into Meituan for conducting exclusionary practices similar to Alibaba’s.²³⁰

Since tech firms’ misuse of consumer data could pose a serious threat to personal privacy and national security, data security also became a flash point during this round of the enforcement campaign. On July 2, 2021, the Cyberspace Administration of China (“CAC”) announced a cybersecurity investigation into Didi Chuxing, two days after the ride-hailing giant’s debut on the New York Stock Exchange.²³¹ This action appears to have been a deliberate and strategic tactic to inflict a reputation sanction on the firm in retaliation of its failure to heed the CAC’s earlier advice to postpone its IPO.²³² In response to growing pressures on U.S.-listed Chinese companies to turn over audit papers to American securities regulators, Chinese regulators have been tightening scrutiny over cross-border data transfer in recent

www.scmp.com/tech/big-tech/article/3142359/china-antitrust-beijing-orders-tencent-music-relinquish-exclusive [https://perma.cc/Y947-DTRB].

226. See Raymond Zhong, *With Alibaba Investigation, China Gets Tougher on Tech*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/business/alibaba-antitrust-jack-ma.html> [https://perma.cc/4QBS-ESSF].

227. Coco Liu et al., *China Fines Alibaba Record \$2.8 Billion After Monopoly Probe*, BLOOMBERG (Apr. 10, 2021), <https://www.bloomberg.com/news/articles/2021-04-10/china-fines-alibaba-group-2-8-billion-in-monopoly-probe> [https://perma.cc/33DV-BJER].

228. Eustance Huang, *China’s Antitrust Push Won’t Bring an ‘Explosion of Cases’ Against Online Campaigns, Professor Says*, CNBC (Nov. 23, 2020), <https://www.cnbc.com/2020/11/24/dont-expect-an-explosion-of-cases-from-chinas-antitrust-push-professor.html> [https://perma.cc/T9QL-93MA].

229. Stephanie Yang, *China’s Tech Giants Vow, in Unison, to Play by Regulator’s Rules*, WALL ST. J. (Apr. 14, 2021), <https://www.wsj.com/articles/chinas-tech-giants-vow-in-unison-to-play-by-regulators-rules-11618402448> [https://perma.cc/V3CK-YUVS].

230. Minghe Hu, *Meituan Becomes the Focus of China’s Antitrust Investigation as Government’s Scrutiny of Business Practice Shifts*, S. CHINA MORNING POST (Apr. 26, 2021, 5:18 PM), <https://www.scmp.com/tech/policy/article/3131121/china-antitrust-fury-drops-upon-meituan-after-record-fine-alibaba> [https://perma.cc/H62U-3EWJ].

231. *Id.*

232. Angela Huyue Zhang, *Didi’s Failure to Listen Forces Rewrite of Chinese Tech Listing Rules*, NIKKEI ASIA (July 9, 2021, 5:01 AM), <https://asia.nikkei.com/Opinion/Didi-s-failure-to-listen-forces-rewrite-of-Chinese-tech-listing-rules> [https://perma.cc/GVK4-CH2F].

years.²³³ The CAC reportedly urged Didi to conduct a thorough cybersecurity review before its U.S. listing, but the firm went ahead with its listing at lightning speed.²³⁴ This prompted the regulator to escalate its action by publicly announcing the investigation and ordering the removal of the Didi app from Chinese app stores.²³⁵ Fueled by nationalistic fervor and speculation about Didi's transfer of critical and sensitive data to the U.S. government, Chinese policymakers rushed to fill in a regulatory loophole with overseas listings.²³⁶ Shortly thereafter, the State Council released a guidance opinion, calling for relevant government departments to increase oversight of overseas listing rules.²³⁷ The CAC immediately followed up with detailed measures requiring data-rich tech firms to undergo cybersecurity review before their overseas listings.²³⁸

IV. IMPACT OF THE GREAT REVERSAL

As I have shown above, China's authoritarian regulatory governance comes with significant strengths but also with fundamental flaws. The vast discretion possessed by China's administrative authorities allows them to adapt and experiment with different policy initiatives, but also generates problems such as a lack of political accountability and undue administrative discretion.²³⁹ In the past, law enforcement campaigns induced "policy overshooting" during their intensive phases, but ended up with few long-term deterrent effects as the market expected these campaigns to be temporary.²⁴⁰ This makes it hard to predict the impact that the current law enforcement campaign will have. In the following discussion, I will examine some impacts that the current campaign has had on administrative agencies, societal

233. Lingling Wei & Keith Zhai, *Chinese Regulators Suggested Didi Delay Its U.S. IPO*, WALL ST. J. (July 5, 2021, 2:43 PM), <https://www.wsj.com/articles/chinese-regulators-suggested-didi-delay-its-u-s-ipo-11625510600> [<https://perma.cc/U6YR-J7CU>]; see Yuan Yang & Sun Yu, *Chinese Companies Face Uncertainty as Data Security Hawks Gain Power*, FIN. TIMES (July 17, 2021), <https://www.ft.com/content/9a35c71d-76b7-437c-b99f-82d0bd4d45dc?segmentID=5d628a47-4099-8385-608a-b4d1f29c7294> [<https://perma.cc/9YLD-B2FP>].

234. Wei & Zhai, *supra* note 233.

235. David Wertime & Shen Lu, *Didi's Humbling is the End of an Era for Chinese Cross-Border IPOs*, PROTOCOL (July 7, 2021), <https://www.protocol.com/newsletters/protocol-china/didi-china-tech-ipo?rebellitem=1#rebellitem1> [<https://perma.cc/N9RU-A9N2>].

236. *Why Didi's Removal from App Win Public Support*, GLOB. TIMES (July 5, 2021, 6:53 PM), <https://www.globaltimes.cn/page/202107/1227859.shtml> [<https://perma.cc/G5Y8-28X2>]; see Brian Wong, *How Chinese Nationalism Is Changing*, DIPLOMAT (May 26, 2020), <https://thediplomat.com/2020/05/how-chinese-nationalism-is-changing/> [<https://perma.cc/96MG-8QLX>].

237. Wertime & Lu, *supra* note 235.

238. Keith Zhai & Frances Yoon, *Beijing Blocks Merger, Tightens Data Rules as Post-Didi Crackdown Speeds Up*, WALL ST. J. (July 10, 2021, 2:28 AM), <https://www.wsj.com/articles/beijing-blocks-merger-tightens-data-rules-as-post-didi-crackdown-speeds-up-11625898515> [<https://perma.cc/G9UE-K3QR>].

239. HEILMANN & PERRY, *supra* note 23, at 24.

240. Chen Li et al., *The Hybrid Regulatory Regime in Turbulent Times: The Role of the State in China's Stock Market Crisis in 2015-2016*, 16 REG. & GOVERNANCE 392, 397-98 (2022); see also *supra* note 212.

welfare, the consumer internet business, Chinese technology, as well as the global investment community.

A. *Administrative Agencies*

Chinese administrative enforcement agencies that exercise policy control over the tech sector appear to be some of the biggest beneficiaries from the law enforcement campaign. The top Chinese leadership's endorsement of the campaign cleared the political hurdles and bureaucratic resistance for these regulators and enhanced the legitimacy of their actions. Meanwhile, increased influence and prestige enable an agency to request a larger budget and more personnel. The expansion of agencies also allows individual case handlers more opportunities to advance their careers within the bureaucracy, while enhancing their exit options when they leave the government to work for the private sector.²⁴¹ This is particularly the case for the PBOC, the SAMR, and the CAC, the three most active enforcers during this enforcement campaign.

The PBOC, China's central bank, is not only in charge of monetary policy but also macroprudential regulation. It had been concerned about Ant Group's ability to extend its dominance from the online payments sector into other financial services, which would infringe on the interests of its competitors, including the state banks.²⁴² To create a level-playing field between Ant and other fintech companies, the regulator asked Ant to decouple inappropriate links between Alipay and its other financial products.²⁴³ To further enhance the legitimacy of its actions, the agency announced new draft guidelines in January 2021 to regulate the online payment industry.²⁴⁴ The guidelines include antitrust provisions such as the definition of the relevant market in the online payment industry, as well as the consequences of abuse by online payment firms.²⁴⁵ Strikingly, the PBOC's guidelines also indicate breaking up an online payment platform as a form of remedy.²⁴⁶ Despite being a very powerful financial regulator, however, the PBOC has no authority to enforce the Anti-Monopoly Law ("AML"), which is a prerogative of the SAMR. Moreover, under China's AML, there is no legal basis

241. ZHANG, *supra* note 29, at 35. See generally JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1991).

242. See Zhang, *supra* note 43.

243. *Id.*

244. *Id.*

245. See Josh Ye et al., *Why China's Central Bank Leads Antitrust Drive and How This May Affect Alipay, WeChat Pay*, S. CHINA MORNING POST (Jan. 22, 2021), <https://www.scmp.com/tech/policy/article/3118883/why-chinas-central-bank-leads-antitrust-drive-and-how-may-affect-alipay> [<https://perma.cc/EU4V-R5JT>]; Tom Mitchell et al., *Crackdown on Jack Ma's Empire Gathers Pace Despite Reappearance*, FIN. TIMES (Jan. 21, 2021), <https://www.ft.com/content/3a7438c5-9fe4-4b8e-94c5-6cf454c38cb4> [<https://perma.cc/JP6A-BR2P>].

246. Mitchell et al., *supra* note 245.

to break up a firm for abuse of dominance.²⁴⁷ The most the regulators can do is to impose a fine, confiscate illegal gains, and ask the firm to desist from anticompetitive conduct.²⁴⁸ Indeed, as the PBOC's guidelines are departmental rules, they cannot preempt the AML, which is a national law. It thus appears that the PBOC is trying to expand its turf so that it can have more policy control over Ant and other Chinese fintech companies.

We can observe similar cases of policy spillover in recent Chinese anti-trust enforcement. Along with the record fine on Alibaba in April 2021, the SAMR released administrative guidance on the firm.²⁴⁹ Administrative guidance is not legally binding. It does, however, set out the regulator's expectations for the e-commerce giant. The guidance made sixteen compliance requests, covering areas such as antitrust compliance, platform self-governance, data protection, fair competition, consumer protection, dispute resolution, and improvement of experience for online merchants.²⁵⁰ Not coincidentally, these areas of compliance also fall within the broader mandates of the SAMR, a vast conglomerate that oversees various aspects of market regulation.²⁵¹ It thus appears that the SAMR is trying to leverage its antitrust functions to enhance its authority in other areas of market regulation. The SAMR and other regulators also applied similar tactics to thirty-three other Chinese tech firms, which were required to conduct self-examinations and submit rectification plans within a month.²⁵² As revealed in the public statements released by these tech firms, the agencies ordered them to improve compliance in a wide range of areas that go far beyond antitrust obligations.²⁵³ For instance, the public statement by JD.com vowed to improve compliance with the Consumer Protection Law, the E-Commerce Law,

247. See Fanlongduan Fa (反垄断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 48 CLI.1.96789 (EN) (Lawinfochina).
248. *Id.*

249. *Chinese Regulator Fines Alibaba, Sends Policy Signal to Ensure Development and Fairness of Online Economy*, GLOB. TIMES (Apr. 10, 2021, 9:08 AM), <https://www.globaltimes.cn/page/202104/1220682.shtml> [<https://perma.cc/JA66-5D7T>].

250. Shichang Jianguan Zongju Yifa Dui Ali Baba Jituan Konggu Youxian Gongsi Zai Zhongguo Jingnei Wangluo Lingshou Pingtai Fuwu Shichang Shishi "Er Xuan Yi" Longduan Xingwei Zuochu Xingzheng Chufa (市场监管总局依法对阿里巴巴集团控股有限公司在中国境内网络零售平台服务市场实施"二选一"垄断行为作出行政处罚) [State Administration for Market Regulation ("SAMR") Imposed Administrative Penalty Against Alibaba Group Holdings Limited For Its "Choosing One From Two" Behavior in Domestic Internet Retail Services Platform Industry], Apr. 10, 2021, https://www.samr.gov.cn/xw/zj/202104/t20210410_327702.html [<https://perma.cc/GM87-HA2G>] (China).

251. State Administration for Market Regulation, Jigou (机构) [Organization], SAMR, <http://www.samr.gov.cn/jg/> [<https://perma.cc/EDR9-MMKK>] (last visited Feb. 26, 2022).

252. *Baidu, Jingdong, Meituan, 360, Zijie Tiaodong Deng Fabu Hegui Jingying Chengnuoshu* (百度、京东、美团、360、字节跳动等发布合规经营承诺书) [*Baidu, JD.com, Meituan, 360, and ByteDance etc. Published Commitment Letter for Compliance*], SINA NEWS (Apr. 14, 2021, 9:10 AM), <https://finance.sina.com.cn/tech/2021-04-14/doc-ikmxzfmk6691431.shtml> [<https://perma.cc/B746-YXQG>] (China).

253. *Id.*

the AML, the Advertising Law, and the Price Law, all of which fall within the broader mandate of the SAMR.²⁵⁴

The CAC, a relatively new government department set up in 2014 to coordinate a fragmented regulatory structure to govern China's cyberspace, also gained significant clout during this enforcement campaign.²⁵⁵ Prior to Didi's U.S. listing, China already passed an array of cybersecurity laws and data protection laws that govern cross-border data transfers.²⁵⁶ However, there were few investigations and no publicly available precedents. The CAC's investigation into Didi represents the first major cybersecurity review of Chinese tech firms, setting up an important precedent for future compliance. By issuing new draft guidelines on cybersecurity reviews, the CAC gained an indispensable regulatory role in vetting overseas listings of data-rich Chinese firms.²⁵⁷ Meanwhile, the Cyber Security Review Office under the CAC, once an obscure bureau created in 2020 as a joint task force by twelve central ministries to assess cybersecurity risks, rose to become the key gatekeeper in overseeing cross-border data transfer issues.²⁵⁸

In addition to expanding the regulatory turf, this enforcement campaign has also led to institutional changes. Although enforcement campaigns can be short-lived, the institutional changes they bring about can have long-lasting impact. In November 2021, the antitrust bureau at the SAMR, founded in 2018 after the consolidation of the three former antitrust authorities, was upgraded to vice-ministerial status.²⁵⁹ The newly elevated antitrust bureau will reportedly expand by increasing its number of officials from about forty to 100, before reaching 150 in five years.²⁶⁰ The budget for the antitrust bureau will also increase, with more funding for daily opera-

254. *Id.*

255. Nabil Alsabah, INFORMATION CONTROL 2.0: THE CYBERSPACE ADMINISTRATION OF CHINA TAMES THE INTERNET, MERICS CHINA MONITOR (2016).

256. The main laws include the National Security Law (promulgated in July 2015), the Cybersecurity Law (effective in June 2017), the Measures for Cybersecurity Review (promulgated in April 2020), as well as the Data Security Law (promulgated in June 2021).

257. Lingling Wei, *China's Cyber Watchdog to Police Chinese Overseas Listings*, WALL ST. J (July 8, 2021, 7:04 AM), <https://www.wsj.com/articles/chinas-cyber-watchdog-to-police-chinese-overseas-listings-11625742254> [https://perma.cc/VD7V-6WYW].

258. Minghe Hu & Coco Feng, *China's Big Tech Crackdown: How an Obscure Office in Beijing's Cybersecurity Administration Has Struck Fear into the Country's Tech Giants*, S. CHINA MORNING POST (July 9, 2021, 1:00 PM), <https://www.scmp.com/tech/big-tech/article/3140432/chinas-big-tech-crackdown-how-obscure-office-beijings-cybersecurity> [https://perma.cc/3ZH7-HREK]; see Coco Feng, *Why Does Ride-Hailing Giant Didi's Cybersecurity Review Involve So Many Chinese Government Agencies and Who Is Absent?*, S. CHINA MORNING POST (July 19, 2021, 5:00 PM), <https://www.scmp.com/tech/policy/article/3141649/why-does-ride-hailing-giant-didis-cybersecurity-review-involve-so-many> [https://perma.cc/UN8J-ALRG].

259. *China Establishes Anti-Monopoly Bureau to Secure Fair Competition*, XINHUA (Nov. 19, 2021, 2:03 PM), http://english.www.gov.cn/statecouncil/wangyong/202111/19/content_WS61973e4cc6d0df57f98e52d9.html [https://perma.cc/56MM-NTRH].

260. Pei Li & Coco Liu, *China to Expand Anti-Monopoly Bureau as Crackdown Widens, Sources Say*, BLOOMBERG (Oct. 12, 2021, 12:19 PM; updated Oct. 14, 2021, 9:53 AM), <https://www.bloomberg.com/global-economics/china-said-to-expand-anti-monopoly-bureau-as-crackdown-widens> [https://perma.cc/L9P6-QCJS].

tions and research projects.²⁶¹ This will be an important boost to this small bureau which used to face significant resource constraints.²⁶² The empowerment of the Chinese antitrust regulator, however, also comes with a further risk of abuse of administrative power, given that agency actions are seldom challenged in court. As pointed out by Wentong Zheng, agencies have incentive to over-enforce in order to broaden their turf and expand their influence.²⁶³ With so much at stake, Chinese tech firms are increasing efforts to lobby these regulators, further heightening the risk of rent seeking and regulatory capture.²⁶⁴

B. Social Welfare

The most important question for the great reversal in regulating Chinese tech giants is whether it will ultimately benefit the hundreds of millions of Chinese consumers, small merchants, delivery workers, and ride-hailing drivers, who are connected by these behemoth online platforms, as well as the employees and contractors of those platforms. During the ongoing law enforcement campaign, it appears that Chinese central administrative authorities have leveraged law enforcement, one of its most potent legal weapons against Big Tech, to achieve welfare redistribution goals. Meanwhile, Chinese tech firms have appeared very pliant by quickly adapting to the demands from the regulators.

The case against Alibaba serves as a good example. After receiving its record fine, Alibaba promised to invest billions of dollars to reduce access fees for merchants and to enhance merchant experience.²⁶⁵ While this commitment is not legally required, it does echo some of the requirements laid out in the administrative guidance issued by the SAMR. Among other things, the administrative guidance stipulates that Alibaba cannot charge unreasonably high service fees and that the firm should provide small- and medium-sized merchants with more convenient and high-quality services.²⁶⁶ In past antitrust investigations, especially in cases investigated by the former agency the National Development and Reform Commission (“NDRC”), firms under antitrust investigation were pressured to lower

261. Cheng Leng, Julie Zhu, Pei Li, Kane Wu & Josh Horwitz, *Exclusive: China's Antitrust Regulator Bulking Up as Crackdown on Behemoths Widens*, REUTERS (Apr. 11, 2021, 6:00 AM), <https://www.reuters.com/world/china/exclusive-chinas-antitrust-regulator-bulking-up-crackdown-behemoths-widens-2021-04-11/> [https://perma.cc/D65F-D5CK].

262. Jing Yang, *China Beefs Up Antimonopoly Body Amid Regulatory Push*, WALL ST. J. (Apr. 30, 2021, 9:58 AM), <https://www.wsj.com/articles/china-beefs-up-antimonopoly-body-amid-regulatory-push-11619791132> [https://perma.cc/NZ3C-Q4DR].

263. ZHENG, *supra* note 212, at 1269.

264. See Yu, *supra* note 114.

265. Raymond Zhong, *Alibaba Will Lower Merchant Fees After Antitrust Fines*, N.Y. TIMES (Apr. 11, 2021), <https://www.nytimes.com/2021/04/11/business/alibaba-fees-antitrust-case.html> [https://perma.cc/A3SV-Z73S].

266. See State Administration for Market Regulation, *supra* note 250.

prices as part of their settlements with the agency.²⁶⁷ For instance, Qualcomm, which was fined by the NDRC in 2015 for abusing its dominant position in China, offered to reduce thirty-five percent of its royalty rates for its licensees in China.²⁶⁸ This important remedy was curiously omitted in the final penalty decision, so it appears that Qualcomm offered an extralegal remedy to appease the NDRC.²⁶⁹

The fact that Chinese antitrust enforcement is being used to address income inequality and redistribute wealth was also evident in a recent central enforcement action against Chinese online food delivery and ride-hailing platforms. In May 2021, eight central ministries summoned ten delivery and ride-hailing businesses, urging them to reduce fees charged to merchants and drivers, enhance driver benefits, and improve their security. One major public complaint about firms such as Didi, the largest ride-hailing business in China, relates to the practice of charging unfairly high commissions on drivers. Didi explained that it charged more than thirty percent commission in only 2.7% of all orders, operating overall on a thin margin of 3.1%.²⁷⁰ Didi and other food delivery companies have also been criticized for the opaque mechanisms they use to distribute orders and the lack of labor and safety protection for their drivers.²⁷¹ After the meeting, all ten companies concerned promised to conduct a comprehensive review of their operations and rectify their business practices to improve conditions for their drivers.²⁷² In late July 2021, the SAMR and six other central ministries issued guidelines to protect labor rights for delivery drivers, setting out requirements on minimum wage, improvements of work conditions, and welfare benefits.²⁷³ It thus appears that the central administrative agencies are

267. ZHANG, *supra* note 29, at 41–44.

268. *Id.* at 31.

269. *Id.*

270. Yujie Xue & Minghe Hu, *Beijing Orders Meituan, Didi Chuxing and Other Ride-Hailing Providers to Give Drivers a Fair Share of Revenue*, S. CHINA MORNING POST (May 15, 2021, 7:00 PM), <https://www.scmp.com/tech/big-tech/article/3133614/beijing-orders-meituan-didi-chuxing-and-other-ride-hailing-providers> [<https://perma.cc/7BXZ-XVT2>].

271. Didi Chuxing, *Meituan Chuxing Deng 10 Jia Jiaotong Yunshu Xin Yetai Pingtai Bei 8 Bumen Lianhe Yuetan*, (滴滴出行、美团出行等10家交通运输新业态平台被8部门联合约谈) [*Ten Online Transportation Companies Including Didi Chuxing and Meituan Were Summoned for Regulatory Talks by Eight Ministries*], SINA NEWS (May 14, 2021, 3:11 AM), <https://finance.sina.com.cn/chanjing/gsnews/2021-05-14/doc-ikmxzfm2427766.shtml> [<https://perma.cc/7DYT-E85A>] (China).

272. *Id.*

273. Josh Ye, *China Moves to Protect Food Delivery Drivers from Digital Exploitation, Knocking Stocks such as Services Giant Meituan*, S. CHINA MORNING POST (July 26, 2021), <https://www.scmp.com/tech/big-tech/article/3142588/china-moves-protect-food-delivery-drivers-digital-exploitation> [<https://perma.cc/34J5-5VKM>]; see also Guanyu Luoshi Wangluo Canyon Pingtai Zeren Qieshi Weihu Waimai Songcan Yuan De Quanyi de Zhidao Yijian (关于落实网络餐饮平台责任 切实维护外卖送餐员权益的指导意见) [*Guidance Opinion on Implementing Internet Catering Platforms' Responsibilities and Strengthening Protection for Delivery Workers' Rights*] (promulgated by the State Administration for Market Regulation, July 26, 2021), http://www.samr.gov.cn/xw/zj/202107/t20210726_333061.html [<https://perma.cc/G5JF-H9GU>] (China).

leveraging the ongoing enforcement campaign to negotiate better conditions for merchants and workers of big platforms.

In addition to the various “soft” regulatory tools such as administrative guidance and administrative interviews, the Chinese government also tries to influence the tech firms through propaganda. A recent commentary from an affiliated newspaper of China’s top political advisory body criticized the infamous “996 working culture,” which refers to the unwritten rules in the Chinese tech sector that push employees to toil from 9 a.m. to 9 p.m. six days a week.²⁷⁴ Using terms from Karl Marx’s influential critique of capitalism, the author called for the tech giants to refrain from “limitless exploitation of surplus labor for high surplus value.”²⁷⁵ Amid the heightened public scrutiny, firms such as ByteDance and Kuaishou announced plans to reform their controversial working cultures.²⁷⁶ In an effort to reduce employees’ work hours and to answer Beijing’s call to boost employment, tech firms such as Alibaba, ByteDance, Tencent, and Meituan were also hiring more college graduates during the regulatory crackdown.²⁷⁷

Meanwhile, Chinese tech executives appeared to curry favor with the Chinese public by donating more of their personal wealth to charities. In 2021, Wang Xing, the CEO of Meituan, promised to donate \$2.27 billion shares for environmental and social initiatives.²⁷⁸ During the same year, Pony Ma, the founder of Tencent, pledged two billion dollars of his shares to charity, while Tencent promised to spend around \$7.7 billion in social and environmental initiatives.²⁷⁹ Colin Huang, who just departed Pinduoduo, also promised to devote more time to basic research, while Zhang Yiming at ByteDance was recently quoted saying he is “giving back to society.”²⁸⁰ The current enforcement campaign therefore appears to be redistributing income from platform shareholders to the users and the general public, thus helping

274. Coco Feng, *China’s Big Tech Sector Urged to Abide by Karl Marx’s Ideals, Do Away with 996 Work Culture*, S. CHINA MORNING POST (July 14, 2021, 10:30 PM), <https://www.scmp.com/tech/big-tech/article/3141129/chinas-big-tech-sector-urged-abide-karl-marxs-ideals-do-away-996-work> [https://perma.cc/4R6Z-5YSD].

275. *Id.*

276. Jane Zhang & Tracy Qu, *Kuaishou Ends Gruelling Overtime Policy as China’s Big Tech Try to Reform Controversial 996 Working Culture*, S. CHINA MORNING POST (June 25, 2021, 6:30 PM), <https://www.scmp.com/tech/big-tech/article/3138781/kuaishou-ends-gruelling-overtime-policy-chinas-big-tech-try-reform> [https://perma.cc/Y8UG-K8SF].

277. Josh Ye, *China’s Tech Giants Go on Hiring Spree for Fresh Graduates Despite Beijing’s Crackdown on the Sector*, S. CHINA MORNING POST (July 26, 2021, 6:00 PM), <https://www.scmp.com/tech/big-tech/article/3142572/chinas-tech-giants-go-hiring-spree-fresh-graduates-despite-beijings> [https://perma.cc/9A8X-HCN8].

278. Sophie Yu, Tony Munroe & Yingzhi Yang, *Meituan Founder Donates \$2.27 Billion Shares as Charity Grips Chinese Billionaires*, REUTERS (June 4, 2021, 2:25 AM), <https://www.reuters.com/technology/meituan-founder-donates-227-bln-shares-charity-grips-chinese-billionaires-2021-06-04/> [https://perma.cc/9NGG-3MKS].

279. Yuan Yang, *How China is Targeting Big Tech*, FIN. TIMES (June 18, 2021), <https://www.ft.com/content/baad4a14-efac-4601-8ce4-406d5fd8f2a7> [https://perma.cc/L64B-RQMY].

280. *Id.*

the government accrue popular support.²⁸¹ In fact, the cultivation of mass support is reminiscent of the populist strategies often employed by the CCP to enhance its legitimacy.²⁸² This phenomenon also echoes what scholars have long identified as a strategy of the authoritarian rule: to survive and stay in power, an authoritarian government not only “suppresses” but also “pleases” its citizens by rewarding them direct and tangible economic benefits.²⁸³

As I have shown above, Chinese central administrative agencies are employing a variety of informal legal tools such as guidance and interviews to pressure Chinese tech firms into reducing prices and improving conditions for their employees, contractors, and suppliers. However, the existing anti-trust legal framework does not appear to offer a clear and strong legal basis for the agencies to do so. The lack of a strong institutional basis for requesting these types of remedies thus casts doubt on their legitimacy and effectiveness. For instance, the administrative guidance issued on Alibaba will last three years, suggesting that the firm will be subject to close monitoring by the SAMR. Given the vagueness of the guidance’s language, it is not entirely clear what exactly Alibaba must fulfill in order to meet those “soft requirements” laid down in the guidance, nor is it clear what the administrative process is to ensure that the SAMR’s monitoring is adequate, transparent, and fair, without being subject to potential interference from interest group lobbying. Above all, there are significant uncertainties with compliance when the administrative guidance expires in three years. Indeed, when this law enforcement campaign ends, it is highly uncertain whether these “voluntary” commitments offered by Chinese tech firms and their executives will last.

Besides leveraging antitrust law as a powerful instrument to combat income inequality, the Chinese government is also starting to initiate labor law reforms. A longstanding concern is that delivery workers do not receive adequate labor protection due to their status as contractors rather than employees. In fact, many large platforms do not directly sign contracts with the delivery workers, but rather outsource this task to third party contractors. As such, there is no direct contractual relationship between the online platform and the gig workers, allowing the former to obviate the need to pay

281. In the past, the Chinese Communist Party has employed similar welfare redistribution schemes to gain mass support. See Yueran Zhang, *The Chongqing Model One Decade On*, MADE IN CHINA J. (Jan. 11, 2021), <https://madeinchinajournal.com/2021/01/11/the-chongqing-model-one-decade-on/> [<https://perma.cc/8V2K-8PKZ>]. See also generally THE USE OF MAO AND THE CHONGQING MODEL (Joseph Y.S. Cheng ed., 2015).

282. See, e.g., MARY E. GALLAGHER, *AUTHORITARIAN LEGALITY IN CHINA: LAW, WORKERS, AND THE STATE* 45 (2017). See generally WENFANG TANG, *POPULIST AUTHORITARIANISM: CHINESE POLITICAL CULTURE AND REGIME SUSTAINABILITY* (2016); Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in *MAO’S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTATIVE GOVERNANCE IN CHINA 165–200* (Sebastian Heilmann & Elizabeth J. Perry, eds., 2011).

283. See MILAN SVOLIK, *THE POLITICS OF AUTHORITARIAN RULE* 9 (2012) (noting that repressions and co-optation are the two main instruments for the authoritarian control).

social security to the latter.²⁸⁴ In practice, Chinese judges are disinclined to recognize an employment relationship between drivers and the platforms except when the drivers have caused liabilities to third parties.²⁸⁵ To enhance their bargaining position, delivery drivers have tried to organize unions or launch strikes to collectively negotiate with the tech giants.²⁸⁶ Yet, local governments have often cracked down on such efforts for fear of social instability.²⁸⁷ Moreover, unions have been of little help to courier workers because unions lack standing to represent independent contractors.²⁸⁸ In July 2021, the All-China Federation of Trade Unions, the only legal labor union in China, issued opinions calling for the improvement of labor rights in China's digital economy.²⁸⁹ A few days later, eight Chinese regulators including the SAMR, the Ministry of Human Resources and Social Security, and the Supreme People's Court issued guidance on safeguarding the basic rights of gig economy workers, suggesting platforms should sign labor contracts with a worker whenever there exists a clear labor relationship between them.²⁹⁰ It remains to be seen how such requirements will be implemented in practice. Above all, it is not entirely clear whether the strengthening of labor protection for gig workers will necessarily benefit them. Indeed, if the regulation becomes too burdensome for tech firms, it could lead to the unintended consequences of unemployment and lower wages. Hence, the regulators will need to strike a very delicate balance between labor protection and economic growth.

Meanwhile, tax reforms, the traditional tool to address income inequality, have yet to be introduced in China. In recent years, many countries have considered imposing a digital service tax on large platform businesses.²⁹¹

284. Minghe Hu, *China's Left-Behind Gig Workers: As Big Tech Pushes for Profit, Labour Conditions Show Little Sign of Improvement*, S. CHINA MORNING POST (June 8, 2021, 5:30 AM), <https://www.scmp.com/tech/policy/article/3136295/chinas-left-behind-gig-workers-big-tech-pushes-profit-labour-conditions> [https://perma.cc/599K-W6QY].

285. Zou, *supra* note 125, at 279.

286. Hong Kong Confederation of Trade Unions, *Report on Food Delivery Rider Unrest (2017-2018)* (Oct. 22, 2019) (on file with author); Zhou, *supra* note 77, at 25.

287. *The Gig Economy Challenges China's State-Run Labour Unions*, ECONOMIST (Jan. 27, 2021), <https://www.economist.com/china/2021/01/27/the-gig-economy-challenges-chinas-state-run-labour-unions> [https://perma.cc/2655-YRPU].

288. *Id.*

289. Masha Borak, *'Gig Workers of All Trades, United!' China's State Trade Union Calls for Branches for Gig Economy Workers*, S. CHINA MORNING POST (July 21, 2021, 7:00 AM), <https://www.scmp.com/tech/big-tech/article/3141846/gig-workers-all-trades-unite-chinas-state-trade-union-calls-branches> [https://perma.cc/F4EX-4MW4].

290. Ministry of Human Resource and Social Welfare et al., Guanyu Weihu Xing Jiuye Xingtai Laodongzhe Laodong Baozhang Quanyi de Zhidao Yijian (关于维护新就业形态劳动者劳动保障权益的指导意见) [Guidance Regarding Safeguarding The Labor Welfare of New Employment Formed Workers], July 16, 2021, http://www.gov.cn/zhengce/zhengceku/2021-07/23/content_5626761.htm [https://perma.cc/G4CR-BKYQ] (China); see Ye, *supra* note 277.

291. Aime Williams, *US Says Digital Tax in Spain, Austria and UK Are Discriminatory*, FIN. TIMES (Jan. 15, 2021), <https://www.ft.com/content/a5933b63-bdcb-44ab-9ca3-47d375cebc5c> [https://perma.cc/RM3E-236C].

China is closely watching this development; indeed, some Chinese government officials have suggested that China should follow this international trend.²⁹² Proponents argue that because platforms are mining user data, citizens should be able to share in the revenues generated by their own data.²⁹³ There is, however, a fierce debate among Chinese academics and policymakers over the ownership of user data, and China has yet to come up with a detailed proposal to levy a digital tax on its domestic tech giants.²⁹⁴

C. Consumer Internet Competition

Although the aggressive law enforcement campaign against Chinese Big Tech held the promise of giving smaller companies more opportunities to grow and succeed outside of Alibaba's and Tencent's ecosystem, it has yet to address the three most fundamental issues in the consumer internet business. The first is data monopolization.²⁹⁵ Both Tencent and Alibaba have amassed troves of consumer data over the years, creating barriers to entry for smaller rivals. This is particularly the case in the area of fintech businesses, where big data analysis plays a crucial role in supporting lending services. For this reason, the PBOC has been trying to break the two companies' data monopolies and has been aggressively pushing them to share their data with the government and other tech firms. There are limits, however, to what the PBOC can do: although the central bank is a powerful institution, it is not an antitrust regulator. Moreover, government mandates to share data may face significant obstacles as consumer consent is usually required for data sharing, especially for commercial purposes.²⁹⁶

292. Zoey Zhang, *China's Position on the Digital Service Tax*, CHINA BRIEFING (June 18, 2021), <https://www.china-briefing.com/news/chinas-position-on-the-digital-service-tax/> [https://perma.cc/Y2VJ-EVKQ].

293. *Id.*; see also Liang Zong et al., *Pingtai Jingji: Quanzhou Fanlongduan Xin Dongxiang Yu Zhongguo Jiankang Fazhan Lujing* (平台经济: 全球反垄断新动向与中国健康发展路径) [*Platform Economy: Global Antitrust Trend and China's Path to Healthy Development*], 3 EXPANDING HORIZONS 25 (2020). Similar arguments have also been voiced in the United States. See ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 205–49 (2018).

294. Yanjing Zhu (朱延静), *Shuzi Jingji Dailai Shuisbou Xin Tiaozhan Xin Jiye Shuisbou Zhibi Xiandaihua Shuiping Youdai Tisbeng* (数字经济带来税收新挑战新机遇 税收治理现代化水平有待提升) [*Digital Economy Brings Challenges and Opportunities to the Taxation System Modernization of Taxation Governance Expects More Improvement*], CHINA NEWS (Apr. 10, 2021, 8:55 AM), <http://www.chinanews.com/cj/2021/04-10/9451725.shtml> [https://perma.cc/2VKT-785X] (China); see also Zhang Junbin (张均斌), *Shuzi Shui Dachao Laixi Zhongguo Rube Yingdui* (“数字税”大潮来袭 中国如何应对) [*Digital Tax is Trending, How Will China React to the Digital Tax*], XINHUA NEWS (Jan. 19, 2021, 8:43 AM), http://www.xinhuanet.com/politics/2021-01/19/c_1126997630.htm [https://perma.cc/9SJY-TL7B] (China); see also Zhou Keqing (周克清) & Li Xia (李霞), *Pingtai Jingji Xia de Shuisbou Zhibi Tixi Chuangxin* (平台经济下的税收治理体系创新) [*Taxation Governance Innovation Under the Platform Economy*], 407 TAXATION RESEARCH 73 (2018).

295. Similar issues are also debated in the U.S. context. See PHILIPPON, *supra* note 104, at 275.

296. Angela Huyue Zhang, *Big Tech is the Regenerative Starfish of Our Times*, NIKKEI ASIA (May 7, 2021, 5:00 PM), <https://asia.nikkei.com/Opinion/Big-Tech-is-the-regenerative-starfish-of-our-times> [https://perma.cc/C6S6-5CVS].

In the past, Alibaba and Tencent refused the PBOC's request to transfer data, citing a lack of consumer consent.²⁹⁷ Given that the PBOC has gained much more leverage over Ant and other fintech giants now, it remains to be seen whether it can successfully enforce data sharing this time. Instead of a direct transfer of data, it appears that the PBOC is pressuring Ant to create a credit scoring company with a few other shareholders (including two state-owned firms) that would oversee Ant's vast amount of data.²⁹⁸ One major obstacle for the PBOC in breaking up data monopolies, however, is regulations that protect consumer privacy. Consumers could be reluctant to share their data with online platforms other than those they use.²⁹⁹ As such, there is an inherent tension between consumer privacy protection and competition law concerns.³⁰⁰ China promulgated its Personal Information Protection Law in November 2021, which imposes obligations on online platforms to obtain consent from consumers if there is any data transfer in the case of mergers or divestiture.³⁰¹ It remains to be seen how the PBOC will be able to push forward its data sharing initiative under China's existing regulatory framework.

The second challenge is interoperability.³⁰² As noted earlier, Tencent and Alibaba have each created their own ecosystem, providing companies within their systems with convenient access to super-apps such as WeChat, Taobao, and Alipay. But outsiders have restricted access to these apps, creating high barriers of entry for smaller rivals. Without addressing these interoperability issues, the current antitrust enforcement actions are unlikely to bring about changes in the competitive landscape of the Chinese tech industry. For instance, ByteDance, the parent company of Douyin and TikTok, has long had tensions with Tencent in that the latter blocked WeChat users' access to Douyin's content. In early February 2021, ByteDance filed a lawsuit against Tencent in Beijing for its restrictive business practices in violation of

297. Yuan Yang & Nian Liu, *Alibaba and Tencent Refuse to Hand Loans Data to Beijing*, FIN. TIMES (Sep. 18, 2019), <https://www.ft.com/content/93451b98-da12-11e9-8f9b-77216ebe1f17> [https://perma.cc/PJ5W-Z9WW].

298. Jing Yang & Xie Yu, *Jack Ma's Ant in Talks to Share Data Trove with State Firms*, WALL ST. J. (June 23, 2021, 6:08 AM), <https://www.wsj.com/articles/jack-mas-ant-in-talks-to-share-data-trove-with-state-firms-11624442902> [https://perma.cc/EM7R-T9TX].

299. Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, YALE L.J. FORUM 647 (2021); see also Mark A. Lemley, *The Contradictions of Platform Regulation*, SOC. SCI. RSCH. NETWK. (Feb. 3, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778909 [https://perma.cc/2UXE-NH9Z].

300. Colum Murphy et al., *Xi's Next Target in Tech Crackdown is China's Vast Reams of Data*, BLOOMBERG (Apr. 23, 2021, 2:00 AM), <https://www.bloomberg.com/news/articles/2021-04-23/xi-s-next-target-in-tech-crackdown-is-china-s-vast-reams-of-data> [https://perma.cc/2L7S-J3TD].

301. Rogier Creemers et al., *China's Draft 'Personal Information Protection Law'* arts. 22–23, NEW AMERICA (Oct. 21, 2020) <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/chinas-draft-personal-information-protection-law-full-translation/> [https://perma.cc/WZ6R-P4RW].

302. Similar antitrust problems exist in the United States. See Herbert J. Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. (2021); see also Randy Picker, *Forcing Interoperability on Tech Platforms Would Be Difficult to Do*, PROMARKET (Mar. 11, 2021), <https://promarket.org/2021/03/11/interoperability-tech-platforms-1996-telecommunications-act/> [https://perma.cc/92XB-FKQ3].

China's AML.³⁰³ Tencent countersued, claiming that Douyin was blocking links to WeChat and Tencent's messaging app QQ, and banning its influencers from redirecting content to these platforms.³⁰⁴ Beijing's ruling on this case could be a game changer for the tech industry.³⁰⁵ Meituan, the largest food delivery company in China, was also challenged by a Chinese consumer in December 2020, accusing it of abusing its dominance by temporarily removing Alipay as a payment option.³⁰⁶ Unlike speedy and hectic administrative enforcement, however, the litigation process is very protracted in China. In the past, tech firms have been able to fend off unfavorable lawsuits by raising jurisdictional issues, which further prolong the battle and complicate the cases.³⁰⁷

In July 2021, Alibaba and Tencent reportedly considered gradually opening up services to one another, although it remains to be seen how far these two firms will go in removing the virtual barriers they have built around their own ecosystems.³⁰⁸ A few days later, the Ministry of Industry and Information Technology ("MIIT"), China's telecom regulator, initiated a six-month rectification program aimed at tackling a whole host of consumer protection and unfair competition violations, including the interoperability issues.³⁰⁹ Notably, although the MIIT lacks the power to enforce the AML,

303. Coco Feng & Tracy Qiu, *China Antitrust: ByteDance and Tencent Legal Battle Seen as Potential Landmark Case*, S. CHINA MORNING POST (Feb. 3, 2021, 6:00 PM), <https://www.scmp.com/tech/apps-social/article/3120377/china-antitrust-bytedance-and-tencent-legal-battle-seen-potential> [https://perma.cc/5U9C-J5YM].

304. Coco Feng, *TikTok Owner ByteDance Sues Tencent Over Alleged Monopolistic Practices, WeChat Owner Vows to Countersue*, S. CHINA MORNING POST (Feb. 2, 2021, 9:29 PM), <https://www.scmp.com/tech/big-tech/article/3120266/tiktok-owner-bytedance-sues-tencent-over-alleged-monopolistic> [https://perma.cc/4WNN-EXL7].

305. *Id.*

306. Tracy Qu, *Meituan Faces Customer Lawsuit for Alleged Abuse of Market Power amid China's Ongoing Antitrust Crackdown*, S. CHINA MORNING POST (Dec. 30, 2020, 5:00 PM), <https://www.scmp.com/tech/apps-social/article/3115832/meituan-faces-customer-lawsuit-alleged-abuse-market-power-amid> [https://perma.cc/EQU5-5C73]. Notably, Meituan is partially owned by Tencent, so it belonged to the Tencent camp.

307. Cao Yanjun (曹彦君), *Douyin Zai Gao Tengxun, Zhechang Guansi Zhisbao San Wu Nian* (抖音再告腾讯, 这场官司至少三五年) [ByteDance Sues Tencent Again, And This Lawsuit May Sustain for Three to Five Years], 21ST CENTURY BUS. HERALD (Feb. 4, 2021), https://m.21jingji.com/article/20210204/herald/5187e125b12bb196d60f5521aa49966a_zaker.html [https://perma.cc/F6JU-WVQT] (China); see Shen Lu, *China's Big Tech Legal Teams are Unbeatable on Their Home Courts, Literally*, PROTOCOL (Apr. 30, 2021), <https://www.protocol.com/china/china-big-tech-unbeatable-lawyers> [https://perma.cc/A5Q2-5B3D] (noting that Douyin dropped an unfair competition case against Tencent after the latter successfully transferred the case to its home jurisdiction Shenzhen).

308. Jing Yang & Keith Zhai, *Alibaba and Tencent Consider Opening up Their 'Walled Gardens'*, WALL ST. J. (July 14, 2021, 6:45 AM), <https://www.wsj.com/articles/alibaba-and-tencent-consider-opening-up-their-walled-gardens-11626259544> [https://perma.cc/MWB5-RYE8].

309. Stephanie Yang, *China's Tech Regulator Orders Companies to Fix Anticompetitive, Security Issues*, WALL ST. J. (July 26, 2021, 11:49 PM), <https://www.wsj.com/articles/chinas-tech-regulator-orders-companies-to-fix-anticompetitive-security-issues-11627304021> [https://perma.cc/TS2W-LGVF]; see *Gongxin Bu Qidong Hulanwang Hangye Zbuanxiang Zhengzhi Xingdong* (工信部启动互联网行业专项整治行动) [Ministry of Industry and Information Technology Launched Special Rectification Campaign for Internet Industry], GONGXIN WEIBAO (工信微报) (Jul. 25, 2021, 11:15 PM), https://mp.weixin.qq.com/s/GZkFr4DVxP-PRvp0_RP8mAQ [https://perma.cc/2BAJ-CYG5] (China).

it can rely on its own departmental guidelines to request firms to rectify their behavior.

Last but not least is the challenge of dealing with the aggressive acquisitions of start-ups by incumbent monopolies.³¹⁰ As noted in Section III.A., Alibaba and Tencent have invested in hundreds of start-ups in the past decade. Although some of these investments are only minority interests, the two tech giants' common ownership over a large portfolio of start-ups poses anti-competitive concerns as it facilitates coordination among these companies.³¹¹ Although the antitrust agency started to retroactively review these past acquisitions, it has only levied small fines on the firms for their procedural failures to notify.³¹² The agency has not imposed any structural remedies, even in cases where the transaction parties have significant direct overlaps in the market. Tencent Music's acquisition of China Music Corporation offers a prime example. According to the SAMR's analysis, the two firms respectively possess thirty percent and forty percent of the market shares in the relevant market of online music broadcasting.³¹³ Instead of directly addressing the horizontal overlap concern in the merger review, the SAMR imposed behavioral remedies on Tencent Music to end its exclusive dealings with leading record label companies.³¹⁴ Notably, the SAMR launched an investigation into the exclusive arrangement between Tencent Music and a few leading record label companies in 2019, but the case was suspended in 2020.³¹⁵ It appears that the SAMR tried to avoid directly addressing the concentration issue by imposing remedies that treated the issue like an abuse of dominance case.

Another example is the SAMR's investigation into the merger between Huya and Douyu, which respectively possess forty percent and thirty per-

310. The harm of incumbents acquiring start-ups has caught a lot of scholarly attention. *See generally* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PENN. L. REV. 1879 (2020); Hovenkamp, *supra* note 302, at 106–119; William P. Rogerson & Howard Shelanski, *Antitrust Enforcement, Regulation and Digital Platforms*, 168 U. PENN. L. REV. 1911, 1937–38 (2020) (noting the challenges for antitrust enforcement in dealing with the acquisition of nascent competitors).

311. Scholars have long identified the potential anticompetitive harm resulting from common ownership even in circumstances of passive investment of minority interests. *See generally* Einer Elhauge, *Horizontal Shareholding*, 109 HARV. L. REV. 1267 (2016); Eric A. Posner, *Policy Implications of the Common Ownership Debate*, 66 ANTITRUST BULL. 140 (2021).

312. Celia Chen & Iris Deng, *Tencent, Didi Chuxing, Other Internet Firms Slapped with Fine by Antitrust Authorities for Failing to Disclose Deals*, S. CHINA MORNING POST (Apr. 30, 2021, 7:34 PM), <https://www.scmp.com/tech/big-tech/article/3131818/tencent-didi-chuxing-other-internet-firms-slapped-fine-antitrust> [<https://perma.cc/86MT-EPK4>].

313. Shichang Jianju Zongju Yifa Dui Tengxun Konggu Youxian Gongsu Zuochu Zeling Jiechu Wangluo Yingyue Dujia Bangquan Deng Chufa (市场监管总局依法对腾讯控股有限公司作出责令解除网络音乐独家版权等处罚) [SAMR Decided to Impose Penalty and Requested Tencent Holdings to End Exclusive Music Deals] (July 24, 2021), https://www.samr.gov.cn/xw/zj/202107/t20210724_333016.html [<https://perma.cc/U9LZ-2EWL>] (China).

314. *Id.*

315. Xue & Deng, *supra* note 225.

cent market shares in the livestream gaming market.³¹⁶ A close look at this case reveals that Tencent actually already possessed sole control over Huya and joint control over Douyu, so this proposed transaction would only change Tencent’s control in Douyu from joint control to sole control.³¹⁷ In the end, the SAMR prohibited the merger transaction.³¹⁸ However, no further remedies were imposed on either transaction party, despite Tencent’s common ownership over these two companies and the risk of coordination.

Thus far, in cases where the incumbent tech giants acquired a competitor in an adjacent market, the SAMR has cleared all such cases without imposing any remedies. For instance, the SAMR unconditionally approved Tencent Holding’s acquisition of Sogou, the second-largest search engine in China in July 2021.³¹⁹ As Tencent is mostly active in social media and gaming, it has few direct overlaps with Sogou. However, Sogou has a user base of over 700 million that could pose a competitive threat to Tencent.³²⁰ Instead of preemptively banning the incumbent’s acquisitions of adjacent firms, the SAMR appears to have taken a rather conservative approach by focusing on the direct competition between transaction parties.³²¹ The measures undertaken by SAMR could therefore further entrench the dominance of the incumbents without fundamentally tackling the market concentration problem in the digital economy.

D. *Sino-US Tech Rivalry*

While this law enforcement campaign has mostly affected the consumer internet business, it has also caused spillover effects in the hardcore technology sector. In fact, the Chinese government appears to be leveraging anti-trust enforcement to steer Chinese tech giants towards a more innovative path to stay competitive with the United States.³²² Since the intensification of the U.S.-China tech war, moving China up the technological ladder has

316. Shichang Jianguan Zongju Yifa Jingzhi Huya Gongsi Yu Douyu Guoji Konggu Youxian Gongsi Hebing (市场监管总局依法禁止虎牙公司与斗鱼国际控股有限公司合并) [SAMR Decided to Prohibit the Merger Between Huya and Douyu International Corporation], July 10, 2021, https://www.samr.gov.cn/xw/zj/202107/t20210710_332525.html [<https://perma.cc/74TE-Q4A7>] (China).

317. *Id.*

318. *Id.*

319. Iris Deng, *China Antitrust: Beijing Approves Tencent’s Acquisition of Search Engine Sogou after Vetoing Huya-Douyu Merger*, S. CHINA MORNING POST (Jul.13, 2021, 1:30 PM), <https://www.scmp.com/tech/policy/article/3140877/china-antitrust-beijing-approves-tencents-acquisition-search-engine> [<https://perma.cc/C3G4-ZJZ8>].

320. Henrik Saetre, *Top 5 Chinese Search Engines in 2022 (With Market Share)*, ADCHINA.IO (last visited Feb. 26, 2022), <https://www.adchina.io/top-chinese-search-engines/>.

321. Mark M. Lemley & Andrew McCreary, *Exit Strategy*, 101 BOSTON U. L. REV. 1, 85 (2021) (calling on antitrust agencies to pay more attention to acquisitions by incumbent monopolists even if the target firms are not direct competitors); see also *supra* note 308.

322. Angela Huyue Zhang, *China Is Leaning Into Antitrust Regulation to Stay Competitive with the U.S.*, FORTUNE (Feb. 9, 2021, 7:00 PM), <https://fortune.com/2021/02/08/china-antitrust-tech-alibaba-tencent-billionaires/> [<https://perma.cc/7EJV-3L9A>].

become the top priority of the Chinese leadership.³²³ In March 2021, Premier Li Keqiang outlined key areas where major breakthroughs in core technologies are needed, including semiconductors, operating systems, computer processors, and cloud computing.³²⁴ Unlike U.S. tech giants such as Google and Facebook, which have gained a strong foothold all over the world, China's largest tech firms such as Alibaba and Tencent have yet to become internationally competitive.³²⁵ Although they stand at the forefront of mobile payment and e-commerce, their success is largely owed to China's vast consumer market and cheap labor.³²⁶

Daron Acemoglu, a prominent economist, has argued that the most pernicious effects of Big Tech firms stem from their ability to direct technological changes as these companies only have incentives to fund research that is compatible with their own interests and business models.³²⁷ Due to the gargantuan size of Big Tech, smaller players have few options but to make their products and services interoperable and subordinate to the major platforms, resulting in less diversity in research and development.³²⁸ Acemoglu envisages a best-case scenario in which the government chooses a more diverse research portfolio that would induce a higher growth rate.³²⁹ To some extent, the Chinese government is heading in the direction suggested by Acemoglu to diversify the innovation portfolios of Chinese tech firms.

In December 2020, a commentary appeared in the *People's Daily*, a party mouthpiece, criticizing Chinese tech firms for their excessive competition in community group-buying businesses, and urged them to forge ahead with higher ambitions to advance China's technological innovations.³³⁰ Pliant tech firms quickly adapted to the government's objective by further committing to investment in foundational sciences and technology. Indeed, the more useful these firms are to the government, the more protection they can seek, and the more room they will have to lobby for favorable policy treatment. In some ways, Chinese Big Tech has been heading in this direction for a while. Tencent has promised to invest seventy billion dollars in new digi-

323. Yuan, *supra* note 37.

324. Colum Murphy et al., *China to Pour More Money Into Chips, AI and 5G to Catch U.S.*, BLOOMBERG (Mar. 5, 2021), <https://www.bloomberg.com/news/articles/2021-03-05/chinese-premier-calls-for-major-breakthroughs-in-core-tech> [https://perma.cc/S4C4-V2BV].

325. Zhang, *supra* note 322.

326. *Id.*

327. Daron Acemoglu, *Antitrust Alone Won't Fix the Innovation Problem*, PROJECT SYNDICATE (Oct. 30, 2020), <https://www.project-syndicate.org/commentary/google-antitrust-big-tech-hurdle-to-innovation-by-daron-acemoglu-2020-10> [https://perma.cc/N4K8-DK8L].

328. Daron Acemoglu, *Diversity and Technological Progress*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED* 319, 345 (Josh Learner & Scott Stern eds., 2012).

329. *Id.*

330. People's Daily Editorial, *Renmin Ribao Ping Shequ Tuangou: Bie Zhi Dianjizhe Ji Kan Baicai, Keji Chuangxin de Xingchen Dabai Geng Lingren Xinbaopengpai* (人民日报评社区团购: 别只惦记着几捆白菜, 科技创新的星辰大海更令人心潮澎湃) [*People's Daily Commenting on Community Group Buying: Don't Just Focus on Selling Cabbages; Technology and Innovation Are More Exciting*], WALLSTREETCN.COM (Dec. 11, 2020, 3:25 AM), <https://wallstreetcn.com/articles/3613229> [https://perma.cc/ZH79-KPXW].

tal infrastructure.³³¹ Alibaba has invested in semiconductors and, in 2019, unveiled its first chip designed to power artificial intelligence.³³² Baidu is betting heavily on driverless cars.³³³ Since the recent law enforcement campaign, Chinese Big Tech has kicked off a new investment spree in hardcore innovation.³³⁴ Alibaba has pledged one billion dollars to nurture 100,000 developers and tech startups over the next three years, and another twenty-eight billion dollars to boost its cloud computing division to invest in technologies relating to operating systems, servers, chips, and networks.³³⁵ Notably, Alibaba is also a major contributor to China's Digital Silk Road, which provides technology to support China's Belt and Road Initiative.³³⁶ Very recently, Meituan raised a record ten billion dollars to develop autonomous delivery vehicles and robotics.³³⁷ It thus appears that Chinese regulation of the platform economy has better aligned the interests of the Chinese tech firms with the government's goal to achieve technological self-sufficiency.

E. *Global Investing*

China's dramatic policy swing in regulating Big Tech has imposed a negative externality on global investments. As the world's second largest economy with a vast lucrative market, China is a leading driver of growth.³³⁸ Despite the tumultuous Sino-U.S. relationship, Chinese companies have

331. Iris Deng & Celia Chen, *Tencent to Invest US\$70 Billion in New Digital Infrastructure, Backing Beijing's Economic Stimulus Efforts*, S. CHINA MORNING POST (May 26, 2020, 7:30 PM), <https://www.scmp.com/tech/big-tech/article/3086162/tencent-invest-us70-billion-new-digital-infrastructure-backing> [https://perma.cc/VC6R-3YQ3].

332. Coco Liu & Cheng Ting-Fang, *Alibaba Unveils AI Chip to Boost Cloud Plans and Cut Reliance on US*, NIKKEI ASIA (Sep. 25, 2019, 6:07 PM), <https://asia.nikkei.com/Business/China-tech/Alibaba-unveils-AI-chip-to-boost-cloud-plans-and-cut-reliance-on-US> [https://perma.cc/R69J-T82W].

333. Arjun Kharpal, *Baidu Pushes to Put Driverless Taxis on China's Roads, Pledging to Build 1000 in 3 Years*, CNBC (June 17, 2021, 2:26 AM), <https://www.cnbc.com/2021/06/17/baidu-pushes-to-put-driverless-taxis-on-china-roads-with-baic-tie-up.html> [https://perma.cc/6DRH-JG6J].

334. Coco Liu, *Alibaba Kicks Off Spending Spree With \$1 Billion for Cloud*, BLOOMBERG (June 8, 2021, 2:30 AM), <https://www.bloomberg.com/news/articles/2021-06-08/alibaba-kicks-off-spending-spreewith-1-billion-for-cloud> [https://perma.cc/WK5K-RC64].

335. Arjun Kharpal, *China's Alibaba to Invest \$28.2 Billion in Cloud Infrastructure as It Battles Amazon, Microsoft*, CNBC (Apr. 20, 2020, 1:27 AM; updated Apr. 20, 2020, 2:30 AM), <https://www.cnbc.com/2020/04/20/alibaba-to-invest-28-billion-in-cloud-as-it-battles-amazon-microsoft.html#:~:text=Alibaba%20said%20Monday%20it%20would,%2C%20servers%2C%20chips%20and%20networks> [https://perma.cc/P2S-9XXP].

336. Paul Triolo et al., *The Digital Silk Road: Expanding China's Digital Footprint*, EURASIA GROUP (Apr. 8, 2020), <https://www.eurasiagroup.net/files/upload/Digital-Silk-Road-Expanding-China-Digital-Footprint-1.pdf> [https://perma.cc/9J6V-QECK].

337. *China Tech Giants Spend Billions to Fuel Growth After Crackdown*, BLOOMBERG (May 27, 2021, 6:00 PM; updated May 26, 2021, 10:34 PM), <https://www.bloomberg.com/news/articles/2021-05-26/china-tech-giants-spend-billions-to-fuel-growth-after-crackdown> [https://perma.cc/T3HD-GC5U].

338. Tom Fairless & Stella Yifan Xie, *Americans' Hunger for the World's Goods Drive Global Recovery*, WALL ST. J. (June 28, 2021, 10:54 AM), <https://www.wsj.com/articles/americans-hunger-for-the-worlds-goods-drives-global-recovery-11624892062> [https://perma.cc/UJB6-FCT7].

queued up to tap the U.S. capital market,³³⁹ while U.S. investors flocked to invest in Chinese stocks and bonds.³⁴⁰ However, the recent crackdown on Chinese tech giants has led to significant stock volatility, undermining investor confidence in these companies. Indeed, since their peak in February 2021, Chinese tech firms had experienced over 800 billion dollars' loss of market capitalization within six months.³⁴¹ The spate of hectic enforcement has made investors highly sensitive to any sign of perceived negative news. A particularly dramatic example occurred recently when Meituan's CEO Wang Xing posted an ancient poem about a misguided Chinese emperor suppressing dissent on a blog.³⁴² Investors speculated that Wang posted the poem to voice discontent with the Chinese government's on-going antitrust probe.³⁴³ The market reacted very negatively, with the firm losing twenty-six billion dollars over the next two days.³⁴⁴ The Chinese cyberspace regulator's high-profile and unexpected probe into Didi dealt a further blow to international investors.³⁴⁵ China's sudden ban on for-profit home-schooling and private tutoring companies, many of which were backed by Chinese tech giants, caused panic among foreign investors and generated a sell-off of Chinese stocks.³⁴⁶ This series of high-profile government interventions seems to have dramatically increased the risk premiums investors place on Chinese tech stocks, discouraging foreign investment in this sector.

339. Evelyn Cheng, *China-Based Companies Raised \$11.7 Billion Through U.S. IPOs This Year, The Most Since 2014*, CNBC (Dec. 12, 2020, 3:23 AM), <https://www.cnbc.com/2020/12/18/china-based-companies-raise-the-most-money-via-us-ipos-since-2014.html> [https://perma.cc/XU27-CA5T]; Jacky Wong & Nathaniel Taplin, *The End of U.S.-China Tech Stock Bromance*, WALL ST. J. (July 8, 2021, 7:43 AM), <https://www.wsj.com/articles/the-end-of-the-u-s-china-tech-stock-bromance-11625744592> [https://perma.cc/VR3B-53PQ].

340. Over the past year, global investors have also increased their holdings in Chinese stocks and bonds by almost forty percent to over \$800 billion. Hudson Lockett, *Global Investors' Exposure to Chinese Assets Surges to \$800 Billion*, FIN. TIMES (July 14, 2021), <https://www.ft.com/content/f0c71c66-b386-4f3c-8796-4384e7378a56> [https://perma.cc/XV83-9KTC].

341. Jeanny Yu & Abhishek Vishnoi, *Down \$831 Billion, China Tech Firm Selloff May Be Far From Over*, BLOOMBERG (July 7, 2021, 10:57 PM), <https://www.bloomberg.com/news/articles/2021-07-07/down-831-billion-china-tech-firm-selloff-may-be-far-from-over> [https://perma.cc/HMX7-6CHS].

342. Coco Liu et al., *A 1,100-Year-Old Poem Cost Meituan's Outspoken CEO Billions*, BLOOMBERG (May 11, 2021, 4:16 PM; updated May 12, 2021, 3:21 PM), <https://www.bloomberg.com/news/articles/2021-05-11/a-1-100-year-old-poem-cost-meituan-s-outspoken-ceo-2-5-billion> [https://perma.cc/6KZ8-HABN].

343. *Id.*

344. *Id.*

345. Kevin Stankiewicz, *Scaramucci Says China's Didi Crackdown an Assault on Capitalism, 'Form of Political Terrorism'*, CNBC (July 7, 2021, 9:30 AM), <https://www.cnbc.com/2021/07/07/scaramucci-says-chinas-didi-crackdown-as-assault-on-capitalism-form-of-political-terrorism.html> [https://perma.cc/TVS6-8EGU]; Josh Rogin, *Wall Street Is Finally Waking Up to The Reality of China*, WASH. POST (July 8, 2021, 6:34 PM), <https://www.washingtonpost.com/opinions/2021/07/08/xi-jinping-sends-a-harsh-message-to-wall-street/> [https://perma.cc/48G6-GDXF]; *China Seems Intent on Decoupling Its Companies from Western Markets*, ECONOMIST (July 10, 2021), <https://www.economist.com/business/2021/07/10/china-seems-intent-on-decoupling-its-companies-from-western-markets> [https://perma.cc/6EED-CY3X].

346. Ryan McMorrow et al., *China's Education Sector Crackdown Hits Foreign Investors*, FIN. TIMES (July 26, 2021), <https://www.ft.com/content/dfae3282-e14e-4fea-aa5f-c2e914444fb8> [https://perma.cc/3BD5-JXJS].

Meanwhile, China's newly imposed regulatory requirement of cybersecurity review creates an additional transaction cost for Chinese companies seeking to tap the U.S. capital market. This indirectly increases the appeal of Chinese stock exchanges based in Hong Kong and mainland China. In the past, some of the largest Chinese tech companies were drawn to the U.S. capital markets not only because the United States has the deepest and most liquid capital market, but also due to its friendly listing rules for issuers.³⁴⁷ One prominent example is Alibaba, which initially preferred to get listed in Hong Kong but chose the New York Stock Exchange instead because the Hong Kong bourse did not allow the dual class share structure.³⁴⁸

Escalating Sino-U.S. tensions in recent years, however, have increased many uncertainties for Chinese companies listed in the United States. Following former U.S. President Trump's executive order, the three largest Chinese state-owned telecom companies were delisted from the New York Stock Exchange in 2021, for their alleged links to the Chinese military.³⁴⁹ Other U.S.-listed Chinese companies also face the threat of delisting as the U.S. securities regulator is ratcheting up pressures on accounting firms to share auditing documents, a requirement that is in conflict with Chinese laws.³⁵⁰ Thus far, this heightened U.S. scrutiny has caused little financial distress to Chinese firms since they can list elsewhere and alternative financing abounds.³⁵¹ Nonetheless, it accelerated Chinese efforts to develop a domestic capital market. In 2018, President Xi Jinping unveiled a proposal to create the STAR market to invigorate science and technology.³⁵² Notably,

347. Ivy Wong & Nick O'Donnell, *The Battle for Listings and Stock Market Reforms: Evolution or Revolution?*, IFLR (Dec. 5, 2019), <https://www.iflr.com/article/b1lmcx63cs877f/the-battle-for-listings-and-stock-market-reforms-evolution-or-revolution> [https://perma.cc/Q68B-C5KK]; see Christopher W. Betts & Will H. Cai, *Hong Kong v. New York: The Competition For Chinese Tech IPOs*, LEXOLOGY (Oct. 2, 2014), <https://www.lexology.com/library/detail.aspx?g=8ac93662-a0bc-4f27-b5c6-8c1be994477f> [https://perma.cc/AQ7N-SCA6].

348. Enoch Yiu, *Hong Kong Stock Exchange's Plan to Attract Tech Listings by Expanding Dual-Class Shares Structures Gains Traction*, S. CHINA MORNING POST (May 28, 2020, 6:15 PM), <https://www.scmp.com/business/banking-finance/article/3086524/hong-kong-stock-exchanges-plan-attract-tech-listings> [https://perma.cc/Z7CP-574Z]; see also Denny Thomas & Elzio Barreto, *Rattled by Alibaba Loss, Hong Kong Bankers Seek Market Reforms*, REUTERS (Sep. 27, 2013, 5:02 PM), <https://www.reuters.com/article/us-alibaba-ipo-hongkongexchange-idINBRE98P18D20130926> [https://perma.cc/5KH5-5TE4].

349. Alexander Osipovich, *NYSE Moves to Delist Chinese Oil Company*, WALL ST. J. (Feb. 26, 2021, 6:48 PM), <https://www.wsj.com/articles/nyse-moves-to-delist-chinese-oil-company-11614383331> [https://perma.cc/VLR8-SXAC].

350. Chad Bray, *US Ratchets up Pressure on Chinese Firms to Share Audits as Failure to Comply Could Lead to Delistings from American Bourses*, S. CHINA MORNING POST (May 14, 2021, 7:00 PM), <https://www.scmp.com/business/banking-finance/article/3133487/us-ratchets-pressure-chinese-firms-share-audits-failure> [https://perma.cc/6RVY-3Q4G].

351. Adam Lysenko, *Testimony Before the U.S.-China Economic and Security Review Commission*, HEARING ON U.S. INV. IN CHINA'S CAP. MKTS. & MIL.-INDUS. COMPLEX 16–17 (March 19, 2021), https://www.uscc.gov/sites/default/files/2021-03/Adam_Lysenko_Testimony.pdf [https://perma.cc/ALE9-WZX7].

352. Shi Jing, *Star Market Listings to Drive China's Technology Innovation Efforts*, CHINA DAILY (Dec. 25, 2020, 9:17 AM), <https://global.chinadaily.com.cn/a/202012/25/WS5fe53dc7a31024ad0ba9e725.html> [https://perma.cc/9JCY-MBRR]; see also Courtney Goldsmith, *STAR Market Offers Opportunities for Investment into China's Tech Industries*, WORLD FINANCE (Nov. 15, 2019), <https://www.worldfinance.com/mar>

Ant Group's scheduled debut at the STAR board last year was expected to give a significant boost to the new exchange.³⁵³

Through its increased oversight over cross-border data transfer, the Chinese government has gained significant leverage in steering Chinese tech companies away from overseas exchanges. One notable example is ByteDance, which cautiously decided to shelve its IPO after being warned about the cybersecurity risks and other regulatory issues.³⁵⁴ However, if overseas stock exchanges are off limits to certain data-rich Chinese tech firms, it could potentially affect their valuation and liquidity if these firms have difficulty meeting the requirements from other listing venues.³⁵⁵ For instance, Didi initially wanted to list in Hong Kong but was unable to fulfill the Hong Kong bourse's requirement of obtaining valid licenses to operate in many Chinese provinces.³⁵⁶ At the same time, the fact that the Chinese government chose to ramp up control over its tech sector despite the anticipated adverse financial consequences also reveals the diminishing importance of foreign venture capital in China. Indeed, while foreign investors used to play an outsized role in funding the first generation of Chinese tech firms such as Alibaba, Baidu, and Tencent,³⁵⁷ they are now locked in fierce competition with home-grown funds, state-sponsored incubators, as well as Chinese internet giants to fund China's booming tech sector.³⁵⁸ That said, foreign investors remain heavyweight players in China's private equity market, despite the stunning speed with which China has been able to develop its onshore venture capital market.³⁵⁹

Above all, the recent developments provide a further illustration of a phenomenon I coined as "regulatory interdependence," that is, how China is regulated will affect how China regulates.³⁶⁰ As the United States tightens

kets/star-market-offers-opportunities-for-investment-into-chinas-tech-industries [https://perma.cc/72NR-6YUS].

353. Alison Tudor-Ackroyd, *Ant Group Gets the Green Light for Mega IPO in Shanghai's Star Market as China Pulls Out All Stops to Help Tech Champions Raise Funds*, S. CHINA MORNING POST (Sep. 18, 2020, 6:29 AM), <https://www.scmp.com/business/banking-finance/article/3102141/ant-group-gets-green-light-mega-ipo-shanghai-star-market> [https://perma.cc/JV82-SDEY].

354. Xie Yu & Liza Lin, *ByteDance Shelved IPO Intentions After Chinese Regulators Warned About Data Security*, WALL ST. J. (July 12, 2021, 4:20 AM), <https://www.wsj.com/articles/bytedance-shelvedipo-intentions-after-chinese-regulators-warned-about-data-security-11626078000> [https://perma.cc/89TE-EAXG].

355. See Lin Lin, *Venture Capital Exits and the Structure of Stock Markets in China*, 12 ASIAN J. COMP. L. 1 (2017) (showing a close connection between the stock market and the venture capital market in China).

356. Jing Yang et al., *Didi Tried Balancing Pressure from China and Investors. It Satisfied Neither.*, WALL ST. J. (July 9, 2021, 7:41 PM), <https://www.wsj.com/articles/didi-ipo-china-regulators-investors-trouble-11625873909> [https://perma.cc/XD5S-LLGD].

357. Lysenko, *supra* note 351, at 6–7.

358. *Life is Getting Harder for Foreign VCs in China*, ECONOMIST (Jan. 11, 2011), <https://www.economist.com/business/2020/01/09/life-is-getting-harder-for-foreign-vcs-in-china> [https://perma.cc/Y58V-2LBB].

359. Lysenko, *supra* note 351, at 6 ("In 2020, 54% of all transactions measured by total invested capital included at least one offshore investor, with the U.S. participation rate at 29%.")

360. See ZHANG, *supra* note 29, at 202 (explaining the close interdependence between the regulatory moves of the United States and China with regard to antitrust enforcement).

securities regulation of Chinese companies listed in U.S. stock exchanges, China will be prompted to accelerate its efforts to develop its own capital market to reduce its reliance on the United States, further exacerbating financial decoupling between two of the world's largest economies.

CONCLUSION

In this article, I develop the HAPPY model containing five essential elements to study Chinese regulation: the regulatory process is *hierarchical*, the top leadership are *adaptable*, the Chinese regulators are *parochial*, the firms are *pliant*, and the Chinese public need to *yelp* to be heard. By focusing on China's great reversal in regulating the platform economy, I show that policy volatilities have stemmed from the hierarchical regulatory structure in which power is centralized among top leaders, who also suffer from a chronic deficit of information. I particularly highlight how favorable support from top leadership, aggressive lobbying from tech firms, and the bureaucratic inertia of the regulators together contributed to a lag in regulating Chinese online platforms. As platforms gain pervasive influence, public dissatisfaction grows. The aggressive regulatory arbitrage sought by the platforms jeopardized the bureaucratic interests of Chinese financial regulators, who stepped out to voice public dissent and reported the matter to the top leaders. As soon as they became informed, top leaders quickly mobilized all administrative resources to initiate a massive enforcement campaign against Chinese tech firms. Chinese tech firms swiftly adapted to the regulatory demands of agencies and adhered to the top leadership's new policy initiatives.

Chinese administrative agencies in charge of regulating the digital economy are among the biggest beneficiaries of the current enforcement campaign, which has significantly enhanced their power and prestige. Although the long-term consequences remain unclear, China's dramatic reversal in regulating its platform economy appears to have produced the short-term effects of safeguarding data security, cultivating mass support, and reducing the country's reliance on the West for both technologies and capital. At the same time, the volatile policy swing has itself generated risks and uncertainties for social welfare and global investment, which in turn could cause disruption and turmoil to domestic social and financial stability. The government's heavy-handed approach in regulating the tech sector therefore also comes with a dear price, which may cause regulators to relax their harsh regulation to provide more breathing room for businesses.

In the West, U.S. tech giants have been accused of exacerbating societal inequality and there has been heated academic and policy debate regarding

whether antitrust is the right tool to deal with income inequality issues.³⁶¹ China presents an almost-extreme scenario where government authorities are able to intervene with lightning speed and velocity. However, without strong institutional oversight, intense law enforcement campaigns create the risk of over-enforcement and administrative abuse. Given the high stakes involved, Chinese tech firms will likely exert greater efforts in lobbying agencies in the future, giving rise to concerns about regulatory capture. China's experience with platform regulation could therefore offer some lessons that should inform the global policy debate about how to rein in Big Tech.

Thus far, much of the public discourse and academic scholarship on Chinese regulatory governance have focused on the preference and actions of the policymakers and the regulators, without giving adequate attention to roles of the firms and the general public.³⁶² The HAPPY model provides a more comprehensive and nuanced perspective by examining the incentive structure of each of the four main actors involved in the regulatory process, as well as the strategic interaction among them within a hierarchical regulatory process. Although this Article focuses primarily on Chinese platform regulation, the HAPPY model I develop here could shed light on the complexity and dynamics in many other areas of regulatory governance in China and beyond.

361. See Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 *GEO. L.J.* 1 (2015) (arguing that tackling income inequality could be an implicit goal of antitrust); Carol Shapiro, *Antitrust in a Time of Populism*, 61 *INT'L. J. INDUS. ORG.* 714 (2018) (arguing that antitrust should not be the primary means to reduce income inequality).

362. See *supra* note 7; see also Liu et al., *supra* note 211; van Rooji, *supra* note 211; He, *supra* note 212.