Resolving Constitutional Disputes in Contemporary China

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Beginning in 1999, a series of events generated speculation that the Chinese Party-state might be prepared to breathe new life into the country’s long dormant constitution. In recent years, as the Party-state has strictly limited constitutional adjudication and moved aggressively to contain some citizen constitutional activism, this early speculation has turned to pessimism about China’s constitutional trajectory. Such pessimism obscures recognition of alternative or hybrid pathways for resolving constitutional disputes in China. Despite recent developments, Chinese citizens have continued to constitutionalize a broad range of political-legal disputes and advance constitutional arguments in a variety of forums. This article argues that by shifting focus from the individual legal to the collective political dimension of constitutional law, a dimension dominant in China’s transitional one-party state, we can better understand the significance of the constitution in China and identify patterns of bargaining, consultation, and mediation across a range of both intrastate and citizen-state constitutional disputes. Administrative reconciliation and “grand mediation,” dispute resolution models at the core of recent political-legal shifts in China, emphasize such consultative practices. This zone of convergence reveals a potential transitional path

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for resolving constitutional disputes. Specifically, the Party-state could choose to adapt and apply the grand mediation model in the context of constitutional disputes. Grand mediation involves a multilevel, Party-state political consultation that preserves a limited but meaningful role for the judiciary. An adaptation of the grand mediation framework would provide an indigenous dispute resolution model for resolving constitutional disputes, regularizing informal constitutional dispute resolution practices, and bringing judges to the constitutional interpretation table. At the same time, it would take account of the realities of China’s current political environment. Chinese reformers could use such a mechanism (or existing informal dispute resolution practices) to advance their long-term goals of facilitating citizen-state consultation, reform concessions, and the diffusion of constitutional norms through the Chinese polity.

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I. INTRODUCTION

This article identifies patterns of bargaining, consultation and mediation in the resolution of constitutional disputes in the People’s Republic of China (“PRC”) and explores the possibility that an emerging dispute resolution framework called “grand mediation” could provide a transitional model for resolving such disputes. In recent years, a series of events has raised concerns that China has abandoned its stated commitment to rule in accordance with the law. Chinese leaders, in a pronounced shift from the 1990s and the early 2000s, have placed progressively heavier emphasis on popular opinion and the mediation of disputes, rather than judicial professionalism and formal adjudication according to law.\(^1\) Through a series of personnel changes and political campaigns, Chinese Communist Party (“CCP” or “Party”) leaders have focused on the role of legal institutions in safeguarding Party leadership. They have also made clear that law enforcement and judicial institutions must not mechanically apply the law and must consider social stability impacts and other extra-legal factors in resolving disputes.\(^2\) At the same time, in an effort to eliminate perceived threats to Party power, the Party-state\(^3\) has suppressed rights lawyers, nascent non-governmental organizations, and citizen activists.\(^4\) In response to these developments, some commentators have observed that China has “turned against” or “abandoned” law.\(^5\)

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\(^3\) The PRC Constitution enshrines the leadership role of the Chinese Communist Party in China’s government. See generally *XIANFA* [PRC CONST.] [hereinafter *XIANFA*] pmbl. (LawInfoChina) (China). State institutions in China are integrated with the Party and subject to Party control. This article uses the term “Party-state” to refer generally to China’s institutions of governance.


In the realm of constitutional law, the Party-state has strictly limited efforts to promote the development of constitutional adjudication mechanisms. Since the National People’s Congress (NPC) created a citizen right to offer proposals for review of the constitutionality of some legal provisions, the NPC Standing Committee has not issued any formal public rulings on citizen proposals and has done little to improve the opaque process for handling them. In an apparent attempt to curtail efforts to “judicialize” the PRC Constitution, the Supreme People’s Court formally annulled a key 2001 decision that authorized a provincial court to apply a constitutional provision as a legal basis for deciding a civil case.

At the same time, senior Party leaders have declared that China has established a socialist legal system “on schedule.” A 2011 State Council white paper entitled “The Socialist Legal System with Chinese Characteristics” repeats this declaration and places heavy emphasis on the socialist dimensions of the Constitution. While confirming that constitutional rights are enforced through the adoption of laws and regulations, the white paper is silent on constitutional review and adjudication. Such events and rhetoric have generated pessimism about prospects for constitutional review and enforcement in China.

China’s constitutional trajectory provides a reminder of the statist orientation of the country’s political-legal system. As Mirjan Damaska has emphasized, structures of state authority and the fundamental...
orientation of the political system shape procedure.\textsuperscript{11} China law scholars have discussed the statist orientation of China’s system and argued that an acknowledgment of this characteristic is essential to understanding the function of the Constitution and other legal phenomena.\textsuperscript{12} In hindsight, observers of the emerging constitutional dynamics of a decade ago may have been too quick to look past the basic orientation of China’s system and interpret these dynamics as a sign that the Party-state might be prepared to embrace more robust constitutional adjudication mechanisms.\textsuperscript{13}

However, it would be a mistake to replace such early optimism with an excessive pessimism that obscures reform possibilities and citizen-state constitutional discourse that does exist in China. As Mark Warren and Baogang He demonstrate, meaningful public deliberation with the potential to shape official decision-making is possible within China’s authoritarian system.\textsuperscript{14} Kevin O’Brien and Liangjian Li have documented the sometimes successful efforts of rural Chinese citizens to use central laws and policies to redress local grievances (a dynamic they call “rightful resistance”).\textsuperscript{15} Recent scholarship on citizen constitutional activism in

\textsuperscript{11} Mirjan Damaska, \textit{The Faces of Justice and State Authority: A Comparative Approach to the Legal Process} 1–15, 47, 184 (1986). Damaska constructs ideal types of state authority (“hierarchical” and “coordinate” systems with horizontal distributions of authority) and system orientation (“activist” states focused on social transformation and policy implementation and “reactive” states focused on constraining state power and providing impartial conflict resolution). \textit{Id}. He argues that procedural form is a product of combinations of these ideal types and the degree to which a state approaches the ideal types. \textit{Id}.


\textsuperscript{13} Lam, \textit{Politicalization, supra} note 2 (arguing that while the Party-state has increasingly emphasized the political role of legal institutions in recent years, this political role has always been a feature of the system).

\textsuperscript{14} Baogang He & Mark E. Warren, \textit{Authoritarian Deliberation: The Deliberative Turn in Chinese Political Development, PERSPECTIVES ON POLITICS}, Jun. 2011, at 268, 269–74. For a detailed discussion of these emerging dynamics and institutions in China, see generally \textit{The Search for Deliberative Democracy in China} (Eitan J. Leib & Baogang He eds., 2010).

\textsuperscript{15} Kevin O’Brien & Liangjian Li, \textit{Rightful Resistance in Rural China} 3 (2006).
China suggests that such dynamics are present in the realm of constitutional law. Michael Dowdle highlights the slow, accretional processes of constitutional learning and adaptation generated by ongoing state-society interactions in China and notes that opportunities for constitutional reform may emerge even during cycles of official repression.

Could China’s steps away from formal constitutional adjudication and its perceived “turn against law” divert attention from alternative paths for resolving constitutional disputes? In the United States, theories of popular constitutionalism have challenged the concept of judicial supremacy and explored the role of political processes involving popular mobilization, deliberation, and bargaining in constitutional interpretation and enforcement. Both Chinese and Western scholars have emphasized the need to look beyond formal adjudication and explore China’s indigenous institutions and unwritten constitutional conventions to understand the country’s evolving constitutional dynamics. Some Chinese legal scholars have concluded that a “latent” or “sub rosa” mediation mechanism for resolving constitutional disputes already exists.

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18 See *infra* Part III(A).

19 See *infra* Part II.

20 Deng Shaoling, “Sun Zhigang An yu Weixian Shencha” Xuexi Yantaohui Zongshu [Summary of Study Workshop on “the Sun Zhigang Case and Constitutional Review”], *ZHONGGUO FAXUE* [CHINA LEGAL SCI.], no. 4, 2003, at 190. According to Beijing University legal scholar Wang Lei, this mechanism does not operate “according to the standards and norms in the written constitution, but instead is a dispute resolution system similar to civil mediation.” Tong Zhiwei et al., *Sun Zhigang An yu Weixian Shencha [The Sun Zhigang Case and Constitutional Review]*, *ZHONGGUO XIANFA JIAOXUE YU YANJU WANG* [CHINA CONSTITUTION TEACHING AND RESEARCH NET], Apr. 24, 2004, at 3.

scholars emphasize the importance of moving beyond these latent processes, others conclude that constitutional dispute resolution in the current system is feasible only through informal coordination.\textsuperscript{22}

The actions of Chinese citizens also highlight the possibility of alternative pathways. Despite a string of setbacks, Chinese citizens have not abandoned constitutional argument. Instead, they have continued to constitutionalize a broad range of political-legal disputes and advance increasingly sophisticated constitutional arguments concurrently through litigation, petitions, review proposals, academic and popular literature, media commentary, and other forums.\textsuperscript{23} These ongoing efforts provide evidence that Chinese citizens seeking to apply the written Constitution and establish it as a legal restraint on the Party-state have identified space within the existing political-legal structure to advance their long-term goals. Such sustained constitutional activism provides another indication that non-adjudicative constitutional dispute resolution processes are worthy of study.

This article reveals a potential evolutionary pathway for resolving constitutional disputes by identifying a zone of convergence in China’s existing, informal constitutional dispute resolution practices and broader trends in its political-legal system.\textsuperscript{24} At their core, constitutional disputes in China implicate unresolved tensions between the leadership role of the Party and constitutional provisions on legal supremacy and citizen rights. In the context of a weak judicial system and a dominant but pragmatic Party-state focused on maintaining stability, these tensions create fertile ground for bargaining and consultation. By shifting focus from the individual legal dimensions of constitutional law to its collective political dimensions, we can better understand the significance of the Constitution and identify patterns of bargaining, consultation, and mediation across a range of both intrastate and citizen-state constitutional disputes in China.\textsuperscript{25}

\textsuperscript{22} Compare Tong Zhiwei et al., The Sun Zhigang Case and Constitutional Review, supra note 20 (citing statements of PKU scholar Wang Lei about the problem with operating outside “standards and norms in the written constitution”) and Tong Zhiwei, China’s Constitutional Research and Teaching: A State of the Art, in BUILDING CONSTITUTIONALISM IN CHINA 107 (Stephanie Balme and Michael W. Dowdle eds., 2009).

\textsuperscript{23} See infra Part III(C).

\textsuperscript{24} The article focuses on disputes over the meaning and application of the text of the Constitution, including disputes over rights provisions and the allocation of state powers and responsibilities set out in the Constitution. The article does not focus on disputes over the body of statutes, conventions, and norms that constitute the broader constitutional order.

\textsuperscript{25} Of course, the distinction between “individual legal” and “collective political” dimensions is not always black and white. The point here is to focus on collective claims.
Administrative reconciliation and “grand mediation,” dispute resolution models at the core of the Party-state’s perceived turn against law, emphasize such consultative practices in the context of citizen-state and “polycentric” disputes that share features with constitutional disputes. This convergence suggests that the Party-state could choose to adapt and apply the grand mediation model to resolve constitutional disputes.

This article is not intended as a proposal to the Party-state and does not argue that the Party-state has already established a grand mediation mechanism for resolving constitutional disputes. It also does not seek to convince reformers that they should abandon their efforts to establish a constitutional court or NPC constitutional review committee (although it raises the possibility that a grand mediation model for constitutional disputes, or even existing informal processes, could provide better frameworks for promoting their long-term goals in the current environment). Instead, the objective of the article is to analyze the political dimensions of constitutional law and their prominence in China, identify potential evolutionary pathways within China’s current political-legal framework, and assess the potential of such pathways to advance the long-term interests and objectives of constitutional reformers. The article argues that grand mediation presents a plausible transitional model for resolving constitutional disputes within the current political-legal framework. Grand mediation involves a multilevel, Party-state political consultation that preserves a limited but meaningful role for the judiciary. An adaptation of the grand mediation framework would provide an indigenous dispute resolution model for resolving constitutional disputes, regularize informal constitutional dispute resolution practices, and bring judges to the constitutional interpretation table. Chinese constitutional reformers could use such a mechanism (or existing informal dispute resolution practices) to advance their long-term goals of facilitating citizen-state consultation, reform concessions, and further the diffusion of constitutional norms through the Chinese polity.

For both comparative law scholars and China specialists, the article offers new insights into the dynamics of constitutional dispute resolution, the interplay of law and politics in an authoritarian state engaged in legal construction and reform, and the objectives and strategies of constitutional reformers. For China specialists, the article presents a nuanced story of constitutional development, one that both recognizes the fundamental orientation of the Party-state and acknowledges space within China’s authoritarian framework. Constitutional law and dispute

and assess their broader political impacts, rather than to focus exclusively on the success or failure of an individual claim in a court or similar legal forum.

26 See Lon Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 394–97 (1978) (characterizing “polycentric” disputes as disputes that involve multiple parties or centers, complicated and interacting webs of interests, and fluid circumstances).
resolution in China may evolve in unexpected ways. Although China’s
developmental path resembles those of other East Asian states in some
striking respects, China has a long history of frustrating the visions and
expectations of foreigners.27 Observers should stay attuned both to the
possibility that unique or hybrid models may emerge in China and the
potential that such models may hold for Chinese reformers.

Part II provides an overview of recent constitutional law
developments in China and related scholarship. Part III explains why a
focus on the collective political dimension of constitutional law reveals
more about the role of the Constitution in contemporary China than a
focus on the individual legal dimension does. Part III also demonstrates
that constitutional argument is important even in the absence of a formal
constitutional adjudication mechanism, and that Chinese reformers are
using such argument to shape public opinion, promote constitutional
consciousness, and build long-term pressures for fundamental reform.
Part IV identifies and analyzes patterns of bargaining, consultation, and
mediation patterns across a range of intrastate and citizen-state
constitutional disputes. Part V explores the emerging practices of
administrative reconciliation and grand mediation and identifies
convergence between these practices and informal patterns of
constitutional dispute resolution discussed in Part IV. Part V then
discusses the applicability of the grand mediation model in the
constitutional dispute context, factors that might motivate the Party-state
to consider such a model, and the implications of such a model for
constitutional reformers.

II. AN OVERVIEW OF RECENT CONSTITUTIONAL LAW
DEVELOPMENTS IN CHINA

Although scholars have discussed China’s Constitution and key
constitutional law developments elsewhere, a brief review of recent events
provides a necessary foundation for this article’s discussion. China’s
current Constitution was adopted in 1982 and has been amended on four
occasions. Like other socialist constitutions, China’s Constitution
contains a long list of robust civil, political, and socio-economic rights. It
also enshrines the political leadership of the CCP, establishes duties to
maintain public order and uphold the integrity of the motherland, and
provides that citizens may not infringe on the interests of the state, society,

27 JONATHAN SPENCE, TO CHANGE CHINA (1969). China’s size, complexity, history,
political environment, position on the international stage, and large-scale legal construction
efforts complicate comparisons with transitions in other East Asian jurisdictions. For one
thoughtful comparison of China and Taiwan, see Randall Peerenboom & Weitseng Chen,
Developing the Rule of Law, in POLITICAL CHANGE IN CHINA: COMPARISONS WITH TAIWAN
155 (Bruce Gilley & Larry Diamond eds., 2008).
or collective in exercising their rights.\textsuperscript{28} The Constitution explicitly states that it is supreme law, and Party-state leaders routinely confirm that the Constitution has supreme legal effect.\textsuperscript{29} However, enforcement of the Constitution is limited in practice and there is a large gap between the structure and values set out in the constitutional text and political reality.\textsuperscript{30} As the late William Jones observed in 1985, “the Constitution seems to bear no relation to the actual government of China.”\textsuperscript{31} In this context, some observers have characterized the Constitution as a national declaration or aspirational text rather than as a legally enforceable charter.\textsuperscript{17}

The leadership’s characterization of the Constitution as supreme law and its stated commitment to build a socialist rule of law state create tensions in China’s political-legal system. The operation of the

\textsuperscript{28} XIANFA pmbl., arts. 1, 33–49, 51–55. Article 33 provides for a balancing of rights and duties.


\textsuperscript{32} See, e.g., id. at 712–14; Clarke, Puzzling Observations, supra note 12, at 105 (characterizing the Constitution as performing a function similar to that of a “National Declaration”); Andrew J. Nathan, Sources of Chinese Rights Thinking, in HUMAN RIGHTS IN CONTEMPORARY CHINA 125, 130–31 (1986) (describing Chinese constitutional rights as “programmatic goals rather than immediate claims on government”); Cai Dingjian, Xianfa Zhidu de Fazhan yu Gaige [Development and Reform of the Constitutional System], LINGDAOZHE [THE LEADER], no. 25, 2008, available at http://reading.caing.com/105849/105893.html (stating that in China the Constitution was long viewed as a political outline and declaration rather than as a legally enforceable text).
Constitution is shaped by a broad body of constitutional rules and conventions, the most important being the principle of Party leadership.\textsuperscript{33} While China’s current Constitution must be understood within this framework, many citizens have argued that the Constitution should act as a legal restraint on the Party-state in practice.\textsuperscript{34} The leadership’s rhetoric creates space for citizens to raise arguments that are grounded in the constitutional text, discuss the constitutional implications of public disputes, and offer constitutional visions that incorporate more meaningful legal restraints on the Party-state. In some cases, these citizens’ arguments shape Party-state action.\textsuperscript{35}

The 1982 Constitution did not incorporate a formal judicial review mechanism. Neither the Supreme People’s Court (SPC) nor the lower people’s courts exercise the power to review and annul administrative and legislative provisions that conflict with the Constitution.\textsuperscript{36} Prior to 2001, the prevailing jurisprudential assumption in China was that courts could not apply the Constitution in the absence of concrete legislation implementing constitutional provisions,\textsuperscript{37} and courts only occasionally referenced the Constitution in their decisions.\textsuperscript{38} Instead, the NPC and the NPC Standing Committee (NPCSC) are charged with supervising the

\textsuperscript{34} See Clarke, Puzzling Observations, supra note 12, at 106–08; Jiang Shigong, supra note 21, at 15; Stephanie Balme, The Judicialisation of Politics and the Politicisation of the Judiciary (1978–2005), 5 Global Jurist Frontiers 1, 4, 6, 18, 22 (Jan. 1, 2005). See also infra Parts III(A), III(C) and IV.
\textsuperscript{35} See generally infra Part IV.
\textsuperscript{36} Albert Chen, supra note 33, at 61. The drafters of the 1982 Constitution considered but rejected a constitutional court. Tong Zhiwei, A Comment on the Rise and Fall of the Supreme People’s Court’s Reply to Qi Yuling’s Case, 43 Suffolk L. Rev. 669, 679 (2010).
\textsuperscript{37} Chinese scholars typically cite a 1955 SPC reply regarding a criminal case and a 1986 SPC rule on sources of law that may be cited in judicial judgments as the legal foundations for this understanding. Some scholars have challenged the conclusion that these decisions prohibit judicial application of the Constitution. Wang Zhenmin, Zhongguo Weixian Shenchizhiqu [China’s Constitutional Review System] 171–74 (2004). In 2009, the SPC issued a new rule on the citation of legal sources in judicial judgments. While the rule does not explicitly prohibit the citation of the Constitution, it does not include the Constitution in a list of sources of law that may be cited in judgments. Zuigao Renmin Fayanu Guanyu Caipan Wenshu Yinyong Falü, Fagui deng Guifanxing Falü Wenjian de Guiding [Provisions of the SPC on Citation of Laws, Regulations, and other Normative Legal Documents in Judgment Documents] [hereinafter SPC Provisions on Legal Citation] (issued by the SPC, Oct. 26, 2009, effective Nov. 4, 2009) 2009 FA SHI [SUP. PEOPLE’S CT. INTERP.] no. 14 (LawInfoChina, Peking Univ. Beida Fabao series CLI.3.122772), available at http://www.court.gov.cn/qwfb/sfsj/201002/20100210_1065.htm.
enforcement of the Constitution. The NPCSC is responsible for interpreting the Constitution and annulling lower-level legislation that conflicts with the Constitution. The NPC and the NPCSC have implemented the Constitution principally through the adoption of concrete legislation and have fulfilled their other duties to supervise and effectuate its enforcement only in limited and largely non-transparent respects.

Beginning in 1999, a series of rhetorical, legislative, and judicial shifts suggested that the dynamics of constitutional enforcement might be changing. In January 1999, then President and Party General Secretary Jiang Zemin made a statement that seemed to open the door to the establishment of a more robust constitutional enforcement mechanism. While emphasizing Party leadership, Jiang stated:

We must progressively establish the authority of the Constitution in the entire society and establish and perfect a vigorous supervision mechanism to guarantee implementation of the Constitution . . . . The most important thing is to standardize and restrict the power of state organs according to law and ensure that state power is exercised strictly in accordance with the Constitution. . . . We must adopt more forceful measures to strengthen effective guarantees for implementation of the Constitution, including perfecting concrete systems for implementation of the Constitution, launching regular investigation and supervision of the implementation of the Constitution, and correcting violations of the Constitution in a timely manner . . . .

Three months later, in March 1999, the NPC amended Article 5 of the Constitution to add the phrase “[t]he People's Republic of China practices

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39 XIANFA arts. 62(2), 67(1).
40 See id. art. 67(7)–(8). Some Chinese scholars argue that the NPC Standing Committee’s interpretation authority is final rather than exclusive. Kellogg, supra note 16, at 226–27.
42 Of course, constitutional development is an ongoing process and the selection of any particular date might be questioned. Arguments could be made for selecting an earlier date, such as the Party’s decision in the mid-1990s to adopt the socialist rule of law formulation. 43 Zhonggong Zhongyang Zhengqiu Dangwai Renshi dui Xiugai Xianfa Bufen Neirong de Yijian [Party Central Solicits Opinion of Non-Party Members on Amendment of Portions of the Constitution], XINHUA NET (Jan. 31, 1999, 9:15 PM), available at http://news.sina.com.cn/richtalk/news/china/9901/013112.html.
ruling the country in accordance with the law and building a socialist rule of law state.”

A senior judicial official later tied the two statements together, arguing that a basic condition for ruling the country in accordance with law is “ruling the country in accordance with the Constitution.”

Legislative and judicial shifts reinforced the perception that Party-state attitudes toward the Constitution were evolving. In 2000, the NPC provided citizens the first statutory right to submit proposals challenging the constitutionality of administrative rules and regulations to the NPCSC. In 2001, the SPC issued a major decision authorizing a provincial court to apply a constitutional provision on the right to education as a basis for deciding a civil case. The Qi Yuling reply and the subsequent provincial high court decision in the case (collectively, “Qi Yuling”) generated significant controversy. Characterizations of Qi Yuling as China’s first constitutional case and as a case in which a people’s court relied on the Constitution as the sole legal basis for deciding a claim are questionable. However, Qi Yuling was a milestone

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44. Xianfa const’l amend. III (1999).


47. Chen Hongyi, Qi Yuling An “Pifu” de Feizhi yu “Xianfa Sifahua” he Fayuan Yuanyin Xianfa Wenti [The Repeal of the Qi Yuling Case and the Problem of Judicialization of the Constitution and Judicial Citation of the Constitution], FAŁŲ SĪXIANG WANG [LAW-THINKER.COM] (Mar. 21, 2009), http://www.law-thinker.com/news.php?id=2241; Huang Li, supra note 41; Tong Zhiwei, supra note 38, at 34–37 (critiquing the Qi Yuling decision and highlighting its most controversial aspects).

48. Some observers have characterized Qi Yuling as China’s “first constitutional case” or the “first case of judicialization of the Constitution.” This claim is subject to challenge. In
1988, the SPC issued a reply to the Tianjin Higher People’s Court on a worker injury case. In that reply, the SPC directly referenced the Constitution. The SPC concluded that an employer’s effort to contract out of liability for work injuries was “not in accord with the Constitution” and that such a contract should be considered “a civil act without validity.” Zuigao Renmin Guanyu Guoyou Hetong “Gong Shang Gai Bu Fuze” Shifou Youxia de Pifu [SPC Reply on Whether an Employment Contract with “No Responsibility for Workplace Injury” Is Valid] (issued by the SPC, Oct. 14, 1988, effective Oct. 14, 1988) 1988 Min Ta Zi [SUP. PEOPLE’S CT. CIVIL CASES] no. 1, available at http://www.lawtime.cn/zhishi/laodongfa/xiangguanfagui/2007042663439.html. In 1999, a Shanghai Intermediate People’s Court cited Article 38 of the Constitution as a legal basis for deciding a defamation case. Tong Zhiwei, supra note 38, at 34. Some observers have suggested that the Constitution was the sole basis for deciding the right to education claim in Qi Yuling. However, the Shandong Higher People’s Court specifed that the violation of Qi Yuling’s rights continued until the date of its decision and also cited Articles 9 and 81 of the 1995 PRC Education Law in support of the claim that Qi’s right to education had been violated. Article 9 of the Education Law and Article 46 of the Constitution are almost identical, and Article 81 of the Education Law provides for civil liability. Although the violation of Qi Yuling’s rights began in 1990, before the NPCSC adopted the Education Law, the Shandong Higher People’s Court’s judgment calculated compensation for the entire period, including indirect damages for employment losses from 1993 to 2001. Qi Yuling Su Chen Xiaoqi Maoming Dingti Dao Luq Qi de Zhongzhu Xueqiao jiu Du Qinfan Xingming Quan, Shou Jiaoyu Quan de Quanzi Sunhai Peichang An [Qi Yuling Case Against Chen Xiaoqi Seeking Compensation for False Use of Her Name to Enroll as a Student in Her Technical School, Violation of Her Right to Her Name and Right to Education] (Shandong Higher People’s Ct. Aug. 23, 2001) (no official reporter info. available), available at http://www.ishenglaw.com/Article/ShowArticle.asp?ArticleID=4350. In a note attached to the judgment, a case editor explains that because the violation was continuous and the Education Law was in effect at the time of the lawsuit, application of the Education Law provisions was possible. Id. Tong Zhiwei states that the Shandong Higher People’s Court applied the Education Law. Tong Zhiwei, supra note 38, at 34. Shen Kui contests this view. Despite the fact that the Shandong court cited the Education Law in its judgment, he asserts that it did not decide the claim under the Education Law and could not have done so without applying the law retroactively. Shen Kui, Is it the Beginning or the End of the Era of the Rule of the Constitution?, 12 PAC. RIM L. & POL’Y J. 199, 214–16 (2003). It should be noted that Article 84 of the Legislation Law contains an exception to the general rule prohibiting retroactive application of legal provisions. The exception allows retroactive application of “special provisions formulated for the purpose of better protecting the rights and interests of citizens, legal persons, and other organizations.” PRC Legislation Law, supra note 46, at art. 84. Because provisions in the Education Law gave concrete legal effect to and enchanced protection of the pre-existing constitutional right to education, it could be argued that the Legislation Law provided a legal basis for applying the Education Law. In short, the proposition that the Constitution was the sole legal basis for deciding the right to education claim is contested. Some courts after Qi Yuling have relied on the Constitution, in connection with other laws, as a legal basis for deciding cases, and many courts both before and after Qi Yuling have referenced the Constitution in their judgments. Tong Zhiwei, supra note 38, at 34–37; infra Part III(C). In his explanation of the Qi Yuling case, Huang Songyou attempted to distinguish the 1988 SPC reply cited above and argued that the right to education claim in Qi Yuling could not have been adjudicated without direct application of the Constitution. Huang Songyou, supra note 45. At the very least, given the language of the 1988 reply, the citation of the Education Law in the final judgment of the Shandong Higher People’s Court, and related commentary, the characterization of Qi Yuling as China’s first constitutional case must be qualified.
in other respects. In an article published on the same day as the SPC’s Qi Yuling reply, SPC Vice President Huang Songyou compared the decision to *Marbury v. Madison* and argued that ordinary people’s courts could reference the practice of American courts and directly apply the Constitution as a legal basis for judgments. Huang’s explicit statement on the need to implement the Constitution and for the courts to play a more active role in implementing the Constitution was historical. Some Chinese commentators referred to Qi Yuling as China’s *Marbury v. Madison*.

Statements by Party leaders reinforced the apparent significance of these legal changes. In 2002, Party General Secretary Hu Jintao gave a speech to celebrate the twentieth anniversary of the 1982 Constitution and made the Constitution the subject of the first Politburo study session under his tenure as General Secretary. Hu’s speech emphasized the importance of constitutional enforcement and encouraged citizens to view the Constitution as a “legal weapon” to safeguard citizen rights. Senior Chinese judicial officials expanded on such messages.

This series of events catalyzed a wave of citizen constitutional activism. In March 2003, a banner headline in the progressive newspaper *Southern Weekend* declared “The Road to Constitutionalism: Begin By Respecting the Constitution!” Only weeks later, Chinese scholars leveraged public outrage over the death of a young man in state custody and filed a groundbreaking review proposal with the NPCSC that challenged the constitutionality and legality of the regulation under which the young man was detained. Reform-minded Chinese citizens viewed the government’s subsequent decision to repeal the regulation as a milestone.

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49 Huang Songyou, *supra* note 45.


51 Lam, *Politicisation, supra* note 2, at 44.


in China’s legal reform effort. In the wake of this incident, a citizen rights defense movement gained new cohesion and momentum.\footnote{For a discussion of the Sun Zhigang case and its impacts, see infra Part IV(B). \textit{See also} Deva, \textit{supra} note 30, at 76 (discussing the impact of China’s Constititution in “facilitating stakeholder activism”).}


The Party-state responded to this constitutional activism with some tolerance and with modest reform measures. As will be discussed in Parts III and IV, the Party-state allowed limited constitutional discourse in official media, established a specific office and more concrete procedures within the NPCSC for review of citizen constitutional review proposals,
and adopted constitutional amendments in 2004 that, at least on paper, enhanced property rights protections and confirmed the state’s commitment to protect human rights. In several instances, governmental organs also adopted reforms that appeared responsive to constitutional arguments.\textsuperscript{60}

However, the Party-state also took steps to limit the scope and impact of emerging constitutional demands. In 2003 and 2004, Party institutions restricted discussion of constitutional reform and senior Party leaders began to reemphasize Party supremacy in legislative and judicial work.\textsuperscript{61} The NPCSC, fearful of encouraging an avalanche of citizen claims, has intentionally avoided issuing formal public responses or rulings on citizen constitutional review proposals.\textsuperscript{62} Frustrated activists liken the submission of a constitutional review proposal to “throwing a rock into the ocean.”\textsuperscript{63} Chinese “netizens” have reported online censorship of terms such as “constitutionalism.”\textsuperscript{64} Law professors have reported the cancelation of courses on constitutional law, interference with constitutional law conferences, and the closure of law school centers focused on constitutional issues.\textsuperscript{65} Although Chinese scholars actively


\textsuperscript{62}Wang Xiuzhe, \textit{Gongmin Qidong Weixian Shencha de Falü Kunjing yu Zhidu Wanshan} [On the Legal Predicament and System Perfection of the Unconstitutional Review Initiated by Citizens], 19 BEIFANG FAXUE 29, 33 (2010); Author Interview with Legal Scholar (2007).


\textsuperscript{65}See Zhongguo Zhengfa Daxue Daxue Jiaoshou Xiao Han Bei Tingle Shijian Diaocha [Investigation into the Suspended Courses of China University of Politics and Law Professor Xiao Han], NANNFANG ZHUMO [S. WEEKEND] (Mar. 25, 2010, 3:35 PM), http://nf.nfdaily.cn/nfzm/content/2010-03/25/content_10465543.htm (noting that several constitutional law courses were suddenly canceled in 2010). In 2005 a Sino-Foreign conference on “Constitutionalism and Political Democratization in China” was canceled. E-mail from Tom DeLuca to author (May 21, 2005) (on file with author); Xianzheng Jiangan Di’er Qi: Zhongguo Fazhi de Kunjing yu Tupo [Second Constitutionalism Forum: the Predicament and Breakthrough of China’s Rule of Law], RENDA YU YIHUI WANG [CENTER FOR PEOPLE’S CONGRESS AND FOREIGN LEGISLATURE STUDY], May 26,
promoted the establishment of a constitutional supervision committee during drafting discussions for the PRC Supervision Law, NPC officials objected to these proposals and the final law failed to provide for such an entity.\textsuperscript{66}

The Party-state has been particularly careful to limit further developments related to constitutional litigation in the courts. Party officials expressed concern about \textit{Qi Yuling} and viewed constitutional litigation as a “latent threat.”\textsuperscript{67} Following \textit{Qi Yuling}, senior Party-state officials issued internal directives confirming that \textit{Qi Yuling} should not be taken as a precedent.\textsuperscript{68} Books on constitutional litigation were blocked from publication.\textsuperscript{69} Senior officials also made public statements confirming that the Constitution is not a basis for litigation and that China would not establish a constitutional court.\textsuperscript{70}

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\textsuperscript{67} Zhang Qianfan, \textit{Zhongguo Xianzheng de Lujing yu Kunjing [The Paths and Difficulties of China’s Constitutionalism]}, \textit{CAIJING WANG} [FINANCE NET] (Jan. 28, 2011), http://blog.caijing.com.cn/expert_article-151521-16381.shtml. In its decision annulling the \textit{Qi Yuling} reply, the SPC listed “application already suspended” as the reason for annulment. SPC Decision on Annulling Judicial Interpretations, supra note 7.

\textsuperscript{68} See Huang Li, supra note 41; Second Constitutionalism Forum, supra note 65, at para. 9 (comments of Jiang Ping); Malmgren, supra note 38, at 14; Beijing Shi Gaoji Renmin Fayuan Guanyu Guifan Panjueshu Yuanyin Falü deng Youguan Wenti de Zhidao Yijian [Beijing Municipalit Higher People’s Court, Guiding Opinion on Relevant Problems of Citing Laws, etc., in Standard Judgments] (Beijing Municipality Higher People’s Ct. Dec. 12, 2005) 2005 JING GAO FADA [BEIJING HIGHER PEOPLE’S CT. DOC.] no. 341, at § 10, available at http://www.chinalawedu.com/falvfagui/lg23079/89204.shtml. In its decision annulling the \textit{Qi Yuling} reply, the SPC listed “application already suspended” as the reason for annulment. SPC Decision on Annulling Judicial Interpretations, supra note 7. SPC provisions published in 2009 did not include the Constitution in a list of legal sources that courts were authorized to cite in judicial judgments. SPC Provisions on Legal Citation, supra note 37.

\textsuperscript{69} Second Constitutionalism Forum, supra note 65, at para. 10 (comments of Jiang Ping).

\textsuperscript{70} Harry Doran, \textit{Beijing Rules Out Constitutional Court—Decision Increases Fears that NPC Rights Amendment May be Little More than Window Dressing}, S. CHINA MORNING
SPC formally annulled its Qi Yuling reply in late 2008. Chinese scholars attributed the annulment of the Qi Yuling reply to numerous factors, including legal infirmities in the original decision, incompatibility with China’s political system and constitutional structure, weak courts, and leadership changes.\footnote{1}

Some observers placed the annulment of the Qi Yuling reply in the context of a broader political tightening in China. Since 2004, the Party has launched a series of “socialist legal education” campaigns to shore up Party loyalty, identified “rights defense” lawyers as threats, and intensified harassment of rights activists.\footnote{2} In 2008, the NPC appointed Wang Shengjun—who rose in the Party political-legal bureaucracy and lacked a legal education and formal judicial experience—to head the SPC. At about the same time, China’s political-legal institutions launched a new campaign to promote Hu Jintao’s “Three Supremes” slogan. The campaign emphasizes that in implementing the law, legal institutions must consider the Party’s interest, public opinion, and the Constitution and other laws.\footnote{3} Party-state leaders retreated from earlier rhetoric on the Constitution and emphasized instead that China should not blindly copy Western systems of government and the concept of separation of powers.\footnote{4}

Strangely, a case that provided an important and more direct catalyst for the formal annulment of the Qi Yuling reply has drawn less attention. In early 2007, a migrant worker named Wang Denghui was hit by a truck and suffered severe injuries during his commute home from work in a factory in southern China.\footnote{5} Crushed by a mountain of medical...
bills, Wang applied to the local labor and social security bureau for a
determination that the injury was work-related. On the basis of its
investigation and the Regulations on Work Injury Insurance, the bureau
determined that the injury was work-related and that the factory was liable
for compensation. Subsequently, the factory filed an administrative
lawsuit challenging the bureau’s determination. In support of its
challenge, the factory argued that its employee manual prohibited workers
from spending the night outside of the facility. Because Wang had done
so without permission, the factory argued, he was at fault and the resulting
injury should not be considered work-related.

In rejecting this argument and upholding the bureau’s
determination, the district people’s court handed down a significant
constitutional decision. In its judgment, the court stated the following:

China’s Constitution endows citizens with very wide-ranging rights and freedoms. Freedom of the person and
freedom of residence are rights of human dignity that citizens enjoy. The third party [Wang Denghui] was a
worker and, after a day of stressful labor, returned home
to rest and attend to housework and his personal life. This
conforms with convention, is an important component of
personal freedom, and is also the most basic right in a
citizen’s life. It should be respected. With regard to the plaintifi’s complaint that “the company prohibits workers
from spending the night outside the facility for the
purposes of management and consideration of worker
safety,” this view is contrary to the spirit of the
Constitution and conflicts with the progressive
development of a civilized society. Therefore this court
will not uphold it.76

The court’s decision expanded on Qi Yuling in several sensitive
respects. First, the court applied the Constitution in an administrative case.
Second, the case was characterized as “China’s first case involving the
constitutional right to personal freedom.”77 Third, some commentators
asserted that the court applied the Constitution as a basis for deciding the
case (although scholars have contested this characterization in subsequent

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76 YANJU (SI) [STUDY OF CHINA’S CONSTITUTIONAL CASES (FOUR)] 1–28 (Han Dayuan, ed.
2010) [hereinafter STUDY OF CHINA’S CONSTITUTIONAL CASES (FOUR)].
77 See, e.g., Wang Jian, supra note 75; Liu Xiaomei, “Xifang Guojia Xianfa Jiandu Zhidu Bijiao Yanjiu” Yantaohui Zongshu [Summary of Roundtable on “Comparative Research on
Constitutional Supervision Systems in Western Countries”], ZHONGGUO FAXUE [CHINA
LEGAL SCI.] (Sept. 19, 2008) [hereinafter Summary of Roundtable], available at
The case generated significant interest and debate in scholarly circles. The vice dean of one of China’s elite law schools expressed “excitement” at the case and a belief that, as courts move from constitutional review of private rights to enterprises to non-governmental organizations, the trend will spill over to review of state acts and the full impact of constitutional review will be realized. At a scholarly conference, an SPC judge publicly placed the Wang Denghui case on par with Qi Yuling as a “peg” for judicialization of the Constitution, while other commentators noted that the case represented a new height for constitutional litigation.

This sensitive case set off alarm bells in the Party-state ranks. Official media sources, including Xinhua, People’s Daily, and Legal Daily, appear to have avoided substantive discussion of the case. Discussion and analysis of the case has been confined to a limited number of scholarly sources and blogs. More importantly, the SPC moved to formally annul its Qi Yuling reply only months after the local court issued its decision in the Wang Denghui case. The timing of the SPC’s move, after it had allowed its Qi Yuling reply to stand for nearly seven years and limited its impact quietly through internal directives, suggests that the Wang Denghui case played an important role in the decision to formally annul the Qi Yuling reply.

Collectively, these events have led to pessimistic assessments of China’s constitutional reform potential. Chinese and Western commentators have characterized the annulment of the Qi Yuling reply as the end of constitutional litigation and a setback for constitutional

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78 See, e.g., Tong Zhiwei, supra note 38, at 39–40; STUDY OF CHINA’S CONSTITUTIONAL CASES (FOUR), supra note 75.
79 Wang Jian, supra note 75 (citing Jiao Hongchang, Vice Dean of the Chinese University of Politics and Law).
80 Summary of Roundtable, supra note 77 (citing statement of SPC Judge Li Bangyou); Huang Li, supra note 41 (alluding to the Wang Denghui case).
82 See Tong Zhiwei, supra note 36, at 677 (concluding that China’s leaders repealed the Qi Yuling reply because judicial enforcement of the Constitution would “undermine China’s political structure”). The first “constitutional right to freedom” case would certainly have magnified this perceived threat.
reform. Many observers remain pessimistic about the prospects for meaningful movement toward the development of a constitutional review mechanism (either within the courts or under the NPC) for the foreseeable future. In the wake of the stillborn push for judicialization of the Constitution and the apparent lack of progress in establishing a more robust NPCSC review mechanism, Chinese reformers face the challenge of finding alternative pathways through which to resolve constitutional disputes and promote their constitutional visions.

A growing body of scholarship on constitutional law has stressed the need to look beyond formal adjudication in assessing China’s constitutional system. In part in reaction to the judicialization movement, some Chinese and Western scholars have criticized the domination of Western, court-focused constitutional theories in discussions of China’s constitutional development. One leading scholar, Jiang Shigong, argues that observers must eschew formalism and explore the interaction between the constitutional text and the broader body of constitutional rules, conventions, and practices that comprise China’s “unwritten Constitution.” Such conventions include the “fundamental law” of Party leadership of the NPC, the relationship between Party and State institutions, consultative practices embedded in the principle of democratic centralism, constitutional statutes, and other components. Jiang concludes that constitutional theories in China must take account of China’s “unique political tradition,” “political reality,” and the interaction between these written and unwritten components. Other scholars such as Tong Zhiwei, Yu Xingzhong, Chen Duanhong, and Zhu Suli emphasize the tensions in adapting liberal Western practices to China’s transitional political reality and highlight the need to explore the popular demands and

83 Huang Li, supra note 41; Chen, Constitutions and Values, supra note 30, at 50; Zhang Qianfan, supra note 67, at §§ 1, 3.
85 Id. at 22–40. The principles of Party leadership and democratic centralism are in fact incorporated into the written constitution. XIANFA pmbl., art. 3. Jiang focuses on the operation of these conventions in practice.
86 Jiang Shigong, supra note 21, at 13–14, 34–36.
87 Id. at 22–40.
indigenous or hybrid institutions that are shaping China’s constitutional order.88 Western scholars have echoed these concerns. In a foundational article on China’s constitutional development, Michael Dowdle argues that judicial enforcement of constitutional norms is more likely to be a product of, rather than a motor for, constitutional development. A focus on judicial review, he concludes, may obscure China’s existing constitutional potential. Dowdle highlights the consultative and deliberative dynamics of China’s legislative institutions and, more recently with Stephanie Balme, the expressions of China’s politically engaged citizenry, as engines of constitutional development.89 Some scholars have proposed hybrid or alternative models for resolving constitutional disputes, but these proposals leave many open questions. On the issue of constitutional review, for example, some Chinese scholars conclude that the most practical mechanism would be some form of constitutional committee under the NPCSC.90 Some proposals, such as Ji Weidong’s suggestion that China first establish a constitutional committee made up of judges, political figures, and legal scholars to issue advisory opinions on constitutional disputes, are quite innovative.91 However, much of the Chinese scholarship is focused on

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88 See Chen Duanhong, “Zhongguo Renmin zai Zhongguo Gongchandang de Lingdao xia”—Zhongguo Xianfa de Genben Yuanze ji qi Geshihua Xiuci [“The Chinese People under the CCP’s Leadership”—Fundamental Principles of China’s Constitution and its Rhetorical Pattern], Mar. 20, 2008, available at http://www.chinaelections.org/NewsInfo.asp?NewsID=124568 (stating that scholars who ignore the fundamental political fact of Party leadership cannot understand political power and rights protection in China); Tong Zhiwei, supra note 38 (criticizing China’s “judicialization” movement and arguing that China’s existing constitutional structure, legal culture and political reality must be taken into account in its emerging constitutional culture). See also Yu Xingzhong, Western Constitutional Ideas and Constitutional Discourse in China, 1978–2005, in BUILDING CONSTITUTIONALISM IN CHINA, supra note 22, at 111–24 (discussing tension between liberal Western constitutionalism and demand for “Chineseness” and noting that the hybrid form of constitutionalism will emerge slowly), and Zhu Suli, “Judicial Politics” as State Building, in id., at 23–37 (arguing that the Party provides an alternative source of Chinese constitutionalism and that Chinese scholars need to move “beyond uncritical reference to simplistic Western notions of judicial independence to more meaningfully identify and situation [sic] these problems and thereby search more effectively solutions [sic]”).

89 Dowdle, Of Parliaments, supra note 17, at 7–11. For populist pathways, see Stephanie Balme & Michael W. Dowdle, Introduction: Exploring for Constitutionalism in 21st Century China, in BUILDING CONSTITUTIONALISM IN CHINA, supra note 22, at 2–5. For a recent critique of the focus on American models of constitutionalism, see generally Michael W. Dowdle, Of Comparative Constitutional Monocropping: A Reply to Qianfan Zhang, 8 INT’L J. CONST. L. 977 (2010). For a detailed discussion on the emergence of citizen constitutional discourse in China, see generally Balme, supra note 34.

90 For a discussion of these options, see Zhu Guobin, supra note 57, at 650–52.

91 Ji proposes a two-step process for establishing a constitutional review mechanism. Ji recommends that China first establish the hybrid constitutional committee described above. The committee would make advisory rulings to the NPC and the NPCSC on constitutional
theory rather than practice,\textsuperscript{92} and it is unclear why the Party would be willing to give a constitutional committee any more latitude than it currently gives the NPCSC or the courts.

Pan Wei has proposed a transitional “consultative rule of law” model. Pan’s model preserves the Communist Party as China’s sole dominant party but incorporates enhanced citizen participation and more robust checks and balances, including an independent Supreme Court responsible for enforcing civil and political rights enshrined in the Constitution.\textsuperscript{93} While some consultative elements of Pan Wei’s model seems plausible, it is unlikely that the Party would voluntarily submit to the authority of such a court. Pan attempts to address this concern by arguing that instability, citizen expectations for reform, and popular demands for controlling corruption will compel the Party to accept a consultative rule of law framework. Arguably, such pressures would have to reach a very high level for the Party to voluntarily take such a dramatic step.\textsuperscript{94} Even if the Party did submit to such a court on paper, it seems unlikely that as the sole dominant party it would respect the independence of such an institution.\textsuperscript{95}

Other Western scholars have discussed the need to explore constitutional models that emphasize the role of the Party and do not rest on assumptions that China is in transition to become a system that embodies liberal Western constitutionalism. Larry Backer has proposed a constitutional review chamber within the Party itself.\textsuperscript{96} Backer’s proposal highlights the need to contextualize constitutional review within China’s existing political-legal system. However, the establishment of an intra-Party chamber would represent an explicit abandonment of the current constitutional text, which vests the power to interpret and enforce the

\textsuperscript{92} Tong Zhiwei, \textit{supra} note 22, at 104–06 (criticizing constitutional law training as too theoretical and detached from the realities of China).


\textsuperscript{94} Pan Wei, \textit{supra} note 93, at 37, 40. In such a context, a much broader range of constitutional options would arguably be in play.

\textsuperscript{95} For comparative perspectives, see \textit{infra} notes 147 to 163 and accompanying text.

Constitution in the NPCSC. As both Chinese and Western scholars have argued, such a retreat would raise serious legitimacy questions about the Party and its stated commitment to “rule of law,” and it is probably not politically feasible. More importantly, while the creation of such a chamber would emphasize and reinforce the realities of Party power, it arguably would constrain efforts to balance the multifaceted visions and demands generated by constitutional disputes in China’s changing political-legal landscape. The creation of such a chamber might also impede efforts to promote consensus with non-Party actors or to navigate a future transition.

Randall Peerenboom also emphasizes the need to consider Party-dominated models. While assessing a range of constitutional alternatives, he concludes that the Party-state will most likely “continu[e] to muddle through, setting aside ideological tensions, jurisprudential puzzles and technical inconsistencies, while adopting a results-oriented pragmatic approach.”

Peerenboom’s analysis invites a more detailed inquiry into transitional mechanisms that might help to navigate the “muddle” and into ways in which China’s constitutional reformers might use such mechanisms.

The events and models discussed above highlight gaps and tensions between constitutional law scholarship that emphasizes the need to account for the realities of China’s current political-legal system and scholarship that focuses on citizen efforts to implement China’s constitutional text as a legal restraint on the Party-state. These gaps and tensions are worthy of further exploration. A dynamic analysis of the Constitution and its significance requires not only an understanding of current realities and constitutional practices (what the Constitution is), but also an appreciation for how these conventions may operate (or be co-opted) to accommodate new constitutional visions and popular expectations. The constitutional dispute resolution model that emerges in a changing China, whether it is a liberal Western model, a model grounded in current political-legal practice, or a hybrid model, will almost certainly be the product of a dynamic interaction between existing conventions and emerging demands. The hybrid models proposed to date are either unrealistic or fail to fully capture these interactive dynamics.

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98 Hand, Can Citizens Vitalize the Constitution?, supra note 58, at 19.
III. THE COLLECTIVE POLITICAL DIMENSION OF CONSTITUTIONAL LAW IN CHINA’S ONE-PARTY STATE

A. The Dual Political-Legal Dimensions of Constitutional Law

It should not be surprising that it might be necessary to shift our focus away from formal adjudication in exploring the resolution of constitutional disputes in China. Constitutional law sits at the juncture of law and politics. Constitutions declare national goals and values, provide governing legitimacy, define the scope of citizen rights and the boundaries of state power, and allocate authority among state institutions. As the legal expression of these fundamental political orderings, constitutional law possesses both political and legal dimensions. Constitutional texts are the product of political bargaining and deliberation. The uncertain task of understanding elastic or abstract constitutional provisions and the content of unwritten constitutional conventions also creates space for negotiation and consensus building. Collective values, perceptions, and demands, and the degree to which powerful political actors are committed to a constitutional vision, shape the operation of constitutional constraints. The interpretation and application of constitutional law is intricately intertwined with the political process and the evolution of the broader political environment.

In the United States, explorations of the dual dimensions of constitutional law have prompted some scholars to reassess the centrality

99 Elkins et al., supra note 24, at 38–39.
102 Kramer, supra note 100, at 30.
103 Keith E. Whittington, Constitutional Constraints in Politics, in The Supreme Court and the Idea of Constitutionalism (Stephen Kautz, ed.), at 221, 223, 229, 231; Ackerman, supra note 101, at 62. For Chinese discussion of such dynamics, see, e.g., Chen, Constitutions and Values, supra note 30, at 10; Zhai Xiaobo, Renmin de xianfa [The People’s Constitution] 42 (Falü Chuban She, 2009) (noting that the effectiveness of a constitution depends on the people’s constitutional consciousness and the morals of political actors), and Jiang Shigong, supra note 21, at 17–22, 30 (noting that the binding force of constitutional conventions in China depends on elite consensus).
and supremacy of courts in interpreting and implementing the American Constitution. In *The People Themselves*, Larry Kramer argues that for most of American history, citizens played a central role in interpreting and implementing the Constitution through their political mobilizations. Drawing on this historical account, Kramer characterizes constitutional law as a special category of law that is “political-legal” in nature and neither has been nor should be solely the province of courts. Kramer concludes that constitutional law should be the product of interpretations offered by a mobilized citizenry, political branches, and the courts, with the people exercising final authority.

Mark Tushnet offers a similar formulation. Tushnet characterizes constitutional law as “political law.” He also rejects a judicial monopoly over constitutional interpretation and argues for a “populist constitutional law” in which citizens, through a principled political process, take an active role in debating, interpreting, and implementing core constitutional values and creating constitutional law. For Kramer and Tushnet, constitutional or “political” law exhibits a legal dimension, and is distinct from ordinary political decision-making, because decisions are constrained by constitutional texts, conventions, and precedents recognized as binding.

Bruce Ackerman has emphasized the role of citizen mobilization and political movements in American constitutional transformations. Ackerman’s theory of popular constitutionalism focuses on periods of “higher lawmaking” or “constitutional politics” in which citizens raise collective demands and catalyze constitutional transformations through their political institutions. His constitutional moments are the culmination of long periods of sustained popular mobilization during which reformers advance arguments, recruit supporters, defend their ideas against doubtful citizens and conservative opponents, and build a popular foundation for new constitutional arrangements. In Ackerman’s account, courts do not catalyze these constitutional transformations. Instead, they are forced to acknowledge the emerging constitutional visions endorsed

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104 See generally Kramer, supra note 100.
105 Id. at 24.
106 Id. at 201, Epilogue.
107 Tushnet, supra note 100, at 991.
108 Mark Tushnet, *Taking the Constitution Away from the Courts* (1999). Tushnet’s theory focuses on the role of citizens in interpreting and implementing the “thin” Constitution, or elements that “establish fundamental guarantees of equality, freedom of expression and liberty” and embody the basic principles set out in the Declaration of Independence and the Preamble. Id. at 11–14, 181.
110 See generally Bruce Ackerman, 1 *We the People: Foundations* (1991) and Bruce Ackerman, 2 *We the People: Transformations* (1998).
by a mobilized citizenry and eventually approve and consolidate them through new constitutional interpretations.

These and other Western theories of “popular” or “political” constitutionalism 111 highlight dimensions of constitutional law that are useful for understanding constitutional dispute resolution in contemporary China. At a certain level of abstraction, elements of these theories resonate with some contemporary experiences in China. Sustained efforts by Chinese reformers to constitutionalize public disputes and promote liberal constitutional visions remind observers of Ackerman’s emphasis on the long periods of political mobilization and consciousness building that may be necessary to challenge existing constitutional interpretations. 112 Kramer’s account of the range of political-legal acts that American colonials employed to enforce their constitutional understandings also resonates in the Chinese context. 113 However, such theories do not provide a template or formula that can simply be transposed onto China. China is a one-party state with a distinct political-legal system, culture, and, history. Instead, these theories bring the duality of constitutional law into sharper relief and remind us that even in the United States, where there is a long tradition of judicial review, the respective roles of citizen mobilization, political institutions, and court adjudication in enforcing and interpreting the Constitution are the subject of active and ongoing debate.

To varying degrees, these theories also provide insight into dynamics of consultation and bargaining in the process of constitutional interpretation and enforcement. For example, in Kramer’s departmental theory, the political branches of government and the courts offer interpretations of the constitution that are neither final nor authoritative. Divergent constitutional interpretations are addressed through a process of deliberation and negotiation in which the people, acting through their political institutions, are the final arbiters. 114 The Supreme Court’s

111 For two other approaches, see Robert Post & Reva Siegal, Popular Constitutionalism, Departmentalism, and Judicial Supremacy, 92 Calif. L. Rev. 1027 (2004) (supporting a robust role for the courts and arguing that popular constitutionalism and constitutional law pronounced by courts shape, balance, and mutually reinforce each other) and BELLAMY, supra note 100 (arguing that judicial review represents arbitrary rule and that the democratic political process is a more effective mechanism for upholding rights than the judicial enforcement of written constitutions advocated by “legal constitutionalists”).

112 Ackerman subsequently discussed this dynamic in the context of liberal transformations in Eastern Europe. See generally ACKERMAN, supra note 101.

113 Colonists undertook a range of political-legal acts to enforce their constitutional understandings, including public assemblies and denunciations, pamphleteering, letters of petition to the government, jury nullification, collective resistance to acts of law enforcement, and mob action. KRAMER, supra note 100, at 25–29. As this article demonstrates, Chinese reformers are using a similar range of political-legal acts to advance their constitutional visions.

114 KRAMER, supra note 100, at 109, 249–53.
constitutional interpretations shape this process. By recognizing the historical role of political institutions in constitutional interpretation and enforcement, popular constitutionalists give full play to the processes of deliberation, bargaining, and negotiation that characterize such institutions.

In China’s socialist one-party system, additional layers are added to the political-legal duality of constitutional law. In Marxist legal theory, law is an instrument of politics. The rhetoric, institutional designs, and practice of the Party embody this firm linkage between politics and law. Courts, prosecutors, police, state security institutions, justice bureaus, and the legal profession are all considered components of a larger zhengfa or “political-legal” system, and Party political-legal committees coordinate and oversee the work of such institutions at each level of administration. Political-legal institutions are instructed to consider not only concrete legal provisions, but also the political interests of the Party, public opinion, and impacts on stability, in resolving legal disputes. The Constitution itself, with its long preamble and textual references to the leading role of the Party, the socialist system, and socialist legality, firmly anchors China’s constitutional framework in the political primacy of the Party.

While China’s legal system is heavily politicized, its political system has also been progressively legalized in the reform era. In 1978, the Party adopted the construction of a “socialist legal system” as a pillar of China’s reform and opening program. In 1982, it incorporated the concept of the supremacy of the law into the Constitution. In the mid-1990s, the Party endorsed the concept of building a socialist rule of law state and administering the country in accordance with the law. These concepts were incorporated into the Constitution in 1999. As discussed

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115 As the highest judicial organ, the Supreme Court’s interpretations are accorded significant weight. In the many cases in which political opposition is insufficient to overcome procedural hurdles and to implement alternative interpretations, Supreme Court interpretations may stand as final. KRAMER, supra note 100, at 235, 252.
116 Id. at 238–41.
118 PEERENBOOM, supra note 12, at 302–309. For a recent Party text that lays out the goals and basic mission of the zhengfa system, see Xuexi Shijian Kexue Fazhan Guan ji Shenru Kaizhan “Da Xuexi, Da Taojun” Huodong [Textbook Reader on Studying Implementation of the Scientific Development Outlook and Deepening Development of “Major Study and Major Discussion” Activities], Mar. 3, 2009 [hereinafter Political-Legal Textbook].
119 See infra Part V(A).
120 For a foundational discussion and analysis of this process for the period from 1978 to 2005, see generally Balme, supra note 34.
121 Third Plenum Communiqué, supra note 29.
122 XIANFA pmbl., art. 5.
123 Id. at art. 5, §1.
above, senior Party leaders routinely emphasize that the Constitution is supreme law, and the NPC has amended the Constitution to provide explicitly that the state protects and safeguards human rights. The Party has adopted such formulations to shore up its governing legitimacy, ease pressures for broader political reform, address local governance problems, and maintain social stability. 124 In the context of China’s tightly controlled political environment, this rule of law campaign has funneled many political demands into the legal arena and made courts an important forum for political expression and protest. 125 Chinese reformers, conscious of the risks of direct political resistance, have attempted to leverage and expand these legal innovations to implement constitutional rights, push for the establishment of a meaningful constitutional review process, and promote the concept of a constitution that restrains political actors in practice. 126 In short, Chinese citizens have magnified the political significance of constitutional law.

In a one-party state experiencing rapid economic and legal development, the political dimensions of constitutional law arguably are at their height. Fundamental questions concerning allocations of power among state institutions, the practical operation of constitutional constraints on the Party, the relationship between citizens and the Party-state, and the role of the Constitution and legal institutions in mediating these relationships are unsettled and are the subject of ongoing

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contention. At their core, all of these questions implicate unresolved tensions between the leadership role of the Party and constitutional provisions on legal supremacy and citizen rights. Chinese commentators characterize this underlying constitutional issue as one of sovereignty.

In the words of one scholar:

In China’s current political environment the difficult problem of sovereignty is largely encapsulated in [the following]: how can the constitutional concept of ‘the Chinese people of all nationalities led by the Communist Party’ (Preamble of the Constitution) and the political reform principle of ‘persisting in the organic unity of leadership of the Party and people as masters of their own house,’ be implemented through a structure of legal rights?

In this context, the very act of interpreting and applying the Constitution implicates fundamental and unresolved political questions. Political processes that facilitate negotiation and a balancing of interests can thus be expected to play a central role in resolving constitutional disputes.

Chinese legal scholars recognize the dual political-legal dimensions of constitutional law and the prominence of the political dimension in contemporary China. Veteran Chinese legal scholar Liang Zhiping explains that “even if the Constitution has a legal nature, it is

127 Peerenboom, supra note 97, at 22; Balme, supra note 34, at 18–20; Chen, Constitutions and Values, supra note 30, at 49; Dowdle, Popular Constitutionalism, supra note 17, at 15–17; Wang Qinghua, supra note 125, at 525. See also Tong Zhiwei, supra note 22, at 107 (“[T]he striking feature of constitutional scholarship is the lack of a common constitutional culture and set of values amidst constitutional experts[,]”); Cai Dingjian, supra note 32, at § 2 (explaining that perceptions of the Constitution have shifted over the reform era, and the Constitution is now viewed as a theoretical and legal weapon for citizen rights defense); Huang Songyou, supra note 45 (arguing that in China’s transition, the legal quality of the Constitution must be strengthened and the Constitution is needed to address new social relations, and noting that citizen rights consciousness is rising, resulting in large numbers of constitutional disputes).

128 Peerenboom, supra note 97, at 36; Balme, supra note 34, at 18–20. See also WANG ZHENMIN, supra note 37, at 378 (asserting that the core problem in building constitutional review is the reconstruction of political power); Second Constitutionalism Forum, supra note 65, at paras. 7, 52 (noting that a core problem with a constitutional court and the socialist legal system more broadly is balancing the authority of legal processes and the leadership of the Party); GHAI, supra note 30, at 85 (observing that the extra-constitutional status of the Party is a core contradiction in socialist constitutions that claim to be moving toward legality). Zhang Qianfan notes that the judicialization of the Constitution failed because the Party viewed it as a latent threat. Zhang Qianfan, supra note 67, § 3, para. 3.

129 Chen Duanhong, supra note 88, at 1; Jiang Shigong, supra note 21, at 25–26; ZHAI XIAOBO, supra note 103, at 1–2.

130 ZHAI XIAOBO, supra note 103, at 2.
different from other laws” because it also incorporates “political elements, philosophical elements, and political morals that are intricately related.” The “extra-legal” elements, he explains, shape the interpretation of the Constitution.” As Liang concludes, while China recognizes the Constitution as fundamental law, the lack of justiciability weakens its legal characteristics.131 Jiang Shigong expresses a corresponding idea. “We can never regard the Constitution as only a legal document,” he asserts. “Why? Because the Constitution cannot guarantee itself. The Constitution must be ensured by a political power beyond the law.”132 Similar themes emerge in other Chinese scholarly sources.133 Constitutional law scholar Zhang Qianfan captures the duality in his concept of “official” and “populist” paths for Chinese constitutionalism. The “official” path, he explains, was embodied in efforts to judicialize the Constitution, died a premature death due to political constraints, weak courts, and a lack of broad popular consciousness and demand.134 However, “populist” efforts to realize constitutional rights through political mobilizations, while facing significant systemic constraints, have demonstrated meaningful potential to promote implementation of the Constitution.135 “The experience of constitutionalism in China,” he concludes, “provides proof of Professor Larry Kramer’s core point about popular constitutionalism: if the people do not actively participate in formulating and implementing the Constitution, a Constitution cannot transform into constitutionalism.”136

B. Obstacles to Formal Adjudication of Constitutional Disputes in China

In this context, China’s courts are poorly positioned to resolve complex constitutional disputes or catalyze constitutional transformations through expansive interpretations of China’s constitutional text. Some Chinese legal scholars argue that judicialization of the Constitution

131 Second Constitutionalism Forum, supra note 65, at para. 39.
132 Ji Weidong, Legal Discourse in Contemporary China, in BUILDING CONSTITUTIONALISM IN CHINA, supra note 22, at 132–33 (citing Jiang Shigong).
133 See, e.g., ZHAI XIAOBO, supra note 103, at 4 (arguing that “judicial constitutionalism” is in conflict with China’s Constitution and advocating “popular constitutionalism”); Cai Dingjian, The Development of Constitutionalism, 19 COLUM. J. ASIAN L. 2, 27–30 (2005); Cai Dingjian, supra note 32, at §§ 1, 2; Chen Duanhong, supra note 88; Huang Songyou, supra note 45 (noting that while the Constitution has had a strong political influence, it must be recognized that the Constitution has both political and legal qualities).
134 See generally Zhang Qianfan, supra note 67, at § 3, paras. 3–5. Other scholars offer similar formulations that distinguish between the path of judicialization and the path of popular constitutional enforcement represented by the Sun Zhigang case. Tong Zhiwei, supra note 38, at § 1.
135 Zhang Qianfan, supra note 67, at §§ 4, 5.
136 Id. at § 6, para. 1.
violates China’s constitutional structure and the principle of rule of law. Even if Chinese courts successfully challenged such constitutional assumptions and applied constitutional provisions as the basis for deciding cases, they exercise neither the power of judicial review nor the power of constitutional interpretation. One attempt by a local court to exercise such powers in a mundane contract case generated national controversy and legislative backlash. There is no system of formal, binding precedent in China, a condition that would facilitate the incremental development of constitutional principles through an evolving body of case law. Collegial panels composed of up to three judges hear cases, and court rules require adjudication committees made up of senior court leaders to approve decisions in “major” or “complex” cases. The Party also exercises tight control over court appointments and promotions through its nomenklatura system, and it closely monitors the work of legal institutions through Party Political-Legal Committees and Party cells. These features constrain the work of courts and individual judges, who may view themselves more as civil servants implementing policy than as independent judicial officials. The NPCSC is subject to similar political constraints.

Chinese courts are also weak with respect to other state actors. Law enforcement personnel often outrank judges on the Party political-legal committees that oversee the work of courts (although recent developments suggest that this power dynamic may be changing).

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137 See, e.g., id. at §§ 1, 3.
138 See infra Part IV(A)(2).
141 PEERENBOOM, supra note 118, at 302–04; Zhang Qianfan, supra note 67, at § 3, paras. 4, 5; Zhu Suli, supra note 88, at 26–27. For information about the nomenklatura system, see KENNETH LIEBERTHAL, GOVERNING CHINA 234–37 (2004).
142 Zhu Suli, supra note 88, at 60.
143 Jiang Shigong, supra note 21, at 25.
144 There are signs that the Party may institute reforms to address this imbalance. For both past practice and contemporary reform discussions, see Wang Liping, You Gaoyuan Yuanzhang Ren Zhengfawei Shiji Xiangdao [Thoughts From the Appointment of a Provincial High Court President as Secretary of the Political-Legal Committee], ZHENGYI WANG [JUSTICE NET] (Nov. 26, 2011), http://wlp2026.fyfz.cn/art/1046573.htm (tracing the
Local governments control court budgets and judicial salaries and often pressure courts. In the administrative law context, courts are turning to “reconciliation” rather than adjudication in part to avoid issuing judgments on the legality of administrative actions that may anger local state actors and are difficult to enforce. These dynamics would be heightened in constitutional cases involving sensitive issues of human rights and constitutional constraints on Party-state power.

Even if China established a constitutional court or committee, such a body would likely apply the Constitution conservatively. In some cases, people’s courts have cited constitutional provisions enshrining Party leadership or conditioning rights with duties in order to negate or deflect constitutional rights arguments. A constitutional adjudication institution could adopt a similar, conservative balancing of constitutional rights and duties. Popular concern about threats to social stability and historical evolution of Political-Legal Committees) and Chen Youxi, Sifa Duli Shenpan Ying Cong Youhua Zhengjiawei Jieguo Rushou [Independent Judicial Adjudication Should Commence by Optimizing the Structure of the Political-Legal Committee], NANDANG ZHOUNG [S. WEEKEND], Nov. 30, 2011, available at http://www.qstheory.cn/zz/tzjs/201111/t20111130_126607.htm (discussing the significance of the appointment of the President of the Sichuan province Higher People’s Court to the position of Secretary of the provincial Political-Legal Committee, but noting that this is only a single appointment).

145 See infra Part V(B).
146 See, e.g., Suqian Intermediate People’s Court of Jiangsu Province, Criminal Verdict, (issued by the Suqian Intern. Crim. 2d Div., Oct. 16, 2009) (no official reporter info. available), translated in http://www.duihua.org/work/verdicts/verdict_Guo%20Quan_en.htm (translating the verdict in the criminal trial of Guo Quan, a subversion case in which the Jiangsu court cited constitutional provisions on public order to reject defendant’s argument that he was exercising constitutional rights of freedom of speech and association). See also Jinshuan Su 360 Dongzhizhang Mingyu Qinquan An Zhongshen Luochui: Zhou Hongyi Bei Pan Shanchun Wuruxing Weibo Bing Pei 5 Wan Yuan [Final Verdict in Defamation Case of Jinshuan Against 360 CEO: Zhou Honghe Ordered to Delete Offensive Microblog Postings and Pay 50,000 Yuan in Compensation], FAZHI RIBAO [LEGAL DAILY], Aug. 31, 2011, available at http://www.legaldaily.com.cn/society/content/2011-09/05/content_2926758.htm?node=28813 (discussing a defamation case in which a Beijing court confirmed that the Constitution protects the right to expression but also noted that citizens posting on Weibo should avoid attacking others with offensive words).
147 Singapore is a soft authoritarian system that engages in such balancing. Singapore’s Constitution authorizes the legislature to adopt statutes restricting some civil and political rights in the interest of security, public order, health, or morality. CONSTITUTION OF THE REPUBLIC OF SINGAPORE arts. 14–16 (Sing.). Singapore’s courts have interpreted such provisions broadly to validate restrictions on some civil and political rights and to limit the role of the courts in policing related policies. Li-ann Thio, Rule of Law within a Non-Liberal ‘Communitarian’ Democracy: The Singapore Experience, in ASIAN DISCOURSES OF RULE OF LAW 199–208 (Randall Peerenboom ed., 2004). In some cases, Singaporean courts have referenced Asian cultural values to qualify rights. Ang Hean Leng, Constitutional Rights Adjudication in Asian Societies, 2011 The Law Rev. (Thomson Reuters) at 262–264, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1903697.
conservative attitudes toward law and rights might also influence the decisions of such an institution. In the unlikely event that a constitutional adjudication institution adopts a balancing of constitutional rights and duties that senior Party-state leaders oppose, such leaders could issue directives prohibiting lower courts from following the interpretation, or the NPC could simply amend the Constitution and negate the ruling with a two-thirds majority vote. Party control over the NPC and its agenda would present a constitutional check on any expansive court decisions.

The experience of constitutional courts in South Korea and Taiwan suggests that the impact of such an institution would be limited in China’s authoritarian system. Both South Korea and the Republic of China established constitutional courts under post-war constitutions. Authoritarian governments effectively marginalized these institutions for decades. The Guomindang in Taiwan and a succession of military governments in Korea employed a variety of mechanisms to marginalize constitutional courts, including strict political control over judicial appointments, executive control of judicial budgets and administration, the ongoing threat of corruption prosecutions, and tight restrictions on entry to


149 Such steps were taken to limit the impact of the Qi Yuling case. See supra note 68 and accompanying text.

150 XIANFA art. 62(1), 64. When Singapore’s Court of Final Appeal issued an expansive interpretation of Singapore’s due process clause to limit the effect of the Internal Security Act, the ruling People’s Action Party amended the Constitution to curtail judicial review and undermine the effect of the precedent. Gordon Silverstein, Singapore: The Exception that Proves Rules Matter, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 78–83 (Tom Ginsburg & Tamir Moustafa eds., 2008) [hereinafter RULE BY LAW]. For a similar incident in Korea, see infra note 157 and accompanying text.

151 In Korea, a succession of different institutions exercised the power of constitutional review. THOMAS GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 208–213 (2003).

the legal profession. Many sensitive political cases were handled in military courts or through administrative processes.

Authoritarian governments also erected procedural obstacles to make it difficult to raise constitutional claims and issue constitutional decisions. For example, from 1948 to 1958, Taiwan’s Council of Grand Justices (CGJ) could issue a constitutional interpretation only in response to a petition by a central or local government agency. From 1958 to 1993, an individual could file a constitutional claim only if he or she disputed the constitutionality of a legal provision relied on by a court of final resort and exhausted all remedies. Until the late 1970s, the CGJ had no power to review the constitutionality of lower court decisions.

Constitutional courts also faced the threat of political backlash. When Korea’s Supreme Court invalidated provisions of a government compensation statute and a statutory provision requiring a two-thirds supermajority for constitutional decisions, authoritarian President Park Chung-Hee engineered amendments to the Korean Constitution that vested him with the power to re-nominate judges to a weakened Supreme Court.

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153 Ginsburg, supra note 151, at 122, 129–30, 211–12; Tsung-fu Chen, supra note 152, at 390–91, 398. For restrictions on the legal profession during authoritarian eras and the importance of expanded access to the profession in liberalizations in Taiwan and South Korea, see generally Tom Ginsburg, Law and the Liberal Transformation of the Northeast Asian Legal Complex, Illinois Public Law Research Paper no. 6-03, May 2006, 1, 7–9, 12–13, 14–27.


156 Id.; Ginsburg, supra note 151, at 135–36, 211–13. In Korea, only an ordinary court could ask the Constitutional Committee of the First Republic (1948–1960) to rule on the constitutionality of a law. The Supreme Court retained authority to adjudicate the constitutionality of administrative regulations. From 1972 to 1986, only the Supreme Court could refer questions to the Constitutional Committee. Id. at 211–13.

157 CGJ History, supra note 155 (stating that a supermajority of two thirds of voting judges was required to issue a constitutional interpretation from 1948–1958, and a quorum of three quarters of justices and a three-quarters supermajority was required to issue an interpretation from 1958–1993); Ginsburg, supra note 151, at 132, 211–12 (stating that the Korean Court Organization Act was amended in 1970 to raise the threshold for a constitutional interpretation to two thirds in an attempt to preempt an unfavorable ruling in a sensitive case). This threshold was later raised to require the votes of seven of nine members of the Korean Constitutional Committee. INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA 263 (Sang-Hyun Song ed., 1983).
Court and shifted the power of constitutional review to a new constitutional committee that he controlled. Park subsequently excluded the Supreme Court justices who had voted against him. Similarly, a 1950s CGJ decision angered the Guomindang-controlled legislature, which responded by curtailing the Council’s jurisdiction and raising the threshold for a constitutional interpretation. In the face of the authoritarian constraints described here, constitutional courts in both jurisdictions remained largely dormant during authoritarian eras and emerged as activist guardians of constitutional rights only after political openings and constitutional reform in the 1980s and early 1990s.

In China’s current political environment, it is unlikely that a court or an NPC committee would apply the Constitution expansively. Fundamental questions related to the Constitution are unsettled. Law in China (and constitutional law in particular) is highly politicized, and the Party carefully monitors both judicial and legislative institutions. Even if a constitutional court or similar institution were created on paper, Party leaders would have many tools to limit the impact of such an institution. Already, Chinese courts are distancing themselves from sensitive administrative law cases that expose the limits of their authority and generate backlash. As the records of similar institutions in South Korea, Taiwan and other jurisdictions demonstrate, constitutional courts are more likely to consolidate, rather than create, political openings. In short, a commitment to political reform is almost certainly a precondition to the establishment of effective constitutional adjudication and meaningful rights enforcement in China.


159 Id. at 131–33. The CGJ found only one statute unconstitutional between 1948 and 1976. The government simply ignored that ruling. The CGJ decision represented an effort to assert judicial control over court finances. Id. at 124, 133–34.

160 Once political transitions were underway, both the CGJ in Taiwan and the Korean Constitutional Court took an active role in dismantling the pillars of authoritarian governance and interpreting constitutional provisions expansively to restrain state power. Ginsburg, supra note 151, at 157, 208–13, 240–44; Tsung-fu Chen, supra note 152, at 386–96. Even political reform is no guarantee of an activist court, however. Japan’s Supreme Court has struck down only a handful of statutes or government acts as unconstitutional. The court has been characterized as one of the most conservative in the world. See David S. Law, Why Has Judicial Review Failed in Japan?, 88 WASH. U. L. REV. 1425–28 (2010–2011).

161 See infra Part V(B).

162 Randall Peerenboom, China Modernizes: Threat to the West or Model for the Rest (2007). See Dowdle, Of Parliaments, supra note 17, at 25–26 (“[W]ith the exception of South Africa, judicial review played little role in the third wave of democratic transitions.”); Hand, supra note 58, at 19.

163 See Wang Zhenmin, supra note 37, at 378 (arguing that resolving the problem of constitutional review depends on political reform); Jiang Ping, supra note 5; Cai Dingjian, supra note 32, at §§ 1, 2; Ji Weidong, supra note 91, at 9; Zhang Qianfan, supra note 67, at §§ 1, 3, 6; Peerenboom, supra note 126, at 88, 95. Even in the wake of a transformative
C. Using the Constitution to Shape China’s Political Environment

In such an environment, how might citizens use the Constitution to create pressures for the type of political reforms that would enable a constitutional adjudication institution to perform a more meaningful role? O’Brien and Li’s concept of “rightful resistance” in rural China provides one perspective. Chinese citizens are citing central laws and policies, leveraging elite allies, and applying multiple and escalating measures to challenge local injustices. O’Brien and Li characterize these tactics as a type of “boundary-spanning” behavior that occupies a gray zone between accepted and transgressive contention. To navigate this uncertain zone, rightful resisters remain focused on clear-cut violations of central laws and have generally refrained from broader constitutional arguments. Prominent rights defenders have applied similar tactics in the context of constitutional law, and O’Brien and Li suggest that rightful resistance could be shaping popular attitudes in potentially transformational ways. However, given the flexibility and tensions in China’s Constitution, rightful resistance in the realm of constitutional law arguably involves some dynamics that differ from the rural dynamics that O’Brien and Li document.

Dowdle’s model of pragmatic constitutional development provides insight into such broader dynamics. Dowdle argues that successful constitutionalism is the product of a slow, transformative process of constitutional learning. This process is fueled by ongoing patterns of discourse between and within state and society and a slow, accretional process he calls “discursive benchmarking.” The center identifies innovations to address social problems through consultative processes and validates them through legal or policy changes. Other social and political actors adapt and expand innovations to their own needs. This process of adaptation and expansion in turn diffuses, legitimizes, and embeds new constitutional practices and visions. Dowdle emphasizes the cooperative dynamics of constitutions and the processes of deliberation, consultation, and bargaining necessary to establish consensus for political shift, judicial protection of rights may be constrained until a new political consensus is constitutionalized. Ackerman, supra note 101, at 112.

164 O’Brien & Li, supra note 15.
165 Id. at 60, 122.
166 Id. at 116–29.
167 Dowdle, Of Parliaments, supra note 17, at 140–60. See also Peter L. Lorentzen & Suzanne E. Scoggins, Rising Rights Consciousness: Undermining or Undergirding China’s Stability?, at 10–11 (Sept. 1, 2011) (unpublished ms.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722352 (arguing that rising rights consciousness involves an interaction between changing state policies and shifts in values and the perception of values held by others).
about the content and operation of abstract or evolving constitutional norms.\textsuperscript{168}

Baogang He and Mark Warren’s concept of authoritarian deliberation also provides a useful framework for understanding the potential impacts of constitutional argument. He and Warren theorize that controlled but genuine deliberation that influences decision-making is possible in authoritarian systems.\textsuperscript{169} They find evidence of such dynamics in the emergence of a range of consultative and deliberative practices in China, including village elections, public hearings, the solicitation of public comment in lawmaking, deliberative polling, and limited debate in the press and on the Internet.\textsuperscript{170} They also note that rights-based actions have catalyzed deliberative interactions.\textsuperscript{171} Assessing the implications of such patterns for China’s political development, He and Warren conclude that authoritarian deliberation will most likely assist the Party-state in co-opting opposition forces and enhancing its capacity and legitimacy. However, they also acknowledge that such processes could promote democratic political dynamics by fueling the incremental development of institutions and related citizen expectations that are not easily contained.\textsuperscript{172}

The heavy emphasis that domestic Chinese actors place on consensus building and evolutionary development processes in the context of constitutional disputes reinforces these theoretical perspectives. It also suggests that some Chinese constitutional reformers are synthesizing rightful resistance and discursive benchmarking dynamics. Many Chinese commentators argue that the resolution of constitutional disputes and the development of constitutionalism in China will be the product of an interactive process involving top-down decision-making, grassroots pressure, and sustained citizen-state dialogue and compromise.\textsuperscript{173}

\begin{footnotes}
\textsuperscript{168} Dowdle argues that in an emerging constitutional system such as China’s, legislatures have unique capacities to promote these dynamics. Dowdle, Of Parliaments, supra note 17, at 1, 3–4, 161–65.
\textsuperscript{169} He & Warren, supra note 14, at 269–74. He and Warren define deliberation as an enabling of discursive space in which participants are not merely consulted but in which arguments, ideas, and preferences are exchanged and actually influence decision-making.
\textsuperscript{170} Id. at 274–80.
\textsuperscript{171} Id. at 278.
\textsuperscript{172} Id. 282–84.
\textsuperscript{173} For examples of these themes in academic literature, see generally Zhang Qianfan, supra note 67, at § 2, paras. 3–4, § 6; Cai Dingjian, supra note 133, at 27–29. For media commentary, see Chen Zhishi, Shehui Wending Xuyao Zhongjianpai [Social Stability Requires a Moderate Faction], NaNANG ZHOUMO [S. WEEKEND], June 26, 2010, at F29, available at http://www.infzm.com/content/47000 (praising the resolution of a constitutional dispute over electoral reform in Hong Kong through moderation and political compromise and suggesting that the mainland should borrow this model); Cao Zhenghan, Baochi Shehui Wending: Ying Gaijin ‘Fensan Shaoguo’ de Zhili Fangshi—Zouchu ‘Zhongyang Zhi Guan, Difang Zhimin Jiu Geju’ [Preserving Social Stability: We Should Improve On the “Scattered Burning Furnaces” Model of Governance—Leaving
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example, the late Cai Dingjian characterized the process of exercising constitutional rights as a “negotiation” with the Party-state and constitutionalism as the product of a slow interactive and step-by-step process of grassroots demands and corresponding Party-state accommodation.\(^{174}\) Zhai Xiaobo emphasizes the existence of divergent views on elastic constitutional provisions and the building of constitutional compromises and consensus through an interactive process involving “popular, political, deliberative and democratic channels.”\(^{175}\) China’s constitutional text is one of multiple sources of authority that shape this bargaining.\(^{176}\) While recognizing the necessity and challenges of working within China’s existing Party-state structure, Chinese observers emphasize that collective grassroots collective pressure is essential for reform, and that citizens will not realize constitutional rights without making collective demands on the Party-state.\(^{177}\) These approaches represent a synthesis of rightful resistance and discursive benchmarking dynamics within China’s existing deliberative space.

Sustained constitutional argument plays an important role in generating such collective demands. In an authoritarian state, citizens may perceive the potential costs of individual resistance to constitutional

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\(^{174}\) Cai Dingjian, suprano note 133, at 28–29; Cai Dingjian, suprano note 32, at § 2 (noting that the establishment of constitutional review will be a long process in which citizens will continually challenge the constitutional review system and the highest organs of state power will gradually adjust to the challenges).

\(^{175}\) See Zhai Xiaobo, supra note 103, at 5–7, 48 (“The people are true actors in representative institutions, the electoral process, the media and Internet, citizen exchanges and public movements, formal channels and informal public space, acclaims and cheers, and anger and blame.”).

\(^{176}\) Cai Dingjian, supra note 133, at 25. See also Peerenboom, supra note 126, at 87 (submitting that the Constitution provides a backdoor against which legal reforms and the balance of power are negotiated).

\(^{177}\) See Cai Dingjian, supra note 133, at 27–29; Zhang Qianfan, supra note 67, at § 6 (emphasizing the crucial role of bottom-up forces, but noting that constitutionalism involves a complex balancing of ruling party interests, local interests, and citizen demands and cannot simply be “populist”); Second Constitutionalism Forum, supra note 65, para. 69 (citing He Weifang); Zhai Xiaobo, supra note 103, at 42. It should be acknowledged that Chinese scholars emphasizing consultative dynamics may be motivated by different visions of the Chinese state. While it seems clear that scholars such as Zhang Qianfan and Cai Dingjian seek to promote a liberal constitutional model for China, others may emphasize consultative practices and political processes of constitutional dispute resolution to strengthen or justify the existing system. This possibility reinforces one of the core arguments in the article. To the extent both conservative and liberal scholars view constitutional dispute resolution as a consultative, interactive process, divergent intellectual factions have at least some rhetorical common ground that can be employed to explore transitional mechanisms.
violations to be high. As constitutional arguments are advanced and discussed, they generate awareness of the Constitution and build common understandings of constitutional rights. If citizens believe that their understanding of the Constitution reflects a broad consensus and that others are acting on that understanding, they will be more likely to raise constitutional arguments to redress perceived violations themselves. Constitutional reformers are working to raise constitutional consciousness both by promoting shifts in values and by strengthening the perception that other citizens hold similar views and will support or advance similar claims. These efforts help to drive the discursive benchmarking process and embed emerging constitutional visions.

Constitutional argument may fuel this feedback dynamic even in the absence of a concrete legal outcome. Certainly, concessions or reforms that are perceived to be responses to constitutional activism may generate a sense of empowerment and encourage new arguments that fuel the cycle further. However, constitutional argument builds awareness and promotes information exchange even in the absence of a positive state response. Citizens may view a failed constitutional argument as only one step in a sustained, multifaceted effort to address particular constitutional concerns and build shared understandings.

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180 Lorentzen and Scoggin disaggregate changes in rights consciousness into three distinct types of change: changes in values (increased consciousness of one’s own desire to have a right); policy changes (increased consciousness of the government’s willingness to grant a right); and equilibrium changes (increased consciousness that others in society share the same concepts about rights and are likely to take action to enforce them). They argue that equilibrium changes are important and underemphasized in the Chinese context. Lorentzen & Scoggin, supra note 167.
182 Dowdle, supra note 180, at 214; Baogang He, Western Theories of Deliberative Democracy and the Chinese Practice of Complex Deliberative Governance, in THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA, supra note 14, at 190 (stating that deliberation is a citizenship-building mechanism through which participants learn about each other, exchange opinions, and raise their moral consciousness). See also supra notes 85–87 and accompanying text.
183 See Hand, supra note 58, at 233 (documenting the motivations of Hu Xingdou in raising constitutional review proposals). Of course, failures could have the opposite effect and discourage citizens from using the Constitution at all. As the discussion in this article suggests, however, the state’s failure to establish a robust constitutional adjudication institution has not had such an effect. In the labor dispute context, Mary Gallagher has found that many unsuccessful litigants with negative perceptions of the legal process
Party-state failure to respond to constitutional arguments also highlights the wide gap between China’s constitutional text and Party-state practice.\textsuperscript{185} Citizens may derive a sense of empowerment from the knowledge that in continuing to expose this gap, they are refusing to submit to and validate a perceived falsehood.\textsuperscript{186}

Of course, not all citizens advance constitutional arguments for these reasons. Citizens often use multiple channels and tactics concurrently, including legal procedures, petitioning, media interviews, and protests, to pressure the Party-state to redress grievances.\textsuperscript{187} Even if citizens do not have a meaningful expectation that a court or the NPCSC will respond to a constitutional argument, such arguments bolster claims and generate tensions in the political-legal structure.\textsuperscript{188} Some citizens may use legal argument as a form of political protest.\textsuperscript{189} Cumulatively, such exposure creates legitimacy challenges for the Party-state and may prompt collective realization that citizens themselves must take an active role in redefining the state-society relationship and ensuring that the Party-state lives up to its stated values.\textsuperscript{190}

This dynamic helps to explain why Chinese citizens continue to raise constitutional arguments in legal forums even though they have little hope of a positive result or even a response. Although it was clear by 2005 (and any remaining doubt was erased by 2008) that the Party-state would not permit an expansion of constitutional litigation in the people’s courts, Chinese citizens have continued to raise constitutional issues in court proceedings. The author has assembled more than 160 cases decided from 2005 to 2010 in which either a court or a party referenced the Constitution in the course of litigation, including at least 120 cases in which it is clear that a party raised a constitutional issue.\textsuperscript{191} In most cases,
parties offered constitutional arguments or referenced the Constitution as one of several legal arguments raised in the proceedings. 192

Similarly, while the limitations of the NPCSC citizen proposal mechanism have become clear, citizens have continued to file review proposals. The author has assembled more than 85 proposals filed from 2000 to 2010. Of these, 69 proposals were submitted from 2005 to 2010 and 59 proposals raise arguments based on the constitutional text. Many of the remaining 26 proposals identify conflicts between legal provisions that implicate the respective constitutional powers of state institutions. Because neither court judgments nor citizen review proposals are published in a systematic way, and because constitutional litigation is sensitive, these numbers provide a floor that almost certainly understates the number of cases and review proposals in which constitutional issues were raised during these periods. 193

While claimants have a variety of motives for advancing constitutional arguments, it is clear that many reformers are focused on raising citizen consciousness. For example, proponents of “rights defense” and “impact litigation” strategies emphasize the importance of publicizing claims that relate to persistent violations experienced by a large numbers of people and that have the potential to educate and raise consciousness through large-scale dissemination. 194 Leading constitutional law scholar Zhou Wei suggests that building constitutional consciousness may be more important than actually winning a constitutional case. 195

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192 Constitutional arguments were raised in a wide range of civil, criminal, and administrative cases.

193 These statistics present only imperfect data points. The majority of court cases were assembled by searching an online database available in the subscription service LawInfoChina. A small number were assembled from online postings and Chinese academic sources. LawInfoChina provides only a selection of cases. Because constitutional disputes are sensitive, courts have incentives to avoid referencing constitutional issues or publishing such cases. Similarly, there are no comprehensive public sources that publish citizen constitutional or legislative review proposals filed with the NPCSC. When new procedures for handling citizen review proposals were announced in 2005, domestic Chinese sources indicated that the number of citizen proposals had been “large.” Quanguo Renda Changweihui Mingque Weixian Shencha Chengxu [NPCSC Clarifies Constitutional Review Procedure], XINJING BAO [BEIJING NEWS], Dec. 20, 2010, http://news.sina.com.cn/c/2005-12-20/02017747956s.shtml [hereinafter Constitutionality Review Procedure Clarified].

194 Wu Ge, Yinguangxing Susong Tuidong Fazhi Jinbu [Impact Litigation Promotes Legal Progress], XINHUA NET (Jan. 5, 2006, 8:58 AM), http://news.xinhuanet.com/legal/2006-01/05/content_4010657.htm; Teng Biao, Shenghuo shi Weiquan Yundong de Yuantou Huoshui [Life is the Fountainhead of the Rights Defense Movement], BOXUN (May 30, 2005), http://blog.boxun.com/hero/tengb/22_1.shtml; Cai Dingjian, supra note 133, at 26; Fu Hualing, supra note 189, at 348 (arguing that the “defining characteristic” of public interest law in China is the “use of litigation by other rights advocates as a strategy to protect a general interest that is larger than that of the individual case interest”).

195 See Chuanda Jiaoshou “Beifa” Yigan Qishi, Yi Xianfa Mingyi Qisu [Sichuan University Professor “Sets Out” Against HBV Discrimination and Litigates in the Name of the
Constitutional law scholars and citizens who have raised constitutional review proposals express similar motivations.196 Professor Hu Xingdou, who has filed numerous proposals, captures this broad sense of purpose well:

My main purpose is still to awaken even more people . . . . Rule of law advancement depends on the concern and effort of all the members of the entire society taking the form of everyone shouting to beat down constitutional violations. However, most of the constitutional review applications are still concentrated in the hands of scholars and experts. This is understandable . . . . A minority of people calling unconstitutionality into question can do a good job of setting an example for society and encouraging and disseminating the greater force of society.197

As these and other passages suggest, many citizen claimants are using constitutional argument as one tool in a long-term process of building collective consciousness and public pressure on the Party-state.

The diffusion of constitutional argument and discourse in non-legal forums reinforces this conclusion. Over the past decade, Chinese scholars have published regular compilations of “typical” or “top” constitutional cases for both scholarly and popular audiences.198 In these

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196 Shang Wei & Zhang Chen, Women Dou ceng Shangshu Quanguo Renda [We Have All Appealed to the NPC], ZHONGGUO QINGNIAN ZAIXIAN [CHINA YOUTH ONLINE] (Dec. 22, 2005), http://www.chinaelections.org/NewsInfo.asp?NewsID=43766 (citing Zhao Heng and noting that constitutional review proposals are a “good way to educate and popularize the law”); Yang Tao, Wo Weishenme Yao xiang Quanguo Renda Ti Jianyi [Why I want to Raise a Proposal to the NPCSC], JIANCHA RIBAO [PROCURATORIAL DAILY], Aug. 4, 2005, available at http://news.xinhuanet.com/legal/2005-08/04/content_3307229.htm (“As an ordinary citizen, the role I can play is extremely small. However, as a citizen who has studied law, I am also deeply aware of where a citizen’s responsibility lies. . . . We must build a citizen society, and this requires all citizens to advocate for their own ‘public rights’ and also proactively exercise their own political rights such as voting rights and to dare to raise appropriate criticism and proposals to state organs.”); Cai Dingjian, supra note 32, at §§ 2, 3 (noting that sustained efforts to raise constitutional claims have inestimable value in promoting implementation of the Constitution regardless of whether the claim is successful in a given case).

197 Yang Tao, supra note 196.

compilations, scholars analyze the constitutional dimensions of a wide range of events that have attracted public attention. In some cases, these events involve constitutional claims. In others, scholars proactively constitutionalize events or disputes that did not directly involve such claims. Hu Jinguang, the editor of one 2007 compilation written for a mass audience, explained his purpose:

This book . . . uses common language to engage in expert interpretation of core constitutional cases to allow the public to understand the value that the cases that have occurred in China and that they have learned about in media reports hold for them. . . . Every person who lives in China may be influenced by these constitutional cases to one degree or another. By disseminating constitutional cases, we will allow the public to understand the connection of these incidents to them, to broadly participate in constitutional cases through all types of channels, and thereby to better promote the establishment of human rights and the construction of the rule of law.\footnote{Pils, supra note 186, at 251.}

Domestic media publish annual compilations of top constitutional cases in which scholars offer simple discussions for a mass audience.\footnote{Such media compilations have been published regularly since at least 2007. For a sampling from the range of online media outlets publishing these compilations, see, e.g., 2007: Zhongguo Shida Xianfa Shili Pingxi [Analysis of China’s Ten Major Constitutional Cases in 2008] (Hu Jinguang ed., 2008); Zhongguo Shida Xianzheng Shili Yanju [Research on China’s Ten Major Cases for Constitutionalism] (Hu Jinguang ed., 2009); Xianfa: Anli yu Tubiao [Constitution: Cases and Diagram] (Wang Yueming ed., 2010).\footnote{Domestic media publish annual compilations of top constitutional cases in which scholars offer simple discussions for a mass audience.}} It is notable that these volumes and media compilations have proliferated since 2005. As hopes for constitutional adjudication have diminished, reformers have turned to alternative channels to constitutionalize the Chinese polity.
Constitutional discourse is common in print, Internet, and broadcast media. Mainstream media publish news articles, editorials, and expert commentaries that reinforce the authority of the Constitution in a variety of ways. Some articles contain simple references to constitutional provisions or the importance of respecting the Constitution, while others explore the constitutional dimensions of public issues, the need to apply the Constitution in practice, and the importance of spreading constitutional consciousness. As one 2008 Beijing News commentary explains:

The Constitution is a nation’s fundamental law and the systemic legal foundation underlying all efforts to build the nation. Therefore, in China’s transition period, the entire society’s recognition of the Constitution must still be raised. The dissemination and extent of constitutional knowledge is inadequate, and society’s conceptual recognition of the Constitution, the rule of law spirit embodied in the Constitution, democracy, and fairness and justice is inadequate . . . . It should be noted that more and more legal experts and public intellectuals are calling for the establishment of a Constitution Day . . . [T]he key is not the memorial day itself, but using this opportunity to call for more people to place importance on the Constitution and to call for the nation’s Constitution to

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have the dignity of the final word in the operation of state power and the life of society. 203

In many instances, official media sources such as Xinhua Net, People’s Daily, China Daily, and Guangming Daily (a Party publication) publish stories that reinforce the authority of the Constitution or transmit commentaries from more progressive publications. 204 For example, Xinhua Net republished the Beijing News editorial quoted above. 205 Popular news programs on Chinese China Central Television, including Focus and News 1+1, also broadcast analyses of public issues that involve limited but meaningful discussion of the Constitution. 206 The proliferation

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204 For a small sampling, see supra note 202 and Guangming Ribao: Xianfa De Shengming Zaiyu Rongru Gongmin Shenghuo [The Life of the Constitution Is To Enter the Life of the People], Renmin Wang, Apr. 1, 2005, http://theory.people.com.cn/GB/40551/3266618.html; Lian Hongyang, Yi Wei Gongmin dui Weixian Shencha de Sange Qiyuan [A Citizen’s Three Wishes for Constitutional Review], Renmin Wang, Dec. 21, 2005, http://legal.people.com.cn/GB/42731/3960196.html; Lishi Cheng Tudi Chabai Zhidu yu Min Zhengli Weibei Xianfa [Lawyers Say the Land Reserve System’s Scramble for Profit against the People Violates the Constitution], Jiancha Ribao [Procuratorial Daily], May 7, 2010, http://news.jcrb.com/jxsw/201005/t20100507_353208.html; Editorial, Improper Stipulations, China Daily, May 10, 2011, at 8, available at http://wenbang.baidu.com/view/1e027e748e9951e79b892776.html?from=related (maintaining that workers have a right to demand payments in arrears and that a Shenzhen government bureau’s move to 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[News 1+1, Henan Province Lingbao City, How Will
of commentaries and stories in Chinese media reflects a clear effort on the part of scholars, editors, and other public intellectuals to constitutionalize public discourse. While constitutional discourse in key official media sources such as Xinhua and CCTV is often less expansive than that in other sources, it provides one indication of the extent to which constitutional consciousness is diffusing in Chinese society.

Finally, open letters, collective petitions, and commentary have proliferated on the Internet. The Internet’s impact in facilitating public discourse that creates pressure on the Party-state has been well documented. Chinese citizens have used the Internet and social media to disseminate open letters and petitions that contain constitutional arguments. One of the most famous, Charter 08, was a call for constitutional government and political reform that was eventually signed by more than 10,000 citizens.

In another case, a constitutional review proposal that challenged restrictions on Internet publications proclaimed that if the NPCSC failed to conduct a review of the challenged regulation, the signatories would apply to a “model constitutional court” of Chinese scholars for review. Many of these open letters, petitions and blogs protest suppression of constitutionally-protected civil and political rights and attempt to expose gaps between the Constitution and Party-state practice. They are also tools for raising consciousness.

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You Face the People’s Challenge], CNTV.COM (Mar. 31, 2010), http://news.cntv.cn/program/xinwen1jia1/20100331/104812.shtml (discussing the constitutional right of citizens to criticize public figures).


For four additional recent examples, see Ai Xiaoming, Xianfa Mengxiau, Liangzhi Shouru: Zhi Tan Zuoren An Shenpan Zhang Li Guanghui de yi Feng Gongkai Xin [The Constitution Insulted, Conscience Humiliated: An Open Letter to Tan Zuoren Case Verdict Chief Li Guanghui] (June 16, 2010, 1:05 AM),
state censorship of the Internet and social media limits distribution of the most sensitive material, the Party-state cannot control such material completely.

At a 2008 Beijing workshop on constitutionalism, legal scholar Xu Zhiyong summarized the relationship between constitutional argument and broader citizen efforts to condition China’s political environment:

[O]ur method for upholding rights is often political. That is, it appeals to public opinion, common knowledge, and people’s choices. The true test of strength usually is not in legal tribunals, but in public opinion. It is taking the power of conscience and morality and justice and resisting bureaucratic and conservative forces. . . . In many instances, we must make use of media exposure for other purposes and draw support from the power of public opinion. Therefore, when we are defending rights, we often raise the big flag of the Constitution. Although our Constitution is imperfect in many respects, in the end the fundamental rights of citizens are all written into it. In addition, the Constitution is the highest law. This is indisputable and has already become a kind of common understanding. However, the Constitution [consists of] principles, and every act of applying the Constitution involves interpretation. In reality, in the process of defending rights, we often interpret the Constitution. . . . Although in China only the NPCSC has the power to interpret the Constitution, from another perspective, everyone has the right to interpret the Constitution. . . . In addition, legal scholars and even citizens must all have the courage to interpret the Constitution. What I want to say is this. Do not belittle our interpretation of the Constitution as

ordinary citizens. Of course our interpretation is not a final, authoritative interpretation and of course it is not directly applied in judicial judgments. However, our interpretation can be transformed into public opinion, common understandings, and a force for promoting social progress. The continuous transmission of our interpretation through public opinion transforms it into the common understanding of the people and at the same time influences power. At this moment, the Constitution has become a legitimate tool for our discourse and is playing an important role. This daily use will in turn enhance the authority of the Constitution.211

Xu Zhiyong’s reference to “raising the big flag of the Constitution” (a phrase often found in citizen discourse)212 highlights distinctions between political-legal claims grounded in China’s constitutional text and those based on ordinary laws, regulations, or rules. By its own terms, the Constitution is “fundamental law” (根本法) with “supreme legal authority” (最高法律效力) and is the “basic standard of conduct” (根本的活动准则).213 As noted above, senior Chinese leaders regularly affirm these standards in public statements. The distinction between the Constitution and ordinary laws and regulations is also reinforced by articles in the Constitution that refer to the “Constitution and law” separately and conventions related to the interpretation of the Constitution and laws.214

While the Party-state has contained the Constitution’s impact in the legal sphere for the reasons discussed above, the Constitution’s unique status in China’s political-legal system (and ongoing tensions created by the gap...
between the Constitution and state practice) gives constitutional argument special resonance in the political sphere.

Legal reformers express guarded optimism about the long-term impact of these efforts even in the midst of institutional reform setbacks and political tightening. While concluding that China’s rule of law is in “major retreat,” one veteran Chinese legal scholar acknowledges that he is an optimist. According to Jiang Ping, recent cases demonstrate that the “people’s sense of private rights has awakened.” He concludes: “[a]dd the role of lawyers and the awakening sense of rights consciousness in ordinary people and that is something extremely powerful.” Teng Biao, writing about the repression of rights defense lawyers, expresses similar long-term optimism:

The letter of the law remains on our side. Moreover, the growing appetite of the Chinese people for the idea of “rights” is easily apparent on the Internet as well as through the many demonstrations, large and small, that happen almost every day in one part of China or another. We feel that history is on our side, and we put our faith in the proverb that says “The darkest hour is right before the dawn.”

The ultimate success of citizen movements elsewhere in East Asia and in Eastern Europe helps to sustain this guarded optimism. Reformers are not naïve about the obstacles to reform and acknowledge uncertainty about outcomes. However, there seems to be a general recognition that without consciousnesses building and collective popular demands, there is little hope for establishing the Constitution as a legal restraint on the Party-state.

Party-state responses to collective demands help to explain interest in such long-term processes. As numerous scholars have

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215 Jiang Ping, supra note 5.
217 Zhang Qianfan, supra note 178 (stating that Taiwan’s constitutionalism was won through perseverance and struggle). Teng Biao’s writing has been heavily influenced by the writings of Czech dissident Vaclav Havel. Teng Biao, Wei Zhengchi Wenming ji Gexian er Fendou—Teng Biao Lishi de Weiquan zhi Lu [Struggle for Civilized Politics and a Standard Line—The Rights-Defense Road of Lawyer Teng Biao], BOXUN (Nov. 1, 2010), http://blog.boxun.com/hero/201011/tengb/1_1.shtml.
218 See, e.g., Zhang Qianfan, supra note 67, at § 6 (acknowledging that the rights defense struggle will be “arduous and difficult and the price high” and that “the possibility of victory is small”).
demonstrated, the Party-state is more likely to respond with concessions to large collective claims advanced simultaneously through multiple channels. The cost of ignoring or even suppressing claims by individuals or small groups is low. In contrast, collective action involving a large number of citizens undermines social stability and increases pressure on Party-state actors to settle disputes or end resistance. Party leaders also recognize that they need the voluntary support of other social groups to advance their modernization agenda and preserve governing legitimacy.

The 2007 Xiamen PX incident provides an example of Party-state responsiveness to collective pressures, scholar efforts to constitutionalize such incidents, and open discussion of the Constitution in Chinese media. The PX incident involved a local government plan to build a paraxylene (PX) chemical plant only a few kilometers from the city of Xiamen in


220 Yang Su & Xin He, supra note 219, at 14–15.

221 Id. at 15, 17; Minzner, supra note 187, at 151–56; Cai Yongshun, Power Structure and Regime Resilience: Contentious Politics in China, 38 BRIT. J. POL. SCI. 411, 418–22 (2008).

222 Zhu Suli, supra note 88, at 28; Dowdle, Of Parliaments, supra note 17, 48–49; Peerenboom, supra note 126, at 95.


224 See, e.g., Yang Su & Xin He, supra note 219, at 3, 17–19 (highlighting a pattern of state concessions but noting that protests with political implications have been repressed); Fu Hai, Chuzu Che Bagong Fengbao Xijuan Zhongguo [Taxi Strike Tempest Rolls Over China], YAZHOU ZHOUKAN [ASIA WEEKLY], Dec. 7, 2008, http://www.yzzk.com/cfm/Content_Archive.cfm?Channel=ae&Path=2194602562/48ae1a.cfm; “Liaowang” Jizhe Diaoyan Duihualu: Tigao Yingdui Quntixing Shijian Nengli [“Outlook” Reporter Investigation and Research Transcript: Raise Mass Incident Response Ability], XINHUA NET (Jan. 6, 2009, 9:37 AM), http://news.xinhuanet.com/newmedia/2009-01/06/content_10610696.htm (noting that both citizens and local governments are conscious of the fact that negotiation, compromise, and peaceful methods of dispute resolution are much less costly than violence). Of course, there are limits to such tolerance. The Party-state will repress collective actions that involve high political costs or represent threats to core Party-state interests. Cai Yongshun, supra note 221, at 413, 419, 427.
Fujian province. After news about the plan became public, some Xiamen residents raised concerns about the health and environmental impacts of the plant but were pressured to withdraw their objections. Officials also ignored a proposal to halt the project drafted by a leading scholar at the Chinese Academy of Social Sciences and signed by more than 105 members of the Chinese People’s Political Consultative Conference (CPPCC). The proposal was submitted to the national CPPCC meeting and reported widely in Chinese media.

This publicity crystallized public opposition to the Xiamen project. In May, angry residents used text messages, the Internet, and other social media to call for a “collective stroll” (jiti sanbu) in front of the Xiamen city government. Over a period of several days, an estimated 10,000 to 15,000 residents participated in the demonstration. Although local officials deployed police and threatened to punish participants, the demonstrations remained largely peaceful. The city government agreed to hold hearings on the PX plant and later abandoned its plan to build the plant in Xiamen. Chinese media reported openly on the incident, and Southern Weekend named Xiamen residents its “persons of the year.”

Subsequently, residents in Shanghai, Guangzhou, and Dalian used similar tactics to pressure local governments to shelve projects that raised environmental or property concerns.

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226 Official Media on Popular Opinion in the Xiamen PX Affair, supra note 225.

227 The euphemism “collective stroll” was used to shield participants from accusations that they were organizing and participating in an illegal demonstration.

228 Cody, supra note 225 (reporting 8,000–10,000 participants on the first day of the demonstration, and around 5,000 on the second day).

229 Southern Weekend praised both Xiamen residents, who accomplished something that “shocked the heavens and shook the earth,” and Xiamen officials, who shifted from a stance of resistance to one of compromise. Nanfang Zhoumo 2007 Niandu Renwu: Xiamen Ren [Southern Weekend 2007 Persons of the Year: the People of Xiamen], NANNFANG ZHUMO [S. WEEKEND] (Dec. 26, 2007, 8:39 PM), http://www.infzm.com/content/9749.

230 In 2007, Shanghai residents engaged in a collective stroll to protest the construction of a maglev train line. In 2009, Guangzhou residents protested the planned construction of an incinerator. Zhang Qianfan, supra note 67, at § 5(2). In 2011, Dalian residents protested and won promises that a PX plant in that city would be moved. Christina Larson, The New Epicenter of China’s Discontent, FOREIGN POLICY, Aug. 23, 2011. Residents of Zhengzhou, Fujian were unsuccessful in resisting the relocated Xiamen PX plant. A series of violent clashes took place there, and organizers were arrested. Edward Cody, Protest
In the aftermath of events in Xiamen, Chinese legal scholars, commentators, and even official media actively constitutionalized the incident. Chapters on the PX incident were included in compilations of constitutional cases for both academic and popular audiences.231 Scholars explained that Xiamen citizens were exercising their constitutional rights and cited constitutional provisions guaranteeing the right to petition and criticize; the rights to expression, assembly, and association; and state responsibilities to protect and improve the living environment. They also justified what was technically an unlawful assembly by noting that earlier citizen efforts to exercise the rights of supervision and criticism had been disrespected and blocked.232 Zhang Qianfan praised the “Xiamen model” as a milestone for constitutionalism in China.233 Chinese media and websites, including official media sources such as Xinhua and Legal Daily, included the PX incident in lists of top constitutional events for 2007 and openly characterized the PX incident as an exercise of rights endowed by the Constitution.234

As the discussion in this section illustrates, an understanding of constitutional disputes and the significance of the Constitution in China requires a shift in focus from the individual legal to the collective political dimension of constitutional law. Constitutional arguments may be raised in the context of individual legal actions, but for Chinese reformers they constitute just one element in a long-term process of constitutionalizing the Chinese polity. Constitutional argument has the potential to fuel two important and interrelated collective political dynamics. First, constitutional argument builds collective consciousness of the

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231 See, e.g., ZHONGGUO XIANFA SHILI YANJIU (SAN) [STUDY OF CHINA’S CONSTITUTIONAL LAW CASES (THREE)] 147 (Han Dayuan ed., 2009); 2007 TYPICAL CASES, supra note 198, at 94–109.
232 2007 TYPICAL CASES, supra note 198, at 100–03; STUDY OF CHINA’S CONSTITUTIONAL LAW CASES (THREE), supra note 231, at 145–46. These materials reference Articles 2, 26, 35, and 41 of the PRC Constitution.
233 See, e.g., Zhang Qianfan, supra note 67, at § 5(2); Xiao Shu, Zhuyuan Xiamen PX Shijian Chengwei Lichengpai [Hoping the Xiamen PX Incident Becomes a Milestone], NANFANG ZHUMO [S. WEEKEND] (Dec. 19, 2007, 8:38 PM), http://www.infnm.com/content/8664.
Constitution as the legal standard to which Party-state acts must conform, and it promotes common understanding and expectations regarding the content of constitutional provisions. Second, as constitutional arguments are repeated over time and in different forums (in part, a product of consciousness building), they cumulatively take the form of collective demands that the Party-state may feel pressured to address through some type of deliberation or accommodation. As Fu Hualing has argued, legal reformers in China face a difficult choice between advocating for rights on the margins of China’s authoritarian system and articulating the type of “transformative agenda of political change” necessary for effective advocacy. Long term conditioning of the Chinese polity through constitutional argument provides a middle path that helps reformers navigate the difficult and uncertain terrain between defending a limited range of rights on the margins of political life and advancing direct and risky demands for political change. Part IV analyzes examples of such dispute resolution patterns and Party-state responses to collective pressures in the context of constitutional disputes.

IV. BARGAINING, CONSULTATION, AND MEDIATION IN CONSTITUTIONAL DISPUTES

Patterns of bargaining, consultation, and mediation are evident across a range of both intra-state and collective citizen-state constitutional disputes in China. As the examples below demonstrate, a key to recognizing such patterns in the citizen-state context is to focus on Party-state responses to collective citizen constitutional demands rather than remedies for individual claims in formal legal proceedings. In some cases, the Party-state has allowed discourse about constitutional matters to proceed in domestic media and has responded to collective constitutional demands indirectly through commentary and legal or policy reforms. In other cases, including constitutional disputes over property rights and the dispute over electoral reform in Hong Kong, Party-state representatives engaged in direct consultations with citizens who raised constitutional demands. The outcomes of these disputes reflect a complex balancing of grassroots political pressures, constitutional arguments, governance interests, and economic concerns.

235 Hand, supra note 58, at 18.
236 Dowdle, supra note 180, at 214 (defining constitutionalism as a product both of elite intentions and evolving collective understandings); Zhang Qianfan, supra note 67, at § 2 (explaining that even if the Constitution is not implemented, citizens are still using the Constitution to pressure the Party-state).
237 Fu Hualing, supra note 189, at 354–55.
A. Intra State Constitutional Disputes

1. Legislative Conflicts

Legislative conflicts involve two types of constitutional disputes. Lower-level legislation may directly conflict with provisions of the Constitution. Lower-level legislation may also conflict with higher-level legislation and thus challenge the allocation of legislative authority set out in the Constitution. Under the Constitution, the NPCSC is vested with the power to supervise the Constitution and annul State Council administrative regulations, local people’s congress regulations, and autonomous region regulations that conflict with (1) the Constitution, (2) national law adopted by the NPC or its Standing Committee, or (3), in the case of lower-level regulations, State Council administrative regulations. The PRC Legislation Law, a constitutional statute adopted after seven years of contentious bargaining, provides detailed rules and procedures for resolving conflicts. In China’s reform era, the number of such legislative conflicts has grown rapidly. The current procedures for NPCSC review (the Working Procedures) were adopted in 2005 and establish a complex, multistage review process that emphasizes consultation and consensus building. The State Council is vested with the power to annul rules issued by ministries, commissions, and local governments. Local people’s congresses are empowered to annul local government rules and the resolutions of lower-level people’s congresses. These reviews involve different procedures and are not addressed here.

PRC Legislation Law arts. 78–92. The difficult Legislation Law drafting process itself provides an example of bargaining and consultation over constitutional divisions of power. See generally Laura Paler, China’s Legislation Law and the Making of a More Orderly and Representative Legislative System, 182 CHINA Q. 301–18 (June 2005).


As Jianfu Chen notes, these were viewed as “internal working procedures.” Jianfu Chen, CHINESE LAW: CONTEXT AND TRANSFORMATION 197 n.113 (2008) (citing to Chinese sources).
A brief review of the Working Procedures demonstrates the complexity of interactions involved in the review process. The procedures provide both for active review and passive review (in response to a request from another state organ or a citizen). Potential conflicts are first sent to one of the nine specialized committees of the NPC and the NPC Legislative Affairs Commission (LAC) (a large, professional staff office of legal specialists) for study and review. During this process, the committees may invite the organ that promulgated the regulation to offer explanations. If, after these exchanges, the specialized committee or LAC determines that the regulation conflicts with the Constitution or national law, it may engage in consultations with the promulgating organ and offer its opinion on the conflict. If the promulgating organ amends or repeals the regulation, the result is reported to the NPCSC and the review process ends.

If the promulgating organ refuses to address the conflict, a new stage of review and consultation begins. The specialized committee reports its review opinion to the NPCSC General Secretary. Upon approval of the General Secretary, the matter is then transferred to the NPC Law Committee for study. If the Law Committee disagrees with the review opinion of the specialized committee or LAC and does not find a conflict, the result is reported to the NPCSC General Secretary for approval. If the Law Committee agrees that there is a conflict, it reports its opinion to the NPCSC General Secretary. Upon approval of the NPCSC General Secretary, the specialized committee then submits its written opinion to the promulgating organ with a suggestion for amendment or repeal. The promulgating organ is permitted two months to study the matter, respond with feedback, and indicate whether it will follow the recommendation.

In the event that the promulgating organ refuses to amend or repeal the regulation, the Working Procedures provide that the specialized committee may offer a resolution to annul the regulation to a meeting of the NPC Chairman’s Council. The Chairman’s Council then decides whether to submit the resolution to the full NPCSC for deliberation and decision. The NPCSC’s meeting procedures provide for further rounds of reporting and deliberation.

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242 The initial handling procedures vary slightly depending on whether review is active or passive (and, if passive, whether the review request comes from another state organ or from a citizen). Working Procedures arts. 1–7.
243 The procedures provide for the option of a joint review meeting involving both the Law Committee and the relevant specialized committee. Working Procedures art. 11.
244 The Chairman’s Council consists of the Chairman, thirteen Vice-Chairmen, and the NPCSC Secretary-General.
government organs may attend and offer reports, the resolution may be tabled for further study, and special investigation committees may be appointed. Chinese scholars report that similar exhaustive procedures for review of and consultations on legislative conflicts (with some variations) were in place both prior to the adoption of the Legislation Law in 2000 and prior to the adoption of the current version of the Working Procedures in 2005.\textsuperscript{246}

Despite the fact that the NPCSC is vested with the constitutional authority to annul conflicting regulations, both formal procedure and practice place a premium on bargaining and consultation. Through the procedure outlined above, the promulgating organ has numerous opportunities to engage NPC decision makers in consultations, provide feedback, and work with different NPC subunits and leaders to suspend further consideration of a conflict.\textsuperscript{247} Chinese scholars note that the NPCSC prefers to address conflicts through internal coordination and requests for voluntary compliance to preserve the “face” of the promulgating organ and because Chinese practice emphasizes resolving such matters through “political” rather than “legal” channels.\textsuperscript{248} The Sun Zhigang incident reviewed in Part IV(B) and one published Hebei government decision provide case-specific evidence of such internal consultation practices.\textsuperscript{249} The fact that the NPCSC has issued no formal public decisions to annul lower-level regulations, despite the large number of legislative conflicts in China, is further evidence of such practices. In some cases, the NPCSC simply drops the matter if, after consultations, the promulgating organ refuses to amend or repeal conflicting provisions.\textsuperscript{250}

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\begin{footnotesize}

\textsuperscript{247} A decision by any of the various committees or leaders not to advance the matter effectively ends the review process. \textit{Wang Zhenmin, supra} note 37, at 121–22.

\textsuperscript{248} Prior to the adoption of the Legislation Law, the NPCSC avoided issuing written opinions and instead coordinated with lower-level institutions by phone. \textit{Id.} at 114–15, 120, 126. \textit{See also Huang Li, supra note 41; Cai Dingjian, Social Transformation and the Development of Constitutionalism, in China’s Journey Toward Rule of Law, Legal Reform, 1978–2000, at 63 (Cai Dingjian and Wang Chenguang, eds. 2010).}

\textsuperscript{249} Guanyu “Hebei Sheng Tudi Guanli Tiaoli” Xiuzheng An (Caoan) Shuoming [Explanation on the (Draft) Amendment of the Hebei Province Land Administration Regulation], Sept. 7, 2005 (noting an NPCSC letter explaining that the Hebei regulation conflicted with national law and requesting that the regulation be amended). This explanation, the decision itself and other related notices are available at http://zfxxgk.lf.gov.cn/content.jsp?code=741543379/2008-00052&name=.

\textsuperscript{250} Zhu Guobin, \textit{supra} note 57, at 637–38. \textit{See also Wang Zhenmin, supra} note 37, at 126.
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2. Conflicts Between People’s Congresses and the Courts

A mundane civil case provides an example of a second type of intrastate constitutional conflict involving the respective powers of courts and people’s congresses. Under China’s constitutional structure, courts are subject to the supervision of people’s congresses and do not exercise the power of judicial review. In 2003, an Intermediate People’s Court in Luoyang, Henan province challenged this constitutional allocation of powers. In adjudicating a civil case over a seed contract, a trial judge determined that a local people’s congress regulation provided a standard for seed pricing that conflicted with the standard set out in the PRC Seed Law. The compensation in the case differed significantly depending on which standard was applied. Instead of simply applying the higher-level Seed Law (the controlling provision under the conflicts rules in the Legislation Law), Judge Li Huijuan took the additional step of declaring the local regulation “spontaneously invalid” (ziran wuxiao). Chinese sources report that the municipal government, the local Party political-legal committee, and leaders of the Luoyang court were consulted and approved the decision, suggesting that Judge Li was aware of the potential for conflict and sought consensus prior to issuing her judgment.

The Luoyang court’s decision sparked a national controversy. The Legal Affairs Office of the Henan Provincial People’s Congress reacted furiously, claiming that there was no legislative conflict, that the court had unlawfully reviewed the local regulations, and that the court’s “serious illegal action” had “violated China’s people’s congress system and encroached on official powers of an authoritative state organ.” It demanded that the municipal people’s congress exercise its supervisory powers over the court, correct the illegality, and sanction both the judge responsible and her superiors.

The Provincial People’s Congress General Office then issued a formal notice to the Henan Higher People’s Court accusing the Luoyang court of a knowing violation of law and demanding that the court “earnestly and severely deal with this serious

251 This account draws on Malmgren, supra note 38, at 6–7 (and sources cited therein); Balme, supra note 34, at 21–22; Han Junjie, Henan Li Huijuan Shijian Zai Qi Bolang, Jiedao Huiyuan Gongzuo Tongzhi [Henan Li Huijuan Incident Again Makes Waves: Work Notice to Return to Court Received], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Feb. 6, 2004 [hereinafter Henan Li Huijuan Makes Waves], available at http://news.qq.com/a/20040206/000116.htm.


253 Han Junjie, supra note 251.
illegal action.” People’s Congress officials stated that although the judge had the discretion to choose which legal provision to apply, she had no power to declare the local regulation invalid. Following these criticisms, court leaders revoked the judicial credentials of Judge Li and the vice-head of the civil tribunal in which the case was adjudicated. Scholars debated the case and its implications, with some noting in media interviews that Judge Li had been treated too harshly. A group of lawyers also filed a legislative review proposal asking the NPCSC to invalidate the conflicting local regulation.

By late 2004, the “Seed Case,” the professional status of the judges involved, and the issue of the conflicting regulation had all been resolved. The SPC, validating the general (but not universal) consensus of leading scholars and legislative officials, concluded that in the event of such conflicts, the court should simply apply the higher-level law to decide the case. On the basis of this guidance, the Henan Higher People’s Court upheld the substantive result in the case on appeal but criticized Judge Li for declaring the local regulation invalid. The Chinese Women’s Judges Association arranged for Judge Li to be sent to Beijing, where she spent several months “recuperating” out of the spotlight.

\[\text{Id.} \]
\[\text{Jim Yardley, A Judge Tests China’s Courts, Making History, N.Y. TIMES, Nov. 28, 2005, http://www.nytimes.com/2005/11/28/international/asia/28judge.html?pagewanted=all. It is not entirely clear why Judge Li did not argue that the Legislation Law itself declares that such local regulations are invalid. Article 64 of the Legislation Law provides that local people’s congresses may “first formulate local regulations on all other affairs for which the State has not yet formulated any laws or administrative regulations. Once the laws or administrative regulations formulated on such matters by the State Council come into effect, the provisions in local regulations which contradict the said laws or administrative regulations shall be null and void, and the organs that have formulated such regulations shall promptly amend or annul the provisions.” PRC Legislation Law art. 64 (emphasis added). Instead of citing to this provision, which would have grounded the declaration of invalidity in the NPC’s Legislation Law provision, Judge Li based her declaration of invalidity on her application of the conflicts rules in Chapter V.}\]
\[\text{Han Junjie, supra note 251.}\]


\[\text{Malmgren, supra note 38, at 7 (citing SPC reply). For general (but not universal) consensus on this approach, see STUDIES OF CHINA’S CONSTITUTIONAL CASES (VOL. 1), supra note 198, at 301–02; Judge Sows Seeds of Lawmaking Dispute, RENMIN WANG, Nov. 24, 2003, http://english.peopledaily.com.cn/200311/24/print20031124_128871.html; Lawyers Propose Review, supra note 258.}\]

\[\text{Yardley, supra note 255.}\]

\[\text{Henan Li Huijuan Makes Waves, supra note 251.}\]
stated that after an investigation, it had determined that the judge had not “twisted the law” and that the controversy had been a problem of “written expression.” The Henan Provincial People’s Congress decided that the judicial credentials of the judges need not be canceled and simply advised the court to pay attention to the issue and avoid such conflicts in the future. In April 2004, the Henan Provincial People’s Congress annulled the conflicting regulation and adopted a new local regulation to implement the Seed Law. This resolution bears the unmistakable imprint of a mediated outcome in which all sides gave ground and reached a consensus.

The consensus reached in the Luoyang Seed Case has been incorporated into SPC notices. A 2004 notice publicized the results of a judicial “discussion meeting” on administrative cases and provided that when faced with an apparent legislative conflict, people’s courts should make a judgment on the conflict, consult the Legislation Law conflicts provisions, and simply apply the controlling law to the case. Courts are advised to consult the relevant legislative organ only in major cases or cases in which there are different opinions on the conflict and the court cannot make a clear determination. In 2009, the SPC published provisions on the citation of legal sources in judicial judgments that reinforce this basic approach and provide specifically that people’s courts may not make explicit statements on the validity of conflicting legal provisions in their judgments. A 2011 people’s court decision in Jiangsu province indicates that these principles are being applied in practice. In the “Salt Case,” a Jiangsu court found that a local government rule implementing an

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262 Id.
263 See Malmgren, supra note 38, at 7 (provincial people’s congress passed the new regulation on April 1, 2004).
265 SPC Provisions on Legal Citation, supra note 37, art. 7. The text of Article 7 reads as follows: “When the normative legal documents that a people's court truly must cite to in formulating judgment documents conflict with each other and the court cannot cannot select which one to apply according to the Legislation Law and related legal provisions, it should submit [the matter] to the organ with decisionmaking authority for a ruling in accordance with law, and is not permitted on its own to make a determination on the validity of the normative legal document in its judgment document.” This provision could be interpreted to mean that courts are only prohibited from making a determination on the validity of a normative legal provision in a judgment if they cannot determine which of two or more conflicting provisions to apply. In the context of longtime PRC practice, the controversy over the Seed Case, and the resolution of the constitutional dispute the Seed Case generated, it is the judgment of the author that the ambiguity here is the product of poor drafting and that Article 7 is intended to prohibit courts from making statements about the validity of normative legal provisions in their judgments in all cases.
industrial salt monopoly conflicted with the PRC Administrative Licensing Law. Instead of declaring the local rule invalid in its judgment, the court solicited the opinion of the Supreme People’s Court on the legislative conflict and, in accordance with the SPC’s instructions, applied the Administrative Licensing Law and overturned the seizure of a local company’s salt.266

Both the NPCSC’s procedures and practices for dealing with legislative conflicts and the course of events in the Seed Case demonstrate a strong proclivity for bargaining, consultation, and compromise in intrastate constitutional disputes. Even when the constitutional authority of state institutions is clear, such institutions prefer consultative processes and negotiated outcomes over formal adjudication and public decision-making. As Jiang Shigong concludes, intrastate disputes are not resolved by “constitutional review according to the written constitution” but through consultative conventions embodied in the principle of democratic centralism.267 The Sun Zhigang incident provides further evidence of such intrastate dispute resolution preferences and an example of state responses to collective citizen constitutional demands.

B. The Sun Zhigang Incident

The Sun Zhigang incident erupted in March 2003 following the tragic death of a young university graduate in Guangzhou.268 Local authorities mistakenly believed that Sun Zhigang was an unlawful domestic migrant and detained him in a custody and repatriation (C&R) center. C&R was a controversial detention system that public security bureaus used to enforce China’s residence registration system and to control internal migration from rural to urban areas. Sun died in the detention center under mysterious circumstances.

After local media exposed the tragedy, reports circulated nationwide and triggered a wave of public outrage. Netizens posted protests online and called both for justice in the case and reform of the C&R system. Three legal scholars leveraged this wave of public opinion


267 Jiang Shigong, supra note 21, at 31–37.

268 For a detailed account of the incident, see generally Hand, supra note 16.
and filed a constitutional review proposal with the NPCSC challenging the legality and constitutionality of the 1982 Measures on Custody and Repatriation of Vagrants and Beggars (C&R Measures), the State Council administrative regulation that governed the system. The scholars’ review proposal, which was discussed approvingly in both official and unofficial media, presented simple but compelling arguments that the C&R Measures violated both the Constitution and national law. It also put the NPCSC in the politically difficult position of either ignoring the review proposal in the midst of a national outcry or formally reviewing and possibly annulling a State Council administrative regulation.

Faced with extreme public pressure, the central government responded. After a local court convicted twelve C&R detainees and guards for involvement in the beating of Sun Zhigang, the State Council announced that it was unilaterally repealing the C&R Measures and replacing them with a regulation that established a voluntary system of aid shelters for vagrants. Chinese scholars concluded that the NPCSC and State Council engaged in behind-the-scenes consultations to reach an acceptable response consistent with the existing state power structure.269 By voluntarily repealing the C&R Measures, the State Council dodged an NPCSC review decision that would have undermined its institutional authority and eased pressure on the NPCSC to pursue a formal inquiry.270 The Party-state also avoided publicly responding to the specific constitutional and legal arguments in the review proposal. Tong Zhiwei concludes that Chinese leaders were concerned about establishing a precedent that would have encouraged similar challenges to the re-education through labor system or the residence registration system itself.271 Chinese citizens expressed a mix of elation at the repeal of the C&R Measures and disappointment that their proposal had failed to establish a formal constitutional review precedent.272

The Sun Zhigang incident and the Review Proposal triggered a broad public discussion about the Constitution and the need for a more


271 Tong Zhiwei, supra note 269, at 6.

robust constitutional review mechanism. Scholars, media commentators and even officials discussed the review proposal mechanism, the importance of constitutional consciousness, deficiencies in China’s constitutional review process, and a range of potential reform models. The incident also encouraged a wave of new constitutional claims in the courts and constitutional review proposals.

The Party-state responded to these collective demands with partial reform of this constitutional review system. In 2004, the NPCSC established a new office for reviewing and processing legislative conflicts and the NPC adopted a constitutional amendment confirming that the state respects and safeguards human rights. In 2005, the NPCSC adopted revised Working Procedures for resolving legislative conflicts and expanded constitutional review to include SPC judicial interpretations. These reform steps were tied explicitly to the Sun Zhigang incident and collective concerns about the need for more robust constitutional review procedures. At the same time, the Party-state took steps to limit some constitutional reform discussions and confirmed that the Constitution was not a subject for litigation.

Patterns of bargaining, consultation, and mediation were evident on several levels of the incident. Consistent with its approach to other legislative conflicts, the NPCSC and the State Council addressed the C&R Measures in a manner that saved institutional face for the State Council. The citizen demands to repeal C&R represented a collective citizen-state constitutional dispute. Through the review proposal and widespread media discussion and commentary, an indirect process of citizen-state consultation took place. Although Party-state officials were careful not to publicly validate the specific constitutional arguments citizens had raised, they did acknowledge the review proposal and discuss the importance of the Constitution generally. The Party-state response to these collective demands represented a compromise; the C&R system was dismantled, but no formal constitutional review precedent was established.

Citizen discussion of the deficiencies of the existing constitutional review mechanism and the need for a more robust process (bolstered by a wave of constitutional review proposals and constitutional claims in the

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273 For discussion of this discourse and for citations to a broad range of Chinese sources, see Hand, supra note 16, at 122–26, 148–53.
274 Id. at 151.
276 Constitutionality Review Procedure Clarified, supra note 193. Provisions on the review of judicial interpretations were later enshrined in the PRC Supervision Law. See supra note 66.
277 Hand, supra note 16, at 152; New NPC Body, supra note 270.
courts and constitutional review proposals) represented a collective constitutional demand on the Party-state. Here again, a consultative discourse (with some limits) was permitted in the official media, and the Party-state responded to these collective citizen demands by imposing a constitutional compromise. While the Party-state limited efforts to judicialize the Constitution and declined to implement a more transparent process for NPCSC constitutional review, it adopted new institutions and procedures that represented incremental improvements to the existing NPCSC constitutional review mechanism.

The Sun Zhigang incident also provides an example of the consciousness building dynamics discussed in Part III. The incident triggered a broad public discussion of constitutional issues, and commentators used this discourse to raise constitutional consciousness. The apparent reform victory also empowered citizens and catalyzed the refinement of popular “rights defense” and “impact litigation” strategies. Reformers subsequently applied the “Sun Zhigang model” to promote reforms with some success, establishing a crucial populist pathway for constitutional demands. Through their collective demands, citizens achieved repeal of the C&R Measure and incremental reform of the constitutional review system, realized symbolic citizenship gains, and built a foundation for a new wave of citizen constitutional activism.

C. Constitutional Disputes Related to Property Rights

Disputes related to property rights provide a compelling example of consultation, bargaining, and mediation in the resolution of constitutional claims. The Constitution empowers the state to expropriate property in the “public interest.” Although compensation must be provided for such takings, no constitutional requirements for compensation are specified, and until recently there was no legal definition of public interest. Citizen constitutional argument has been a core element of citizen demands for enhanced protection of property rights that have been advanced through review proposals, lawsuits, and public

280 Since 2003, citizens have filed review proposals challenging the constitutionality and legality of state regulations and judicial decisions related to property rights. For examples, see Liu Jincheng et al., Letter to the Standing Comm. of the Nat’l People’s Cong.: Dui Guowuyuan he Hangzhou Shi de Chaiqian Tiaoli Zuo Weixian Shencha de Jianyishu:
protests. As discussed below, constitutional issues related to takings have also been the focus of extensive media discussion.

A constellation of factors has generated a wave of takings in China over the past two decades. China’s rapid economic growth, urban development and expansion, skyrocketing land prices, and local corruption have fueled demand for land and in turn have led to mass displacements. Because the market value of land is often significantly higher than the compensation paid, local governments expropriate property and resell it to commercial developers at a large profit. Tax reforms that required local governments to remit a larger portion of revenues to the central government left local governments heavily dependent on such land transfers.

Unlawful takings, embezzlement,
collusion between government officials and developers, manipulation of weak legal protections, intimidation and physical violence against existing land users, and other abuses are common in the takings process. Such abuses have generated widespread public anger and social instability in both urban and rural China.

Since 2000, the Party-state has implemented three major waves of reform related to property rights. In the early 2000s, instability related to takings was clearly on the rise and citizens filed a series of constitutional review proposals challenging the legal framework for urban takings and land use. As collective pressure related to takings mounted, the Party-state adopted measures to address public anger and alleviate conflicts. In 2003 and 2004, the State Council and its subordinate ministries issued a series of regulations and circulars mandating reductions in land seizures, tightening supervision over land management, banning abusive practices, improving appraisal procedures for urban takings, and strengthening sanctions for local officials and companies that violated rules. The


285 It should be noted that both the legal rules governing land use and ownership, as well as the legal rules and standards governing takings of land and buildings, are different depending on whether the property is located in an urban or rural area. The consequences of such takings also vary. When rural arable land is seized for development, peasants lose not only their residences but also their livelihoods.


NPC also adopted historic constitutional amendments in 2004 specifying that rights to legally obtained private property must not be violated and that compensation must be paid when land and structures are expropriated. Although the constitutional standard for such compensation was not defined, the amendment and related discourse represented a confirmation of the Party-state’s commitment to property rights, focused public attention on the constitutional dimensions of the property rights issue, and expanded political space for reform activism.

Party-state efforts to adopt a comprehensive Property Law generated a second wave of constitutional contention in 2005 and 2006. The Property Law, which was eventually adopted in 2007, strengthened the legal status of private property rights, implemented the 2004 constitutional amendments in statutory form, and introduced new protections for citizens subject to takings. However, a draft of the law was subjected to a public constitutional attack led by Gong Xiantian, a law professor at Peking University. Professor Gong issued an open letter arguing that the draft law violated the principles of socialism enshrined in the Constitution and several constitutional provisions. The letter ignited public controversy and derailed plans to adopt the Property Law at the March 2006 NPC session.


NPC Chairman Wu Bangguo stated that “we should avail ourselves of the occasion of the constitutional amendment to publicize and study the Constitution” and initiated a Party-state campaign to that effect. Nailene Chou Weist & Josephine Ma, Constitutional Amendments Are Given the Seal of Approval, S. CHINA MORNING POST, Mar. 15, 2004 (available on Westlaw at 2004 WLNR 5985297). See also The Impact of the Constitution Amendment on Chinese Society, LIAOWANG [OUTLOOK], Mar. 14, 2004, available in FBIS. For expansion of political space, see Demolished, supra note 284, at 34 (citing an interview with a Chinese activist on the impact of the amendments).


Yi Fengxin Dangzhu Wuquan Fa Caaoan? [One Letter Blocked the Property Law
issued in late 2006 and signed by more than 700 scholars and former officials, triggered further public debate.292

The Party-state, facing an unexpected leftist challenge to a major legislative initiative to enhance private property rights, took unprecedented steps to address Professor Gong’s concerns. Several weeks after he published his first open letter, Professor Gong was invited to a meeting with the NPCSC to engage in consultations on the Property Law and the concerns expressed in his letter.293 Official media noted the important role of citizens in raising constitutional issues, and the NPC subsequently revised the draft to protect against fraudulent asset sales and strengthen language on public ownership, two key concerns that Professor Gong had raised.294 Having validated Professor Gong’s concerns, the Party-state launched a vigorous and public constitutional defense of the draft law.295 These official responses represented a rare instance in which

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293 See One Letter Blocked the Property Law Draft?, supra note 291 (citing statements by NPCSC officials that the meeting was the first time an individual scholar had been invited to engage in such consultations).


the NPCSC directly engaged citizen constitutional arguments in the public sphere. The Party-state eventually suppressed further public debate on the Property Law. Nonetheless, by delaying the law and publicly defending the constitutionality of the statute, Chinese officials legitimized Professor Gong’s constitutional claim and reinforced the concept that laws must have a constitutional basis.

As Chinese officials considered further revisions to takings regulations, unlawful takings, petitions, and protests continued. Several of these incidents generated widespread public attention and outrage.


Hand, supra note 58, at 18.

For example, the Ministry of Land and Resources (MLR) identified 96,000 new illegal land cases in 2006, a sharp increase over the prior year. In the first half of 2010, the MLR reported 22,000 unlawful land projects. Shanghan Nian Quanguo Faxian Weifa Yongdi An 22.2 Wan Jian—Weifa Yongdi Mianji Shangsheng [22,000 Instances of Illegal Land Use Discovered in First Half of Year—Area of Illegally-Used Land on the Rise], XINHUA NET (July 15, 2010, 9:24 PM), available at http://news.xinhuanet.com/politics/2010-07/15/c_111959523.htm. For increases in mass incidents and leadership concerns about general stability trends, see Wines & Ansfield, supra note 284; Shao Daosheng, Chudi “Tufaxing Qunti Shijian” Bixu Zunsheu de Liu Da Yuanze [Six Major Principles That Must Be Observed in Handling “Sudden Mass Incidents”], GUANGMING GUANCHA [GUANGMING OBSERVER] (Mar. 9, 2009, 10:49 AM), http://guancha.gmw.cn/content/2009-03-09/content_895809.htm; Steve Hess, Nail Houses, Land Rights, and Frames of Injustice on China’s Protest Landscape, 50 ASIAN SURVEY, no. 5 (Sept.–Oct. 2010), at 908–26.

Citizens actively constitutionalized such incidents and filed new constitutional review proposals challenging the legal framework for takings. Such events took place in the context of growing Party-state concern over social stability.

Against this backdrop, a dramatic event catalyzed new legislative action. In December 2009, a woman named Tang Fuzhen self-immolated in an act of protest against workers who had arrived to tear down her former Chengdu home. The incident was captured on video and widely reported by Chinese media. Leveraging public discourse over the incident, Chinese scholars filed a new constitutional review proposal with the NPCSC challenging the constitutionality of China’s regulation on urban takings. The proposal offered sophisticated, nuanced, and policy-oriented arguments that identified constitutional and legal infirmities in the existing regulatory framework and tied them to social instability. The scholars cited both the 2004 constitutional amendments and the Property Law and explained that the existing takings regulations undermined the policy goals behind these legal reforms.

State institutions and media immediately engaged these scholars. In the month following the review proposal, the scholars were invited to the State Council and the NPC Legislative Affairs Commission to consult with officials on the constitutional issues raised in the proposal and the drafting of a new takings regulation.


Reaction to the Tang Fuzhen incident was powerful and played a major role in catalyzing subsequent legal reforms. Zhang Qianfan, supra note 67, at § 4, para. 4. For the proposal, see Shen Kui, supra note 280.

as precedent-setting. Wang Xixin, one of the signatories, praised it as “extremely constructive” and a “positive change,” and he expressed hope that as a result of the event, the process of responding to citizen review proposals would be “proceduralized.” The scholars were also invited to share their expertise on takings issues on Chinese central television and in official print and online media. One month later, the State Council released a draft regulation for public comment that addressed several key constitutional concerns that the scholars had raised. Noting progress, the scholars signaled flexibility on some constitutional issues, such as the State Council’s constitutional power to issue the takings regulation. If the new regulation “satisfies the demands and hopes of the masses,” noted Shen Kui, they would not necessarily focus on “legal technicalities.”

Release of the draft regulations in January 2010 triggered a year of consultations involving multiple actors. Central authorities engaged in extended and difficult negotiations with local government leaders, who were concerned about the impact of a more restrictive takings process on local finances, development plans, and official evaluations. As this
process played out, local governments launched a new round of takings, suggesting that they were drawing out the process in part to secure time to expropriate property under the old, more permissive regulatory regime.309 Citizens raised additional comments and concerns about both the January draft and a second draft released for public comment in December 2010.310 As these events indicate, efforts to finalize the new regulations involved a complex balancing of interests.311

In January 2011, the State Council announced the adoption of a revised takings regulation.312 Chinese official media emphasized the consultative nature of the drafting process and the need for the final regulation to balance conflicting interests.313 While the final regulation retains many features of the original draft and addresses several core constitutional issues that the legal scholars raised, it leaves other concerns unresolved. Some commentators expressed concern that the regulation had been watered down or would be ineffective.314 Days after the


309 Huang Xiuli, supra note 308.


314 See, e.g., Cheng Xueyang, Jinbu, Yuandi Tabu, Yu Tubu: Ping “Guoyou Tudi Shang Fangwu Zhengshou Buchang Tiaoli Di Er Ci Yijiangao” [Progress, Marching in Place,
adoption of the final regulation, Chinese media announced plans to experiment with a new property tax in selected local jurisdictions. Although the experiments were tied to efforts to curb real estate speculation rather than the adoption of the new takings regulation, the timing of the announcement, the massive debts that local governments have incurred, and the importance of land sales for local government finances suggest that consideration of a property tax was in part the product of bargaining with local governments over the new takings regulation.

Ongoing reform of the legal framework for takings in China provides a powerful example of the consultative dynamics identified in this article. In response to collective constitutional demands, the Party-state undertook a multi-stage, incremental reform of the property law framework. The Party-state engaged not only in a series of indirect, collective consultations in the public sphere but also unprecedented direct consultations with legal scholars who had mounted public constitutional challenges on various issues related to property rights. The resulting reforms represented a balancing of Party-state concerns about social stability and regime legitimacy, ongoing legal and economic reform imperatives, interpretations of existing constitutional and legal requirements, local governance and taxation issues, and collective citizen constitutional claims both supporting and challenging stronger legal protections for private property rights. As the third wave of reform illustrates, bargaining and consultation to resolve constitutional disputes may be found even in the midst of the heightened Party-state repression and politicization of legal institutions of the past several years.

Constitutional disputes over property rights also illustrate the benchmarking dynamics discussed in Part III. Following the third wave of reform, plans to introduce a property tax generated new, more expansive

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citizen discourse. Chinese citizens have raised public questions about the legal basis for a tax on state-owned land and demanded greater public participation, transparency, and supervision of local government to ensure that any new tax revenues are spent properly. Each Party-state response in this multistage process has resolved a constitutional dispute, but has also created benchmarks for new constitutional claims and reinforced the legitimacy of constitutional demands, a ratcheting effect that appears likely to continue.

D. Electoral Reform in Hong Kong

Negotiations over procedures for electing Hong Kong’s Legislative Council (LegCo) provide a fifth example of consultation and bargaining in constitutional disputes. Hong Kong maintains a special constitutional status within China. Since sovereignty over Hong Kong reverted to the PRC in July 1997, Hong Kong has been governed under the Basic Law, a domestic statute adopted by the NPC in July 1990. The Basic Law establishes Hong Kong as a Special Administrative Region of the PRC (HKSAR), sets out the political structure of the HKSAR and the rights of HKSAR residents, and guarantees the HKSAR a high degree of autonomy and preservation of its capitalist system for fifty years. As both a PRC domestic statute and the constitutional text of the HKSAR, the Basic Law has a dual nature and is often referred to as the HKSAR’s


317 As this article was going to publication, thousands of villagers angry over the seizure of their land and related abuses expelled local officials in Wukan village, Guangdong province. The tense standoff in Wukan attracted world attention and ended with a negotiated settlement. In the wake of the Wukan protest, Chinese commentators have publicly discussed the constitutional dimensions of the incident. Premier Wen Jiabao has also confirmed that reforms incorporated into the January 2011 regulation on urban property seizures should in principle be applied to rural land requisitions. For a discussion of the Wukan incident and its constitutional implications, see Keith Hand, Constitutionalizing Wukan: The Value of the Constitution Outside the Courtroom, 12.3 CHINA BRIEF (The Jamestown Found., Washington, D.C.), February 3, 2012, at 5, available at http://www.jamestown.org/uploads/media/cb_02_03.pdf.


319 Basic Law chs. I & II. This formula is commonly referred to as “one country, two systems.”
“mini-constitution.” The power to amend the Basic Law is vested in the NPCSC, subject to the limitation that amendments may not “contravene the basic policies of the PRC toward the HKSAR.”

The Basic Law vests both the HKSAR courts and the NPCSC with authority to interpret the Basic Law. In adjudicating cases, HKSAR courts are authorized to interpret provisions of the Basic Law “within the limits of the autonomy of the Region.” However, ultimate authority to interpret the Basic Law is vested with the NPCSC. Although the scope of the NPCSC’s interpretive power under the Basic Law was the subject of controversy in several early cases, the HKSAR Court of Final Appeal has recognized that the Basic Law confers the power of interpretation on the NPCSC in “general and unqualified terms” and that NPCSC interpretations are “binding on the courts of the HKSAR.”

The constitutional dispute examined here concerns Basic Law provisions on the procedures for electing LegCo. Article 68 of the Basic Law provides:

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

Annex II of the Basic Law establishes the method for electing LegCo. Under the original procedure, 30 members of LegCo were directly elected in geographic constituencies, while 30 members were elected by so-called “functional constituencies,” which represent industry

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321 Basic Law art. 159.
322 Basic Law art. 158(2).
323 Basic Law art. 158(1).
federations, chambers of commerce, and business groups.\textsuperscript{326} Annex II provides that after 2007, the method for electing the LegCo may be changed with a two-thirds vote of LegCo, the consent of the HKSAR Chief Executive, and reporting to the NPCSC “for record.”\textsuperscript{327} These broad provisions have been the subject of ongoing controversy over the HKSAR’s political future, with an array of democratic parties in the HKSAR pushing for implementation of the Basic Law’s promise of universal suffrage for all LegCo seats.\textsuperscript{328}

As these debates progressed, the NPCSC asserted its authority over changes to the LegCo election procedures. In an official interpretation of the Basic Law issued in 2004, the NPCSC stated that it must determine whether there is “a need” for amendments to the procedure before such amendments are submitted to LegCo for debate.\textsuperscript{329} This interpretation generated significant controversy, since the text of Annex II provides only that a decision to amend the LegCo procedures must be submitted to the NPCSC “for record.”\textsuperscript{330} In 2007, the NPCSC issued a decision confirming that universal suffrage would not be adopted.


\textsuperscript{327} Basic Law annex II, § III.

\textsuperscript{328} Ma Ngoc, \textit{The Beginning of a Thaw—or a Fatal Split in the Democracy Movement?}, H.K. J., July 1, 2010, at 1–7, \url{http://www.hkjournal.org/archive/2010_fall/1.htm?zoom_highlight=Fatal+Split+in+the+Democracy+Movement}. Universal suffrage for the election of the HKSAR Chief Executive has also been the subject of controversy and NPCSC interpretations. This discussion focuses on the LegCo procedure.


\textsuperscript{330} Basic Law annex II, § III. In contrast, Annex I provides that changes to the method of choosing the Chief Executive shall be submitted to the NPCSC “for approval,” but only \textit{after} approval by LegCo and the Chief Executive. Basic Law annex I. The NPC is the supreme organ of state power in the PRC, and the NPCSC’s interpretative power over the Basic Law is general and unqualified. Given such powers, the requirement that an election plan be submitted to the NPCSC “for record” could be read to incorporate an implicit NPCSC power to assess and veto a plan. Lower-level regulations and rules on the Mainland are submitted to the NPCSC “for record.” The NPCSC regularly engages in review of such regulations. PRC Legislation Law art. 89. Article 17 of the Basic Law provides for NPCSC review of HKSAR “laws” reported for the record if the law is not in conformity with Basic Law provisions regarding the responsibility of Central Authorities or the relationship between Central Authorities and the HKSAR. For information about the controversy regarding Annex II, see Gittings, \textit{supra} note 324.
in the 2010 LegCo election and that the existing ratio of half geographic constituencies and half functional constituencies would be maintained in 2012. The NPCSC’s decision and a subsequent HKSAR proposal for reform of the 2012 electoral procedures disappointed Hong Kong political parties pushing for realization of the Basic Law’s stated goal of universal suffrage. The developments also raised concerns about the prospects for universal suffrage in 2017 or 2020.

In the wake of this NPCSC decision, pro-democracy groups in Hong Kong were divided over the steps to pressure the mainland government. One group proposed that LegCo representatives from geographic constituencies resign their seats in two progressive steps, triggering replacement elections that would serve as referendums on the HKSAR’s electoral policies. Representatives of the older, more established Democratic Party refused to participate in this plan and advocated direct negotiations with the mainland government. The mainland government denounced the referendum strategy, and the replacement elections were marred by boycotts and low turnout.

The mainland government took advantage of the split in Hong Kong’s pro-democracy forces. For the first time, mainland government representatives engaged in direct consultations with the Democratic Party in an effort to reach consensus on an electoral reform package. After five months of difficult negotiations, Party General Secretary Hu Jintao approved a compromise package that called for an increase in the number of LegCo seats to 70, with 40 seats to be chosen by direct popular vote.


332 The Decision left open the possibility of universal suffrage for the election of Chief Executive after 2017 and LegCo seats after 2020, but confirmed the NPCSC’s power to approve any amendment before it is put to a vote of LegCo. Ma Ngoc, supra note 328. For the government’s reform proposal, see GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, CONSULTATION DOCUMENT ON THE METHODS FOR SELECTING THE CHIEF EXECUTIVE AND FOR FORMING THE LEGISLATIVE COUNCIL IN 2012 (Nov. 18, 2009), available at http://www.cmab-ed2012.gov.hk/en/consultation/index.htm.

333 For discussion of the political negotiations over the LegCo issue and their aftermath, see Ma Ngoc, supra note 328; Chung, supra note 326; and Kent Ewing, The Death of Political Idealism in Hong Kong, ASIA TIMES ONLINE, July 28, 2010, http://w.atimes.com/atimes/China/LG28Ad01.html.

334 When considered in the context of LegCo’s voting procedures, the Mainland’s concession was less dramatic than it might appear on its face. Approval of two thirds of LegCo is required for changes to LegCo’s election procedures. Basic Law annex II. For other bills introduced by the government, a simple majority vote of LegCo is required for approval. Id. For bills or amendments introduced by members of LegCo, a majority of
LegCo subsequently approved the package. The compromise created a severe rift among Hong Kong’s pro-democracy forces, with many expressing concern that the Democratic Party had abandoned its commitment to universal suffrage. However, public approval of the moderate faction’s lead negotiator rose after the deal.335

The LegCo compromise provides a vivid example of the Party-state’s willingness, within limits, to resolve constitutional disputes through consultations and compromise. As both a practical and legal matter, the mainland government could control the outcome of the ongoing constitutional dispute over the implementation of Basic Law provisions on LegCo. While the Basic Law establishes universal suffrage as an “ultimate goal,” the language of Article 68 leaves broad room for interpretation on the conditions for this change. The NPCSC exercises ultimate authority over both the interpretation and amendment of the Basic Law. More importantly, because both the HKSAR Chief Executive and two-thirds of LegCo members must approve any change to election procedures, the mainland government could have blocked the adoption of any plan it opposed.336

Nevertheless, the mainland government engaged in consultations and accepted a compromise on a core constitutional issue. By adopting this approach, the government exacerbated splits in Hong Kong’s pro-democracy camp and reduced the likelihood that moderate pro-democracy forces in Hong Kong would radicalize.337 Hong Kong’s pro-democracy forces had demonstrated their ability to generate massive street protests over the HKSAR’s Anti-Subversion Law in 2002.338 By engaging in dialogue and making limited concessions, the mainland government reinforced its credibility in Hong Kong and prevented a repeat of the 2002 showdown. Leveraging these political pressures and negotiating against the background of the Basic Law provisions on universal suffrage, moderate pro-democracy forces succeeded in engaging Beijing in a direct political dialogue, building trust, and pushing reform of LegCo beyond

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335 Ewing, supra note 333, at 104.
336 The mainland government dominates the process for choosing the Chief Executive, and half of LegCo seats were in the hands of conservative functional constituencies. Tom Mitchell, Hong Kong By-Election Thwarted by Beijing, FINANCIAL TIMES, May 16, 2010, http://www.ft.com/intl/cms/s/0/5064a87e-6114-11df-9bf0-00144feab49a.html#axzz1bpG5pZCH.
337 Ma Ngoc, supra note 328.
that set out in the 2007 NPCSC decision.\footnote{Ma Ngoc, supra note 328, at 4–5.} With little chance of forcing reforms through litigation or a LegCo vote, moderates settled for limited concessions and an expanded political base from which to push for universal suffrage in 2020.

While the dispute over election procedures in the HKSAR revolved around the Basic Law, rather than the PRC Constitution, the dispute provides insights into the resolution of constitutional disputes on the mainland. Although it exercised ultimate control over the political-legal outcome of the dispute, the Party-state engaged in bargaining and offered tactical concessions on a core constitutional question in an effort to appease moderate reformers and maintain stability. This pattern is consistent with that in the mainland examples discussed above. In the context of the HKSAR’s separate and more open political system, however, the Party-state demonstrated a willingness to engage in direct consultations and bargaining with a moderate political adversary. The LegCo example provides an indication of how the Party-state might approach constitutional disputes at a future stage of China’s transition in which greater political openness is tolerated.

\section*{E. Additional Examples and Limitations}

Additional disputes could be cited as examples of these patterns. For instance, citizens have challenged various forms of discrimination by advancing arguments based on Article 33 of the Constitution, which provides that “all citizens are equal before the law.” To address discrimination against Hepatitis B carriers, citizens have advanced constitutional arguments in constitutional review proposals, litigation, and the media. These efforts, which have been documented in detail elsewhere, have prompted some legal and policy concessions.\footnote{See Hand, supra note 58, at 236–38; Kellogg, supra note 16, at 237–45; Cai Dingjian, supra note 32, at § 2. For an official acknowledgement of such citizen impacts, see Chen Chao, Public Opinion Defeats HBV Discrimination, \textit{China Internet Information Center} (Sept. 23, 2004), http://www.china.org.cn/english/2004/Sep/107886.htm.} On a broader level, the continued disparate treatment of urban and rural residents remains an active zone of constitutional contention. In addition to challenging the C&R Measures, citizens have raised constitutional arguments to challenge the residence registration (\textit{hukou}) system.\footnote{341}
allocations of people’s congress delegates that disadvantage rural residents, disparate injury compensation standards for urban and rural residents, and related issues. Such challenges create legitimacy problems for a regime that claims to represent workers and peasants and emphasizes “balanced” development.

Of course, consultative dispute resolution patterns are not evident in some constitutional disputes. The suppression of Charter 08, the prosecution of lead Charter 08 organizer Liu Xiaobo for subversion, the aggressive suppression of rights lawyers and activists, and the Party-state’s efforts to block independent candidates for local people’s congresses are ongoing reminders that there are limits to the consultative dynamics illustrated here. Nevertheless, Chinese leaders have demonstrated a willingness to bargain even on some issues of great political sensitivity. For example, officials have approached citizens whose relatives died in the 1989 Tiananmen demonstrations and who engaged in sustained calls for reform to discuss the possibility of compensation.


344 See supra notes 2, 4, 5 and 208 and accompanying text; Willy Lam, Local Elections Open for All but the Independent Candidates, 11.17 CHINA BRIEF (The Jamestown Found., Washington, D.C.), Sept. 16, 2011, at 3, http://www.jamestown.org/uploads/media/ch_11_42.pdf. 345 In June 2011, Hong Kong media reported that government authorities had, for the first time, approached relatives of one of the victims of the Tiananmen incident and offered compensation. Payout Discussed With Family of June 4 Victim, S. CHINA MORNING POST, June 1, 2011, http://topics.scmp.com/news/china-news-watch/article/Payout-discussed-with-family-of-June-4-victim. For nearly two decades, the “Tiananmen Mothers,” a group of people with relatives who died in 1989, have issued numerous public statements on politically sensitive issues. In March and May 2011, the Tiananmen Mothers issued open letters demanding an investigation into the deaths, compensation for victims’ families, and
citizen claimants at a sensitive time and was rejected as insufficient, it highlights the fact that consultative dynamics may be present even in the context of some highly sensitive issues.

By shifting focus from the individual legal to the collective political dimension of constitutional law, we can observe patterns of bargaining, consultation, and mediation in intrastate and some citizen-state constitutional disputes. An understanding of these dynamics helps to explain why Chinese commentators speak of a “latent” constitutional review mechanism and characterize the exercise of constitutional rights as a “negotiation” or “dialogue” with the state. As Part V demonstrates, emerging approaches to administrative law disputes and complex collective disputes provide evidence of convergence between general dispute resolution practices and informal patterns of dispute resolution in the constitutional law context.

V. EMERGING DISPUTE RESOLUTION MODELS IN CHINA AND THEIR RELEVANCE TO CONSTITUTIONAL DISPUTES

In an effort to address rising instability, perceived threats to Party power, and an overwhelmed court system, Party and judicial leaders have strengthened controls over courts and other legal institutions; instructed them to consider political and social effects, in addition to the law, in resolving disputes; and promoted alternative dispute resolution processes. An analysis of two core components of this program provides insights into how the political-legal system is coping with problems that also arise in the context of constitutional disputes. The first component is a push to mediate administrative lawsuits. The second is the promotion of grand mediation (大调解), an integrated dispute resolution mechanism designed to settle collective or difficult cases at the local level. Such an analysis reveals a zone of convergence between China’s informal practices for resolving constitutional disputes and broader dispute resolution trends. This convergence, considered in the broader context of Party-state interests and political conditions that are motivating experimentation with new consultative and deliberative practices, raises the possibility that the steps to hold those responsible legally accountable. They also invited dialogue. Liu Si Sinan Zhujia Jiu Shi Xin Lianghui Yaoqiu Diaocha “Liu Si” [Family Members of June Fourth Victims Send a Letter to the Two Meetings [the NPC and the National Committee of the Chinese People’s Political Consultative Conference] Demanding an Investigation into “June Fourth”], DEUTSCHE WELLE (Mar. 1, 2010), http://www.dw-world.de/dw/article/0,,14880136,00.html; Zhang Xianling: Peichang ye Yao Xian Jiang Ge Shifei Duicuo [Zhang Xianling: Before Compensation There Must be a Discussion of Right and Wrong], BBC ZHONGWEN WANG [BBC CHINESE NET] (May 31, 2011), http://www.bbc.co.uk/zhongwen/simp/chinese_news/2011/05/110531_tiananmen_zhangxianling.shtml.
Party-state could adapt its grand mediation model to create an indigenous mechanism for resolving constitutional disputes.

A. China’s Mediation Drive

The contemporary emphasis on mediation in China has deep historical roots. Mediation is often characterized as a traditional dispute resolution method grounded in the Chinese cultural emphasis on harmony. Under Mao Zedong, the Party continued to practice mediation in part as a tool of political education. Maoist mediation exhibited some coercive elements. In the post-Mao era (particularly in the 1990s), political-legal institutions shifted their focus to adjudication as the Party-state constructed a comprehensive legal system, introduced reforms to professionalize the judiciary and improve legal procedure, and promoted the concept of a socialist rule of law state.

Over the last decade, however, China has steadily revived the status of mediation as a preferred mechanism for resolving a broad range of disputes. Political-legal institutions initiated this revival in 2002. As concerns about social stability and related threats to Party power intensified, Party leaders strengthened their emphasis on mediation. By 2007, the SPC had introduced the work principle of “giving priority to

347 LUBMAN, supra note 139, at 40–70. Mediation was applied to resolve “non-antagonistic” disputes among the people. Donald C. Clarke, Dispute Resolution in China, 5 J. CHINESE L. 245, 286–88 (1991).
348 LUBMAN, supra note 139, at 59–63; Clarke, supra note 347, at 273–74, 286–88.
349 See generally Minzner, supra note 1, pt. I; Peerenboom & Xin He, supra note 346, at 24–26.
350 Peerenboom & Xin He, supra note 346, at 26.
mediation and combining mediation and adjudication.” A 2010 circular explains the motivations behind this policy:

Strengthening mediation work in all respects is the inevitable demand of the inheritance of the Chinese people’s elegant culture and development of the fine traditions of the people’s administration of justice, of giving play to the political superiority of a socialist judicial system with Chinese characteristics, of upholding sociality stability and harmony, and of giving play to the professional role of the people’s courts.

In the context of this drive, Chinese leaders have revived Maoist dispute resolution practices that emphasize populism and political education. Mediation quotas have created significant pressure to mediate cases, have led to sharp increases in the ratio of cases resolved through mediation, and have raised concerns that parties are being forced to compromise their legal rights.

Chinese leaders have promoted mediation in a variety of cases. Official statements emphasize mediation as a tool not only for resolving private disputes, but also public law issues such as administrative lawsuits and minor criminal cases. They also instruct courts to make efforts to mediate cases that (1) involve difficult, complex, or collective disputes; (2) require the cooperation of government organs; (3) influence social harmony and stability; (4) involve legal rules that are unclear, difficult to apply, or may be difficult to enforce; (5) involve sensitive issues of


355 See Minzner, supra note 1, Part II (describing revival of Maoist practices); Zhao Lei, Sifa Gaige Zui Re Zhengyi: Ma Xiwu Fuhuo [The Hottest Controversy in Judicial Reform: The Resurrection of Ma Xiwu], NANFANG ZHOUMO [S. WEEKEND] (June 10, 2010, 10:49 PM), http://www.infzm.com/content/29885 (describing the controversy around reviving Ma Xiwu model in legal practice).

363 Minzner, supra note 1, at 943–46, 955–59, 963.

355 SPC Opinion on Positive Role of Mediation, supra note 353, at § 2.
common concern to society; or (6) involve extreme emotions. Chinese leaders have promoted mediation by people’s mediation committees, administrative organs, and other government and social entities in addition to court mediation.

This trend is the product of several factors. Stresses related to China’s rapid development and rising citizen legal consciousness have led to sharp increases in both the number and complexity of disputes. Chinese courts, which face chronic difficulties enforcing judgments, also lack the capacity and authority to provide adequate remedies for many complex cases that involve collective or politically sensitive socio-economic claims, vague legal provisions, or complex, intersecting interests of multiple parties and levels of the Party-state. Growing social conflict and deficiencies in the legal process have contributed to a large number of petitions, collective protests, and mass incidents that have aggravated Party-state concerns about instability. Political-legal leaders note that judicial and extrajudicial mediation, consultation, and guidance are key components of a multifaceted social management system designed to release such pressures, promote the settlement of disputes before they intensify, and ensure social harmony.

In implementing this social management system, Party leaders have infused speeches and directives with instructions to integrate the consideration of political, social, and legal factors. For example, Hu Jintao’s “Three Supremes” slogan calls on state institutions to “take as
supreme the Party’s cause, the people’s interest, and the Constitution and laws.” Party and judicial leaders also stress the importance of recognizing the “organic unity” of “legal, social, and political effects” and the “organic unity” of “the leadership of the Party, the people as masters of their own house, and ruling the country in accordance with law.”365 In resolving cases, courts are instructed to consider not only the content of the Constitution and law, but also the opinions of the masses, community norms, government interests and relationships, the political interests of the Party, public policy and economic development, social stability, and other factors.366 As Wang Qinghua argues, many cases in China affect multiple strands in this web of often conflicting interests and extra-legal factors.367 Political-legal policy thus magnifies the polycentric characteristics of a broad range of disputes.

Western legal theorists have recognized that alternative dispute resolution may offer advantages in addressing these types of problems. Lon Fuller has discussed the limitations of adjudication, and the advantages of hybrid and consultative processes, in resolving complex polycentric disputes.368 Alternative dispute resolution provides greater flexibility to take account of non-legal factors and develop creative remedies that may not be available to a court applying legal rules in an adjudication setting.369 This flexibility may promote more productive


367 Carrie Menkel-Meadow, Whose Dispute Is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 Geo. L. J. 2662, 2677 (1995); Brian Ray,
dispute resolution outcomes than would be possible through adjudication. Parties faced with an all or nothing adjudication based on legal rules may harden their positions in a manner that intensifies, rather than dissipates, conflict. Losing parties may undermine compliance by exacting revenge or pursuing alternative channels of resistance. In contrast, consultative processes at least have the potential to facilitate reciprocal acceptance and greater willingness to explore adaptive solutions.

Law may play a role in the context of bargaining and consultation. Legal rules provide “bargaining endowments” that shape the framework for negotiation outside of the adjudicative process. Legal rules that are pliable, vague, or conflicting leave room for a broader range of negotiated options and may thus have less value as “bargaining chips” that shape negotiations. In situations where the law is vague or disputed, however, adaptive solutions reached through consultation and negotiation may facilitate new understandings or consensus on the content of unclear legal standards and create expectations that similar approaches will be applied to future disputes. Moreover, in disputes in which adjudication is unavailable and bargaining power is disparate, the act of compromise involves an implicit recognition of the legitimacy of the claims of weaker parties and a commitment to accommodation. While uncertain or conflicting laws may provide only broad parameters for bargaining, the process of bargaining and accommodation may strengthen legal rules over time by dissipating perceived short-term threats, generating legal understandings, and raising public expectations for future settlements.

Chinese legal scholars emphasize such dynamics. Chinese judges are obliged to decide cases in accordance with the law. The injection of

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372 Id. at 42, 51, 56; Lon L. Fuller, Mediation: Its Forms and Functions, 44 S. Cal. L. Rev. 305, 325–27 (1971). Fuller argues that “mediation” is subject to the limitation that it generally cannot be employed to resolve disputes involving more than two parties. However, he acknowledges consultative approaches to multiparty problems and characterizes them as exhibiting “mediational” aspects.

373 See generally Mnookin & Kornhauser, supra note 370.


375 Menkel-Meadow, supra note 369, 2680–82.

non-legal factors in the adjudication context places courts in a difficult position, raises questions about improper interference, and may generate conflicts between courts and other Party-state institutions. Although Chinese law requires mediation to be consistent with law and policy, this requirement has been interpreted flexibly in practice and leaves room for creative settlements. As such, Chinese scholars argue that mediation facilitates the consideration of both legal and non-legal outcomes.

Chinese legal scholar Zhu Suli goes further and argues that an insistence on adherence to the law in mediated settlements undermines the advantages of mediation over adjudication and should be relaxed to allow the parties to facilitate consensus-based outcomes. Legal provisions, he concludes, can play a role through the entire mediation process as a bargaining chip for the parties.

Other Chinese sources note that “grand mediation” (discussed below) has altered past reliance on the “supremacy of law” in social management and introduces a flexible method for parties that changes the “rigidity” of the law. While law is one factor that shapes the bargaining process, political-legal personnel overseeing mediation may persuade or even pressure parties to agree to outcomes that are consistent with the imperatives of stability maintenance and the political interests of the Party-state.

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378. Clarke, supra note 347, at 292. See Chen Jilan, Shi Lun Wo Guo Minshi Susong Hejie Zhidu de Gaige [China’s Civil Litigation Reconciliation System Reforms], LAW-LIB.COM (June 10, 2010), http://www.law-lib.com/lw/lw_view.asp?no=11524 (noting that regulations about reconciliation are vague and leave room for parties to avoid reconciliation altogether, and even violate the law in reconciliation negotiations).


380. See Zhu Suli, supra note 12, at 11–13 (criticizing the legitimization of courts and the failure of lawyers and legal institutions to recognize the political and economic dimensions of their cases).

381. Wang Quanbao, supra note 352 (citing Renmin University Professor Fan Yu).

382. Chinese commentators have raised concerns that such practices undermine the authority of the law, the legal rights of the parties, the neutrality of courts, and the voluntariness of the mediation process. See, e.g., Huang Xiuli, Tiaojie Tiaojie Zai Tiaojie: Sifa Tiaojie Youxian Huajie Shehui Maodun [Mediation, Mediation, and More Mediation: Give Priority to Judicial Mediation and Resolve Social Conflicts], NANFANG ZHOUMO [S. WEEKEND] (Mar. 4, 2010, 11:42 AM), http://nf.nfdaily.cn/nfzm/content/2010-03/04/content_9744376.htm; 150 Wan Min Gao Guan Anjian Tuidong Zhongguo Fazhi Jincheng [1,500,000 Citizen Lawsuits Against Officials Propels China’s Rule of Law Process], JIANCHA RIBAO [PROCURATORIAL DAILY] (Oct. 1, 2010, 8:35 AM), http://news.jcrb.com/jxsw/201009/t20100930_450739.html (hereinafter 1.5 Million Citizen Lawsuits). Damaska notes that the legal proceedings of an activist state must be designed
B. “Reconciliation” of Administrative Litigation Cases

Two core components of China’s mediation drive provide insights into how China’s political-legal system is coping with tensions in cases that share attributes with constitutional disputes. The first is the effort to resolve administrative lawsuits through “reconciliation” (和解) or “coordination” (协调). Under the Administrative Litigation Law (ALL), citizens have the right to challenge a limited range of administrative acts in the people’s courts. Although the ALL formally prohibits “mediation,” political-legal institutions have actively promoted judicial “reconciliation” or “coordination” of administrative lawsuits. Court leaders place special emphasis on reconciliation processes involving local people’s congresses and Party institutions as a preferable mechanism for resolving “major” or “difficult” administrative lawsuits with significant social impacts.

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384 SPC Opinion on Giving Priority to Mediation, supra note 354, at paras. 6, 7. For the legality of mediation, see ALL art. 50.  The SPC began to promote administrative reconciliation in 2006. 1.5 Million Citizen Lawsuits, supra note 382. Some Chinese sources suggest that while mediation emphasizes the role of the judicial mediator, reconciliation places greater emphasis on the role and communication of the parties. See, e.g., Zhang Xiaohua, Guanya Xingzheng Susong Hejie Zhida de Sikao [Reflections on the Reconciliation System for Administrative Lawsuits], ZHONGGUO WANG [CHINA NET] (Mar. 19, 2008), http://www.china.com.cn/law/txt/2008-03/26/content_13604843.htm. Others acknowledge that they are really the same type of process and that it is an “open secret” that courts are using mediation to resolve a large number of administrative lawsuits. Min Gao Guan, Hejie Chu Shuangying [In Citizen Suits Against the Government, Reconciliation Produces a Double Win], SHANXI XINWEN WANG [SHANXI NEWS NET] (July 2010), http://www.dzwww.com/rollnews/news/201007/t20100704_6274779.htm [hereinafter Reconciliation Produces a Double Win].

385 See SPC Opinion on Giving Priority to Mediation, supra note 354, at § 6 (“In major crises and influential cases, the Court must proactively strive for the cooperation of the local Party Committee, People’s Congress and upper-level administrative organs, and invite relevant local government organs to participate and coordinate. In administrative cases where concrete government actions were taken that were illegal, or were legal but were not reasonable, the court should, in the course of coordination, and to the greatest extent possible, urge the government organ involved in the lawsuit to revoke those illegal actions on its own accord, or to acknowledge the actions as invalid, or to make a new determination.”). See also Courts Asked to Better Handle Lawsuits Against Administrative
Administrative lawsuits pose acute problems for courts. As noted in Part III, local governments have numerous ways to exert pressure on courts. Administrative organs pressure courts not to accept administrative cases, interfere with the adjudication process, and refuse to implement judgments. According to official statistics, enforcement rates in administrative lawsuits dropped from 74% in 1992 to 21% in 2004. Administrative organs also intimidate lawyers and plaintiffs. Officials exert these pressures in part because they fear that losing an administrative lawsuit will result in loss of face, undermine their governance authority, and negatively impact their performance evaluations. The difficulties courts face in adjudicating administrative cases and enforcing judgments in turn undermine judicial authority and can generate destabilizing citizen discontent and petitions.

Administrative lawsuits also present problems of legal interpretation. Chinese laws and regulations are drafted flexibly to leave administrators significant discretion. Terms such as “public interest” or “appropriate” present interpretive challenges for courts and leave room for administrative organs to argue that their actions were in fact lawful. Many administrative orders (China’s ubiquitous “red-hatted” documents) occupy a legal grey zone and do not fall clearly within the scope of the


386 The reduction in litigation fees in 2007 aggravated these tensions, as courts became more dependent on local government funding and faced a new wave of lawsuits. Zhang Xiaohua, supra note 384.


389 See Dan Shibing, Min Gao Guan Anjian Qicheng Baisu de Yuanyin [The Reasons Citizens Lose Lawsuits Against the Government 70% of the Time], ZHONGGUO QINGNIAN ZAIXIAN [CHINA YOUTH ONLINE] (Oct. 29, 2008), http://zqb.cyol.com/content/2008-10/29/content_2408651.htm.

390 Zhang Xiaohua, supra note 384.

391 See, e.g., Cheng Gang, Renda Dalbiao Tijiao Yuan Xiugai Xingzheng Susong Fa—Xingzhen Susong Fa Ying Baohu Gongmin Quanyi er Fei Zhenggu Quanwei [NPC Delegate Raises Resolution to Amend the ALL—ALL Should Protect the People’s Rights and Interests and Not the Government’s Authority], ZHONGGUO QINGNIAN ZAIXIAN [CHINA YOUTH ONLINE] (Mar. 22, 2008), http://zqb.cyol.com/content/2008-03/22/content_2113716.htm; Reconciliation Produces a Double Win, supra note 384.

392 Feng Qijiang, supra note 379.
As Wang Qinghua observes, courts facing the many pressures discussed here “vacillate between law and policy, pragmatism and formalism, protecting government authority and realizing individual rights.” Collectively, these pressures have contributed to a high rate of withdrawal of administrative lawsuits.

In an effort to cope with problems in administrative litigation, courts have turned to reconciliation. Reconciliation gives courts a platform for reaching “efficient” and “harmonious” settlements that preserve the authority of government institutions, take account of non-legal factors such as social stability and local political power, and protect courts from administrative resistance that undermines their authority.

In the words of one Chinese commentator:

By engaging in reconciliation under the direction of the court, one’s own interests are satisfied and a rigid deadlock in the relationship with administrative organs does not occur. This is consistent with the psychological requirement of the plaintiff. At the same time, reconciliation in the litigation process is consistent with the needs of administrative entities. Due to the idea of prioritizing one’s own power, which has more or less existed for a long period of time, administrative organs are not willing to participate in litigation. If they lose a lawsuit, not only do they lose face, but there are also impacts on the professional evaluation of their departments. Although they may win an administrative lawsuit, dissatisfied plaintiffs may petition and influence the normal work of the administrative organ. Administrative organs need a stable and harmonious social environment... Therefore, under the preconditions of legality and not harming the public interest, it is absolutely possible for administrative organs to give ground and agree to reconciliation.

As this passage indicates, while administrative organs have numerous reasons to resist administrative litigation, their interest in efficient
governance and stability provides incentives for reaching mediated settlements. Moreover, while administrative discretion creates problems for court adjudication, it creates space for such settlements.\(^{398}\)

Some Chinese commentators even conclude that reconciliation settlements strengthen the authority of courts and the law. In the view of these commentators, such settlements preserve at least some legal rights, involve an implicit acknowledgement of improper administrative conduct, and are more likely than judgments to be implemented. As such, they strengthen the authority of courts and the law.\(^{399}\) Such assessments may strike outsiders as exaggerated. In the context of a system in which only 20% of administrative litigation decisions are actually enforced, however, settlements may be viewed as coping mechanisms that preserve some authority for the law and legal institutions.

Coordination may begin even before a case is filed. In his survey work on administrative litigation, Wang Qinghua found that courts commonly maintain a façade of legality but consult with Party committees, local governments, people’s congresses, and higher-level courts to coordinate outcomes before cases are accepted for filing.\(^{400}\) When government actions are clearly illegal, the law is in tension with Party policy, or cases may impact social stability, judges view such coordination as essential.\(^{401}\)

Ongoing problems in administrative litigation provide a window into issues that would arise (and likely be aggravated) in the context of constitutional adjudication.\(^{402}\) Many constitutional disputes, like administrative lawsuits, involve citizen legal challenges to the Party-state and exhibit polycentricism. The dynamics of resistance present in administrative lawsuits would almost certainly be heightened in constitutional adjudications involving sensitive human rights issues and constitutional restraints on Party-state power.\(^{403}\) In addition, like the elastic terms in some administrative regulations, abstract and conflicting constitutional provisions present significant challenges for adjudication institutions and leave space for negotiated outcomes.\(^{404}\) Finally, the SPC

\(^{398}\) Zhang Xiaohua, supra note 384.  
\(^{399}\) Feng Qijiang, supra note 379; Zhang Xiaohua, supra note 384. See Wang Qinghua, supra note 125, at 525 (explaining that local courts refuse to file difficult cases in part to protect the authority of the law).  
\(^{400}\) Wang Qinghua, supra note 125, at 522–23.  
\(^{401}\) Id. at 520–23.  
\(^{402}\) At least one commentator has suggested that administrative law is a kind of substitute constitutional law in China. He Xin, Administrative Law as a Mechanism for Political Control in Contemporary China, in BUILDING CONSTITUTIONALISM IN CHINA, supra note 22, at 160–61.  
\(^{403}\) Constitutional adjudication would catalyze resistance and interference not only from local actors, but also from central Party organs.  
\(^{404}\) Balme, supra note 34 at 15 (noting that “the more technical a legal text appears, the less the Party is able first of all to impose a strictly political interpretation of it.”). According to
has instructed courts to do everything possible to mediate complex or collective cases that involve sensitive issues. Most constitutional disputes exhibit similar characteristics. In short, the same pressures that have prompted China’s beleaguered courts to turn to reconciliation in the administrative litigation context would create significant challenges for constitutional adjudication.

C. China’s Grand Mediation Mechanism

“Grand mediation” (大调解) is a core component of the Party-state’s effort to maintain stability. Definitions of grand mediation vary, but all emphasize grand mediation as a comprehensive stability maintenance and dispute resolution mechanism that incorporates (1) top-down integration and deployment of state, Party, and social resources, and (2) a synthesis of people’s mediation, administrative mediation, and judicial mediation designed to resolve complex disputes at the basic level and ensure social stability. China’s leaders introduced grand mediation in 2002 and have progressively intensified their emphasis on the model over the past decade. In April 2011, Party-state institutions issued a joint notice on grand mediation, and the model features prominently in official notices on dispute resolution.

Li Buyun, local government representatives argued that the Legislation Law should provide more explicit standards for determining when a local regulation contradicts the Constitution. Scholars included such a provision in the expert draft of the law, but the provision was dropped later in the drafting process. Li Buyun, supra note 46, at 228.


Grand mediation emphasizes integrated, top-down stability maintenance practices. Under the current structure, local Party committees and government leaders provide unified leadership and guidance; comprehensive stability management offices (综治部门) at each level organize grand mediation platforms, investigate disputes, and coordinate responses; and functional departments and social organizations keep Party-state leaders informed, direct disputes to appropriate channels, and carry out dispute resolution work. Chinese sources emphasize the top-down nature of this system and the central role of the Party-state as a proactive (rather than passive) force for dispute resolution. The focus of grand mediation is on the local level, where political-legal institutions are instructed to actively detect and resolve complex, collective disputes at the “germination” stage before they spread to higher levels of the system.

Grand mediation emphasizes a synthesis of Party, government, and social resources to resolve complex disputes. For example, directives on grand mediation highlight the importance of winning the support and participation of a range of stakeholders such as Party committees, local people’s congresses, people’s political consultative conferences, and local administrative units in major or difficult cases. In applying grand mediation, the Party-state deploys not only a broad range of government departments, but also social organizations such as people’s mediation committees, village and resident committees, Communist Youth League units, labor unions, the women’s federation, industrial associations, and other organizations. This practice allows Party-state leaders to tap the expertise, capacity, and influence of a range of social-political actors, adopt extra-legal settlement methods, and ensure that the interests of multiple actors are represented in forging dispute resolution outcomes.

Local courts play a central role in the grand mediation structure. Basic-level courts keep local leaders informed about conflicts, guide cases to people’s mediators and other organizations, and undertake judicial mediation at different stages of the litigation process. Court leaders sit

410 Chen Hanfei & Mou Naidong, supra note 405.
411 SPC Opinion on Giving Priority to Mediation, supra note 354, at para. 6; Guiding Opinion on Grand Mediation, supra note 405, at para. 6.
412 See, e.g., SPC Opinion on Giving Priority to Mediation, supra note 354, at para. 26; Guiding Opinion on Grand Mediation, supra note 405, at paras. 5, 18.
413 Guiding Opinion Grand Mediation, supra note 405, at para. 6; Zhu Suli, supra note 12, at 5; Chen Hanfei & Mou Naidong, supra note 405, at 132.
on leadership groups that direct grand mediation work and thus play a role in shaping dispute resolution outcomes.  

Within this structure, judges contribute professional skills and legal expertise. Judges provide Party and government leaders with opinions on the legal rules implemented in disputes and guidance to non-judicial mediators on legal questions and dispute resolution techniques. In this context, courts are not simply unitary and detached forums for adjudication. Instead, they constitute the “legal” component of an integrated state governance and dispute resolution structure. Legal provisions give courts a source of argument and crucial support in shaping such consultations. Court views on the law may not be dispositive, but they are significant. Rising citizen legal consciousness and growing legal demands enhance the guiding position of the courts and law in this multifaceted balancing process.

Domestic reports on grand mediation cases provide a sense for how the mechanism works in practice. Carl Minzner characterizes these exchanges as “political conferences” that are designed to coordinate Party-state responses and may or may not involve the parties themselves. Domestic reports on grand mediation cases confirm this general characterization. In one example, a woman in a rural township argued that a village had improperly transferred her land use rights to a local company and won a court judgment. She rebuffed efforts by the township government to mediate, and, in cooperation with her extended family, repeatedly obstructed the operation of the company. After a violent altercation and petitions by all parties, county Party and state leaders ordered the county grand mediation coordinator to organize an integrated investigation and settlement process. The coordinator convened a meeting involving local Party, government, court, public security, and Letter and Visits Bureau officials to analyze the dispute and develop a settlement plan. Mediation personnel then engaged in a series of exchanges with the parties in which they applied “persuasion and guidance . . . from the perspectives of emotion, reason, and law,” identified key interests, and convinced the woman, the village, and the company to agree to a

415 Long Zongzhi, Chongjian Minzhong Dai Sifa de Xinrengan, Dangqian Sifa de Nanti ji Yingdui [Rebuild the Confidence of the Masses in Judicial Administration, Present Difficulties and Responses in Judicial Administration], NANFANG ZHUMO [S. WEEKEND] (July 15, 2010, 8:54 AM), http://www.infzm.com/content/47673; SPC Opinion on Giving Priority to Mediation, supra note 354, at para. 28; SPC Opinion on Linking Litigation and Non-Litigation, supra note 366, at para. 2; Chen Hanfei & Mou Naidong, supra note 405, at 130.  
416 Long Zongzhi, supra note 415. See also Yang Su & Xin He, supra note 219.  
417 Wang Qinghua, supra note 123, at 525.  
418 Chen Hanfei & Mou Naidong, supra note 405, at 130.  
419 Minzner, supra note 1, at 946–48 and accompanying notes.
compromise settlement. In this idealized depiction of grand mediation, the role of Party-state pressure and the integration of legal, political, and social factors are evident.

Citizens seeking to protect their legal rights and interests are not without leverage in this process. An important goal of the Party-state’s mediation drive is to preserve social stability and in turn eliminate potential threats to Party power. While the Party-state possesses the raw power to impose whatever settlement it wishes in a given case, its evaluation of whether a settlement takes account of competing interests and serves overriding stability goals will influence its decision regarding the appropriate outcome. The threat of group petitioning, collective discussion in mainstream and alternative media, protests, or other non-institutionalized or illegal actions provide parties with meaningful leverage to bargain and secure at least partial realization of rights and interests at issue.

Administrative reconciliation and grand mediation highlight a zone of convergence between existing informal patterns of bargaining, consultation, and mediation in constitutional disputes and broader trends in China’s political-legal system. To cope with the range of challenges posed by citizen-state and complex disputes that are also present in constitutional disputes, China has imposed a Party-supervised process of consultation and mediation. While some commentators have characterized China’s mediation drive as a “turn against law,” in the context of constitutional disputes this drive reveals a potential path forward. China has never implemented a robust mechanism for formal adjudication of constitutional disputes, and the Party-state has made it clear that it will not permit further incremental movement towards the establishment of such a mechanism for the foreseeable future. Abstract constitutional provisions, tensions between constitutional rights provisions and provisions enshrining Party leadership, and offsetting rights and duties provisions leave room for a wide range of constitutional interpretations and make constitutional disputes fertile ground for bargaining and consultation. Grand mediation provides an indigenous dispute resolution model that is consistent with the demands and limitations of China’s current political environment and would regularize existing, informal constitutional dispute resolution practices that emphasize these dynamics.

421 Clarke, supra note 347, at 270.
422 Id.; Minzner, supra note 1, at 960–61. See also sources cited, supra note 221.
D. Grand Mediation as a Transitional Model for Resolving Constitutional Disputes

The convergence highlighted above raises the possibility that the Party-state could adapt its grand mediation model to create a transitional mechanism for resolving constitutional disputes. Although grand mediation is designed to contain disputes at the local level, the tensions and dynamics that the mechanism is designed to address are present in the context of constitutional disputes. Grand mediation involves consultation among multiple Party, state, and social institutions with intersecting interests. Grand mediation also gives judges roles as legal advisors, creates limited space for citizen bargaining, and facilitates the integrated consideration of legal, political, and social interests in settlement outcomes. The abstract nature of China’s constitutional text, the inherent and unresolved tensions between provisions about rights and duties, the tension between provisions about rights and Party leadership, and the weakness of judicial institutions make it particularly difficult to generate principled “black and white” constitutional interpretations. In China’s one-party state, a transitional constitutional dispute resolution mechanism arguably must address these tensions and dynamics.

Of course, emphasis on consultative processes and negotiation in resolving constitutional disputes is not novel. In the United States, the political question doctrine provides that a range of constitutional disputes involving political issues are non-justiciable and leaves the resolution of such disputes to the political process.\(^{423}\) American Supreme Court justices bargain and compromise on constitutional interpretations to reach majorities and forge consensus that may be important for preserving the Court’s institutional authority.\(^ {424}\) The theories of popular constitutionalism discussed in Part III, both by tracing historic patterns of political mobilization and bargaining in the resolution of constitutional disputes, and by advocating a greater role for the political processes in interpreting and enforcing the constitution, also highlight such dynamics. Larry Kramer offers a constitutional model under which adjudication is but one element in a broader process of political-legal decision-making.

Legal scholars have noted the potential advantages of alternative or hybrid processes for resolving some difficult constitutional issues. In the United States, Carrie Menkel-Meadow has argued that a willingness to consider compromise solutions to intractable constitutional disputes may be more productive than insisting on “principled” outcomes that lack legitimacy or generate backlash.\(^ {425}\) Brian Ray contends that a hybrid dispute resolution process blending elements of both adjudication and

\(^{424}\) Menkel-Meadow, supra note 374, at 909–13.
\(^{425}\) Id.
negotiation/mediation could be an effective model for resolving disputes over constitutional socio-economic rights provisions. Ray, drawing on the work of Lon Fuller, characterizes socio-economic rights cases as classic polycentric disputes involving the “complex and intersecting sets of relationships” that are difficult to resolve through adjudication. His model is based in part on the experience of the South African Constitutional Court, which has avoided issuing substantive interpretations of constitutional provisions on socio-economic rights and instead ordered parties to engage in negotiations that consider constitutional values, state duties, and practical considerations. Collective disputes over land expropriations in China provide examples of a type of constitutional dispute that exhibits similar polycentric characteristics.

Such thinking is beginning to percolate in the English-language literature on Chinese law. For example, Peerenboom (also drawing on the experience of the South African Constitutional Court) argues that institutionally weak Chinese courts should emphasize cooperative processes rather than confrontational or assertive decision-making in handling complex socio-economic claims. Dowdle has argued that the consultative dynamics of legislatures are more conducive to constitutional development than adjudication and has observed that the Party-state’s recent emphasis on populism and mediation may open new pathways for China’s constitutional development even as it closes others. In a recent study on basic-level courts, Stephanie Balme finds that judges prohibited from citing the Constitution in formal judgments are using the space created by judicial mediation to integrate constitutional principles into dispute resolution outcomes.

China’s existing grand mediation framework provides a rough guide for how a hybrid mechanism for resolving constitutional disputes might be structured. A small group made up of senior Party, administrative, legislative, and judicial figures could provide leadership and oversight for such a mechanism. As constitutional disputes are referred from lower levels, central leaders could decide whether to take up the dispute and organize consultation meetings with Party-state institutions that have technical expertise or interests in the disputes. Coordination of constitutional dispute resolution could be carried out.

426 See generally Ray, supra note 369. Ray’s model relies on elements of judicial supervision and transparency that may be absent in the Chinese context.
427 The Constitutional Court has applied the “engagement remedy” in a series of cases involving the constitutional right to housing. Ray, supra note 369, at 834–43.
429 Dowdle, Popular Constitutionalism, supra note 17, at 9–12.
430 Stephanie Balme, Ordinary Justice and Popular Constitutionalism in China, in BUILDING CONSTITUTIONALISM IN CHINA, supra note 22, at 196.
within the central comprehensive security management office or by central Political-Legal Committee. However, NPC leaders do not play a major role in either of these institutions as currently constituted. Because the NPC and the NPCSC are the state entities formally charged with constitutional supervision, NPC leaders would arguably need to play a central role in a coordination entity. As constitutional disputes are referred from lower levels, central leaders would decide whether to take up the dispute and organize consultation meetings with Party-state institutions with technical expertise or interests in the dispute.

Dispute resolution groups would negotiate and reach consensus on a preferred solution that balances concerns regarding the constitutional text, collective demands, stability and Party power, and other governance and institutional interests. In this process, the SPC would draw on its professional competence as China’s highest judicial organ and act as a legal advisor, offering interpretations of the constitutional provisions for Party-state leaders to consider. As in the property rights examples, legal scholars and citizen participants might contribute, discuss ways to balance conflicting concerns, and comment on draft laws or regulations. Party leaders could provide oversight, mediate conflicting interests, and ensure that solutions are consistent with China’s political structure. Officials and scholars could then use domestic media and representative institutions such as the NPC and CPPCC to explain the measures.

A grand mediation model for constitutional disputes would be consistent with China’s political-legal traditions and policies. Deeply rooted historical traditions provide a foundation for deliberative institutions. As numerous scholars have shown, consultation and consensus building are core features of both contemporary Chinese legislative and policymaking processes and China’s approach to international disputes. Over the past decade, the Party-state has emphasized citizen participation, consultation, and supervision; expanded controlled channels for such participation; and experimented with new deliberative institutions and practices to build consensus and promote good governance. Finally, Party leaders have introduced the concepts


432 He & Warren, supra note 169, at 276–78. For an overview of this rhetoric and new efforts to promote hearings and solicitation of public comment on legislation in China, see
of “scientific development” and “building a harmonious society.” Both of these concepts involve a balancing of socio-political interests and an emphasis on stability. A constitutional dispute resolution model that emphasizes consultation and consensus building would be consistent with these cultural traditions, emerging political practices, and governance themes, and would reinforce them.

Such a mechanism would take account of the realities of China’s current system. As demonstrated in Part IV, patterns of bargaining, consultation, and mediation are already evident across a range of constitutional disputes in China. In the context of administrative and complex collective disputes, the Party-state is mandating the adoption of similar dispute resolution practices in an effort to maintain stability and ensure that outcomes incorporate political, social, and legal considerations. A grand mediation model for constitutional disputes would be consistent with these trends. Party-state institutions could activate the mechanism on a discretionary basis, and the Party would play an integrated leadership and coordination role. In such a context, the mechanism might not pose the same type of “latent threat” to Party power that judicial application the Constitution was deemed to pose. Party-state actors would engage in a political-legal dialogue and reach consensus-based outcomes that take account of China’s constitutional text but do not involve formal rulings that might undermine the power of Party-state institutions or generate new concerns about stability.

A grand mediation model for constitutional disputes could enhance the role and authority of courts in constitutional dispute resolution without generating conflicts over the respective constitutional powers of courts and legislatures. Under the current framework, judicial institutions do not play a formal role in constitutional interpretation. The creation of a constitutional court (or the vesting of constitutional review power with the SPC) would require a constitutional amendment and would almost certainly trigger both NPC resistance and a sensitive public debate over China’s constitutional structure. Under the current framework, judicial institutions do not play a formal role in constitutional interpretation. In the context of a grand mediation model for constitutional disputes, judicial officials would act as legal advisors in multiparty political negotiations with legal dimensions. Justices would draw on the SPC’s status as China’s highest judicial organ and contribute legal opinions on the Constitution as one of multiple factors to be

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434 WANG ZHENMIN, supra note 37, at 378. For an example of the type of constitutional debate such a move might provoke, see generally Tong Zhiwei, supra note 38.
considered. Such contributions would not involve formal challenges to the NPCSC’s constitutional authority or formal rulings that would place justices in direct conflict with more powerful Party-state institutions. Instead, justices would apply legal arguments to shape interpretation of the Constitution and dispute resolution outcomes. By integrating legal and political actors into a multifaceted dispute resolution mechanism, a grand mediation model could give courts a limited but more meaningful role in shaping official understandings of the Constitution than they presently enjoy. A mechanism organized along these broad lines would address some gaps in the current range of alternative or hybrid models that scholars have proposed. By involving a constellation of Party-state actors, the grand mediation model alleviates the perceived threats posed by a formal constitutional adjudication institution, whether it be a court, the NPCSC, or an NPC commission. While acknowledging the current realities of Party leadership, the model preserves a meaningful role for courts and takes an incremental step toward institutionalizing Party efforts to mediate constitutional tensions. In contrast to Backer’s model, which would validate the Party’s monopoly on constitutional interpretation, a grand mediation model would preserve a role for the bottom-up citizen demands and related consultations that have become an important component of China’s constitutional trajectory. A constitutional grand mediation mechanism draws on the consultative elements of Pan Wei’s hybrid governance model. At the same time, it would provide an interim or transitional stage that could help to bridge the wide gap between China’s current practice and the independent court Pan envisions as a core feature of a consultative rule of law regime. Finally, while giving full play to the political and consensus-building processes that Dowdle emphasizes, grand mediation would not be constrained by the current institutional limitations of China’s people’s congresses and would incorporate legal institutions in a consultative dispute resolution framework.

Why might the Party-state consider such a model? Given the Party-state’s priorities and existing national conditions, it might consider the model to be a appropriate fit for China. However, the simple answer may be to buy time. As collective demands grow and constitutional arguments diffuse through the Chinese polity, the Party-state faces a dilemma. Repression may eliminate immediate threats. However, if the Party-state represses or ignores underlying problems, dismisses constitutional rules, or imposes one-sided settlements, it may catalyze an

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435 Rule by Law, supra note 150, at 20–21 (noting that judges in authoritarian systems may preserve some ability to “champion rights at the margins of political life” by containing activist impulses and avoiding challenges to core regime interests); Balme, supra note 430.
escalation and intensification of disputes, radicalize moderate reformers otherwise inclined to work within the system, and undermine China's long-term stability. Repression also undermines a pillar of the Party-state's governing legitimacy by revealing the gap between the Constitution and political reality. Abandoning or altering the constitutional text to address the tension between rights/rule of law provisions and the reality of Party-state power would involve similar legitimacy costs. On the other hand, accommodation and concessions validate and reinforce evolving public views of the Constitution, establish precedents for compromise settlements, and encourage new, more expansive constitutional arguments. Concessions to address collective constitutional demands may also encourage citizens to make further demands through collective action, thus leading to further instability.

A grand mediation model for constitutional disputes would not resolve these dilemmas, but it could buy time for the Party-state by easing some of the tensions embodied in the difficult choices above. Deliberative institutions can provide safety valves that ease pressure on the state and create perceptions of responsiveness that build legitimacy. For example, Party leaders have experimented with controlled legislative hearings as a way to allow citizens to vent frustration and participate in decision-making without threatening Party-state authority. A more organized and defined process for responding to collective constitutional demands and reaching consensus on outcomes consistent with Party, local government, and social interests would be more efficient than current practices as a means of alleviating grassroots pressures on particular issues.

The Party-state might also view such a mechanism as a relatively safe concession that would reinforce its governing legitimacy. The failure of the judicialization movement, the recent shifts away from judicial professionalism and adjudication, and the wave of repression against legal

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437 See Zhang Qianfan, supra note 67, at § 2, para. 3; Peerenboom, supra note 97, at 39–40.

438 Cai Yongshun, supra note 221, at 417–18; Yang Su & Xin He, supra note 219, at 19; Hand, supra note 16, at 158–62.

439 Minzner, supra note 1, at 963–64.

440 He & Warren, supra note 14 at 280–81; He Baogang, supra note 431, at 178, 188; Min Jiang, supra note 207, at 266–67.

441 Paler, supra note 239, at 314–15 (citing motivations of Guangdong Province Party leaders).
activists has weakened the Party’s narrative that it is building a rule of law system. The so-called “fifth generation” of leaders that will take the reins of the Party-state apparatus in 2012 and 2013 (or a faction within the new leadership team) could be motivated to explore ways to reinvigorate this narrative. In establishing a grand mediation model for constitutional disputes, China’s leaders could argue that they have taken new steps to ensure implementation of the Constitution and institutionalize the resolution of constitutional disputes while continuing to marginalize the “latent threat” of a formal constitutional adjudication institution. The leadership might also argue that it has developed an indigenous mechanism that is grounded in China’s social and political traditions, addresses questions about “Chineseness,” and reinforces the narrative that China should not blindly copy Western institutions. Certainly, some Chinese citizens would challenge the legitimacy and appropriateness of such a mechanism (just as many have raised concerns about the push to mediate civil and administrative cases). Others might take pride in grand mediation as an indigenous innovation or interpret steps to create this mechanism as signs of incremental progress in an otherwise difficult political environment.

Party-state leaders might also be motivated by opportunities to create fissures among Chinese reformers. While repression or disregard of constitutional argument runs the risk of radicalizing moderate reformers, the creation of alternative mechanisms and greater responsiveness to collective constitutional demands could reinforce the resolve of moderates to work for incremental change. One source of the Party-state’s resilience has been its effectiveness in integrating new social-political forces. As the property rights examples suggest, the Party-state might encourage moderate citizen to work with the regime by inviting them to participate in shaping responses to collective constitutional demands, thereby co-opting them into a “safe” mechanism. In China’s rights defense movement, fissures between moderate reformers and others who advocate challenging the Party-state aggressively have already emerged. The negotiation over electoral reform in Hong Kong provides a striking example of how strategic Party-state constitutional concessions can fragment opposition forces. The implementation of a grand mediation model for constitutional disputes in China could generate similar tensions.

442 The transition from the Jiang Zemin administration to the Hu Jintao administration in 2002–2003, and Hu’s interest in promoting a populist and reformist image, provided an important backdrop for the progress in constitutional reform from 2002–2004. Hand, supra note 16, at 132–35. See also Cai Yongshun, supra note 221, at 431.
443 Elkins et al., supra note 24, at 176 (noting that the endurance of the 1982 PRC Constitution highlights the importance of including and coopting new social forces).
444 Hand, supra note 16, at 180–82; Pils, supra note 186.
445 The point here is to highlight possible Party-state motivations for considering such a model. If China’s constitutional reformers are fragmented, they may find it more difficult
At the same time, such a mechanism would not be inconsistent with, and could be co-opted to facilitate, the long-term efforts of constitutional reformers. At present, hopes for formal constitutional adjudication in China have all but vanished. In a Party-dominated political environment in which constitutional adjudication is viewed as a latent threat and courts have been excluded from the constitutional interpretation process, a “second-best” arrangement could give courts a limited but meaningful role in constitutional interpretation and implementation. A Party-state decision to adapt the grand mediation model in the context of constitutional disputes would advance constitutional reform, if incrementally, and establish a more efficient process for generating constructive responses to some collective constitutional demands. The establishment of a consultative process that acknowledges the importance of social-political factors in constitutional interpretation and gives the Party a supervisory role might also desensitize a broader range of constitutional issues and create conditions more conducive to compromise and accommodation. As noted above, concessions relieve some immediate pressures but also generate consensus on constitutional meaning, reinforce public expectations for settlement, and generate new, more expansive arguments.

While political channels for consultation and bargaining over constitutional disputes are significantly more constrained in China than in democratic systems, they are not absent. Participation in even heavily controlled consultative and deliberative processes may empower citizens and build consensus. While citizens face severe political constraints and bargaining disparities in constitutional disputes, they are not without bargaining endowments. Even in the context of abstract or conflicting constitutional provisions, citizens have some leverage to pressure the Party-state to consider collective concerns and the constitutional text in shaping dispute resolution outcomes. Citizens derive such leverage from public expectations that constitutional rights provisions should have some meaning and not simply be negated by provisions on Party leadership or citizen duties, the threat of new or further instability, and the prospect of more radical constitutional demands. Moreover, as scholars of alternative

to generate reform pressure on the Party-state. Fragmentation and the existence of radical reform elements could strengthen the willingness of the Party-state to grant strategic concessions to moderate reformers and help them to maintain incremental reform momentum.

Adrian Vermeule has explored the advantages of “second-best” constitutional designs. Adrian Vermeule, System Effects and the Constitution, 123 Harv. L. Rev. 4 (2009). The “second-best” theory holds that offsetting departures from optimal constitutional designs may produce a result that is preferable to those generated by failed constitutional models that most closely approximate optimal designs. Id.

Baogang He, supra note 431, 188–90; Dowdle, Of Parliaments, supra note 17, at 201–16.
dispute resolution in the United States have suggested, the precedential impact of widely publicized public law settlements may be significant.\textsuperscript{448} The establishment of a consultative process for resolving constitutional disputes would arguably facilitate citizen-state dialogue and broader constitutional learning. Chinese reformers believe that such dynamics are crucial for building the collective expectations and political pressures necessary to strengthen the Constitution as a legal instrument over the long term.

The following replies might be offered to address some potential concerns (indicated in italics) with a grand mediation model for constitutional disputes.

\textit{The application of a grand mediation model for resolving constitutional disputes would not provide an effective legal remedy for individual constitutional claims. Instead, it would legitimize Party dominance and undermine efforts to establish a meaningful constitutional adjudication institution and the rule of law.} It is true that a grand mediation model for constitutional disputes would facilitate Party-state responses to collective demands rather than provide a remedy for individual constitutional claims. It is also true that the adoption of a hybrid or transitional mechanism could drain energy from efforts to establish a constitutional adjudication institution. This author shares the hope of many Chinese reformers that a robust constitutional adjudication institution will emerge in China’s future. In contemporary China, however, the political dimensions of constitutional law are dominant and the legal dimensions weak. At present, Chinese citizens do not have an effective process for resolving individual constitutional claims, and prospects for constitutional adjudication are negligible. Even if a constitutional adjudication mechanism were created, there would be severe constraints on its independence in the existing political environment. In the absence of a meaningful constitutional adjudication option in China, questions regarding the relative merits of adjudicative and alternative models for resolving constitutional disputes are largely moot. Identifying and evaluating the evolutionary potential of existing practices may be more productive than trying to resolve theoretical debates about the relative merits of adjudicative and non-adjudicative approaches.

In this context, it is important to consider alternative evolutionary pathways for constitutional dispute resolution and assess their reform potential. The zone of convergence between existing informal practices for resolving constitutional disputes and emerging Chinese practices for

\textsuperscript{448} Menkel-Meadow, \textit{supra} note 369, at 2680–82. The successful replication of citizen rights defense strategies after the Sun Zhigang incident and the string of successful citizen environmental protests in Xiamen, Guangzhou, Shanghai, and Dalian provide clear examples of this dynamic.
handling administrative and complex/collective claims highlights one potential pathway. Chinese reformers are focused on building consciousness and altering collective political expectations. They seek to shape popular opinion, generate collective demands, and encourage the types of tectonic shifts necessary to establish the Constitution as a legal restraint on the Party-state in the long-term. A grand mediation model for constitutional disputes could provide space for such efforts. As discussed below, it may provide even greater space than a tightly controlled constitutional adjudication mechanism. Even if a grand mediation model is not adopted, existing practices will continue to give play to the dynamics identified in this article on an informal basis and may be more useful than a formal constitutional adjudication mechanism in facilitating the long-term efforts of Chinese reformers.

Even if a constitutional court or alternative constitutional adjudication mechanism is ineffective in the short-term, it is important for China to establish and develop such an institution now to lay a foundation for constitutional review when and if a political opening arises in the future. Although this argument seems intuitive, the record in other East Asian transitions is mixed at best. Tom Ginsburg’s account of transitions in South Korea and Taiwan suggests that while the creation and operation of institutions under authoritarian governments may help to lay foundations for transition, such actions may also institutionalize conservative cultures and practices. Korea’s Constitutional Court was a new institution and a product of the 1987 constitutional bargain that paved the way for Korea’s political liberalization. The court very rapidly began to dismantle the pillars of authoritarian governance and has become perhaps the most activist constitutional court in East Asia. In contrast to the Korean Constitutional Court, Taiwan’s Council of Grand Justices had been in existence for decades prior to Taiwan’s transition and was slower and more cautious in asserting its constitutional role during this transition. In addition, the Korean Supreme Court, a pre-existing institution that retained the power to review the constitutionality of administrative acts after Korea’s constitutional bargain, continued to exercise its power conservatively. As Ginsburg concludes, the record in Taiwan and South Korea “suggests that prior history is neither necessary nor sufficient for the successful operation of a particular institution.”

Spain’s transition provides another example. In 1978, Spain established a new Kelsenian constitutional court in part out of concern that leaving the power of constitutional review with a judiciary that was “educated in the legal dogmas of Franco’s regime” would weaken the

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450 Id. at 241–42.
451 Id. at 258.
country’s new democratic constitution. The Court played a crucial role in consolidating and defending the new constitution against the conservative impulses of the existing political-legal class.

A political transition in China, when and if it takes place, may or may not share characteristics with transitions in South Korea, Taiwan, or Spain. In some cases, constitutional courts in authoritarian regimes have expanded rights on the margins of political life. As the examples cited here suggest, however, reform proponents should not assume that establishing a constitutional adjudication institution now is a necessity. A constitutional adjudication institution may even hinder future reform efforts. If existing institutions are flawed or incomplete, future constitutional designers may face the challenge not only of creating new, more effective institutions, but also of battling existing institutional players with entrenched interests.

One can even envision a scenario in which the establishment of a constitutional adjudication institution might create new constraints on the efforts of Chinese reformers. At present, the Party-state has largely abandoned the field of constitutional argument and left it to the citizenry. In some cases, the Party-state responds to constitutional arguments indirectly through scholars with ties to the regime, strategic reform concessions, or censorship and repression. In many other cases, Party-state institutions simply ignore citizen constitutional arguments. The NPCSC has issued only a handful of decisions or interpretations that relate to the Constitution and has yet to issue a single formal ruling on a citizen constitutional review proposal. The people’s courts and other Party-state institutions have directly applied the Constitution in only a handful of cases. As a result, there is no meaningful body of official precedent interpreting China’s constitutional text. Within the constraints of China’s censored media (and increasingly outside of those constraints through new media), Chinese reformers have been left with considerable space to offer their own visions, arguments and interpretations of the Constitution as part of a long-term effort to raise consciousness and shape public expectations.

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453 Id. at 541–43, 559–62.
454 RULE BY LAW, supra note 150, at 149–55.
455 WANG ZHENMIN, supra note 37, at 290–300; Wang Zhenmin, supra note 320, at 2–3, 7. Most of the decisions or interpretations relating to the Constitution involve the status of Hong Kong and Macao. Albert Chen concludes that the NPCSC has never “expressly exercised its power of constitutional interpretation.” ALBERT CHEN, supra note 33, at 156. In making this statement, Chen presumably distinguishes NPCSC constitutional interpretations expressly issued pursuant to Article 67(1) of the Constitution and NPCSC “decisions” or “legislative interpretations” that cite to the Constitution or involve constitutional issues.
A constitutional adjudication institution issuing official interpretations could alter this dynamic. Chinese leaders would arguably gain legitimacy from a decision to establish such an institution or to further develop the role and procedures of the NPCSC. However, as discussed in Part III, the Party could maintain the façade of constitutional review and legality while employing numerous measures to limit the impact of such an institution. To the extent that such an institution did issue formal interpretations of the Constitution, it likely would issue conservative interpretations. Such interpretations would create the perception of legality and legal process but take into account the same political and social factors that are considered in existing informal practices and that would be considered in a grand mediation model. Although some citizens would question the reasoning or legitimacy of conservative interpretations, for others the decisions of a constitutional adjudication institution reached through legal procedure would represent a final, authoritative statement on the constitutional issue in dispute. NPCSC interpretations of the HKSAR Basic Law, some controversial, appear to have had such an effect.

A grand mediation process for constitutional disputes would not create this kind of legal façade. On the contrary, it would represent an explicit acknowledgment of the limitations and realities of constitutional law in China’s current political environment. In addition, while facilitating citizen-state dialogue, responses to collective demands, and incremental reforms, a grand mediation model for constitutional disputes would not produce formal constitutional interpretations. Either within the current informal dispute resolution framework or under a grand mediation model, reform-oriented citizens could continue their efforts—in the absence of official interpretations—to use a variety of public forums to offer constitutional arguments that some segment of the population might accept as authoritative.

There is no guarantee that constitutional argument will generate the type of popular pressures that could prompt a political opening in China and, in turn, the establishment of a more robust constitutional adjudication mechanism. This is true. China’s citizens may not accept the constitutional interpretations and the liberal constitutional vision advanced by some reformers. The Party-state, through a combination

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456 The Hong Kong Court of Final Appeal has compromised with mainland authorities on some politically sensitive cases and acknowledged that there are no limitations on the NPCSC’s final authority to interpret the Basic Law. Gittings, supra note 324, at 4–6. The NPCSC’s controversial decisions asserting authority over electoral reform have established boundaries for negotiation and dialogue. Similarly, Singapore’s ruling party has used courts and legal processes to cloak its efforts to marginalize political opponents with the veneer of legality. See generally Silverstein, supra note 150.
457 Peerenboom, supra note 97, at 31–34; Dowdle, Popular Constitutionalism, supra note 17, at 15–17; Lorentzen & Scoggins, supra note 167, at 5.
of adaptation and repression, may maintain the status quo or delay meaningful reform for a long period of time. Deliberation within China’s authoritarian framework, or state-driven shifts in rights consciousness, may ultimately stabilize and reinforce the regime. Chinese leaders might also manipulate nationalist sentiments to bolster their legitimacy and deflect attention from liberal constitutional demands. Entrenched elite interests (at both the central and local level) create difficult obstacles for reform even under the best of conditions. Of course, all this would be true even if China were to establish a constitutional adjudication institution that looked more familiar to Western observers.

VI. CONCLUSION

Chinese legal reformers face a challenging political-legal environment, and many are suffering from the Party-state’s drive to contain perceived political threats. In such an environment, constitutional law and adjudication face severe constraints. Broad political reform in China seems unlikely for the foreseeable future. However, if we are to draw a lesson from the guarded but misplaced optimism for constitutional adjudication that began to percolate a decade ago, it should be that analysis of China’s constitutional development must be qualified with a strong dose of humility. Early optimism for constitutional adjudication may have been misplaced, but we should not replace it now with an excessive pessimism that obscures important trends and possibilities within the political-legal system. Constitutional disputes are being discussed and resolved in China, and China’s constitutional reformers are using emerging dispute resolution patterns to advance long-term, collective goals. We just need to shift our focus to recognize these patterns and understand their significance. Such patterns, and efforts to institutionalize them, may entrench and bolster the legitimacy of the Party-state, but they also have the potential to generate pressure and new prospects for incremental change. As they face current challenges, Chinese reformers may take some consolation from the knowledge that the Party-state itself faces difficult tensions and long-term dilemmas as it confronts citizen constitutional argument.

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458 He and Warren argue that deliberative institutions could facilitate the demobilization of regime opponents and enhancements in governing capacity that help the Party avoid broader political reform. He & Warren, supra note 169, at 282–3. Lorentzen and Scoggins argue that rising rights consciousness in China has been predominantly policy driven and stabilizing for the regime, but they also acknowledge evidence of destabilizing equilibrium shifts. Lorentzen & Scoggins, supra note 167, at 11–13.