

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-state³ 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

¹ Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 938–39 (2011); Randall Peerenboom, *More Law, Less Courts*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA 175–76 (Tom Ginsburg & Albert Chen eds., 2008).

² See Willy Lam, *CCP Tightens Control over the Courts*, 11.11 CHINA BRIEF (The Jamestown Found., Washington, D.C.), June 17, 2011, at 2, http://www.jamestown.org/uploads/media/cb_11_05.pdf; Willy Lam, *The Politicisation of China's Law-Enforcement and Judicial Apparatus*, CHINA PERSPECTIVES, no. 2, 2009 [hereinafter Lam, *Politicization*], at 42–51; Minzner, *supra* note 1.

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.

⁴ See Joshua Rosenzweig, Op-Ed., *China Abandons the Law*, WALL ST. J., Mar. 24, 2011, <http://online.wsj.com/article/SB10001424052748704425804576220102254442640.html>; Patrick Kar-wai Poon, Exec. Sec'y of the China Human Rights Lawyers Concern Grp., Presentation at the 2011 Gwangju Asia Forum: Rights Defense Lawyers and the Rule of Law in China (May 16, 2011).

⁵ See, e.g., Minzner, *supra* note 1; Rosenzweig, *supra* note 4; Evan Osnos, *Is China Giving Up on Western Rule of Law?*, THE NEW YORKER BLOG (Mar. 2, 2011), <http://www.newyorker.com/online/blogs/evanosnos/2011/03/is-china-giving-up-on-western-rule-of-law.html> (asserting that Party-state officials have "mothballed previous attempts to improve Chinese courts as a site of conflict-resolution"); Jiang Ping, «*Lüshi Wenzhai*» 2009 Nian Nianhui Fayan: Zhongguo de Fazhi Chuzai Yige Da Daotui de Shiqi [Speech at the 2009 Meeting of *Lawyers Digest: China's Rule of Law Is in a Period of*

In the realm of constitutional law, the Party-state has strictly limited efforts to promote the development of constitutional adjudication mechanisms.⁶ 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.⁷ At the same time, senior Party leaders have declared that China has established a socialist legal system "on schedule."⁸ 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.⁹ Such events and rhetoric have generated pessimism about prospects for constitutional review and enforcement in China.¹⁰

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

Major Retreat] (Feb. 21, 2010), *available at* <http://www.gongfa.org/bbs/redirect.php?tid=4037&goto=lastpost>; Teng Biao, Op-Ed., *The Law on Trial in China*, WASH. POST, July 27, 2009, at A19 (describing China's persecution of rights lawyers); Fu Hualing, *The Varieties of Law*, CHINA L. PROF BLOG (June 28, 2011), http://lawprofessors.typepad.com/china_law_prof_blog/2011/06/fu-hualing-on-the-varieties-of-law.html ("It is the combination of the Party's confidence and its vulnerability that has produced the recent repression and explains China's recent turn against the law[.]").

⁶ As used in this article, the term "constitutional adjudication" refers broadly to the formal adjudication of constitutional disputes either by a court or the NPC Standing Committee.

⁷ See Guanyu Feizhi 2007 Niandi Yiqian Fabu de Youguan Sifa Jieshi de Jueding [Decision of the SPC on Abolishing the Relevant Judicial Interpretations (the Seventh Batch) Promulgated before the End of 2007] [hereinafter SPC Decision on Annuling Judicial Interpretations] (issued by the SPC, Dec. 18, 2008, effective Dec. 24, 2008) 2008 FA SHI [SUP. PEOPLE'S CT. INTERP.] no. 15 (LawInfoChina, Peking Univ. Beida Fabao series CLI.3.111685), *available at* http://www.law-lib.com/law/law_view.asp?id=272499.

⁸ *Socialist System of Laws Established in China*, CHINA INTERNET INFORMATION CENTER, Mar. 10, 2011, *available at* http://www.china.org.cn/china/NPC_CPPCC_2011/2011-03/10/content_22099470.htm.

⁹ INFO. OFFICE OF THE STATE COUNCIL, THE SOCIALIST SYSTEM OF LAWS WITH CHINESE CHARACTERISTICS, at §§ II, III (Oct. 2011). There is no mention of constitutional enforcement or review mechanisms in the section of the white paper focusing on future improvements to the legal system. *Id.* at § IV.

¹⁰ See *infra* notes 83 and 84 for pessimistic appraisals of China's constitutional reform prospects.

orientation of the political system shape procedure.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.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.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.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").¹⁵ Recent scholarship on citizen constitutional activism in

¹¹ MIRJAN DAMASKA, *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). *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. *Id.*

¹² See Donald Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake*, in *UNDERSTANDING CHINA'S LEGAL SYSTEM* 101–02 (Stephen Xu ed., 2003) [hereinafter Clarke, *Puzzling Observations*]; Jerome Cohen, Op-Ed., *Law Unto Itself*, S. CHINA MORNING POST (Mar. 30, 2011), available at <http://www.cfr.org/china/law-unto-itself/p24538>; Donald Clarke, *China's Jasmine Revolution and the Legal System*, CHINA L. PROF BLOG, May 26, 2011, http://lawprofessors.typepad.com/china_law_prof_blog/2011/05/chinas-jasmine-crackdown-and-the-legal-system.html. See also RANDALL PEERENBOOM, *CHINA'S LONG MARCH TO RULE OF LAW* 55–126, 304 (2002) (discussing competing conceptions of rule of law and characterizing "statist socialist" rule of law); Zhu Suli, *Guanyu Nengdong Sifa yu Datiaojie* [On Judicial Activism and Grand Mediation], ZHONGGUO FAXUE [CHINA LEGAL SCI.], no. 1, 2010, at 5, 6–7, 15–16 (discussing ruling Party demands on courts to realize goals of harmonious development and the judicial activism necessary to address such demands).

¹³ Lam, *Politicization*, *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).

¹⁴ Baogang He & Mark E. Warren, *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 *THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA* (Ethan J. Leib & Baogang He eds., 2010).

¹⁵ KEVIN O'BRIEN & LIANGJIAN LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* 3 (2006).

China suggests that such dynamics are present in the realm of constitutional law.¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹ Some Chinese legal scholars have concluded that a "latent" or "sub rosa" mediation mechanism for resolving constitutional disputes already exists.²⁰ Jiang Shigong characterizes such consultative conventions as elements of China's "unwritten" Constitution.²¹ While some Chinese

¹⁶ See Keith Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TRANS. L. 114, 116 (2006) (discussing efforts by legal reformers to use and expand space within China's authoritarian system); Thomas Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT. J. CONST. L. 215, 218 (2009) (discussing citizen efforts to judicialize the Constitution).

¹⁷ Michael W. Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1, 3 (2002). For a discussion of reform opportunities during cycles of repression, see Michael W. Dowdle, *Popular Constitutionalism and the Meaning of Charter 08* (unpublished ms.) (on file with author) [hereinafter *Popular Constitutionalism*]. The Party-state's active efforts to publicize and implement the Administrative Litigation Law (ALL) during the conservative retrenchment that followed protests in 1989 provides an interesting example of such "double movement." The ALL provided Chinese citizens with the first statutory right to sue the state for unlawful administrative acts. Pitman B. Potter, *The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform*, in *DOMESTIC LAW REFORMS IN POST-MAO CHINA* 274–76 (Pittman B. Potter ed., 1994).

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 YANJIU WANG [CHINA CONSTITUTION TEACHING AND RESEARCH NET], Apr. 24, 2004, at 3.

²¹ Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 MODERN CHINA, no. 1, Jan. 2010, at 12, 31–37.

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.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.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.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.²⁵

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).

²³ See *infra* Part III(C).

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. ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 36–47 (2010). While an analysis of this broader range of constitutional disputes is potentially rich, it is also less focused, and it diverts attention from the significance of a text that both Party-state actors and many citizens recognize as having supreme legal effect. The article contributes to an understanding of China's broader constitutional order by identifying unwritten constitutional conventions for resolving disputes over the constitutional text.

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.²⁶ 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.²⁸ The Constitution explicitly states that it is supreme law, and Party-state leaders routinely confirm that the Constitution has supreme legal effect.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.³⁰ As the late William Jones observed in 1985, “the Constitution seems to bear no relation to the actual government of China.”³¹ In this context, some observers have characterized the Constitution as a national declaration or aspirational text rather than as a legally enforceable charter.³²

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

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

²⁹ *Id.* pmbl., art. 5. The Party is subject to the PRC Constitution. *Id.* For four examples of leadership statements on constitutional supremacy that span the reform era, see Communiqué of the Third Plenary Sess. of the 11th Centr. Comm. of the Chinese Communist Party (Dec. 22, 1978), at § 3, translated at http://www.bjreview.com.cn/special/30yearsofreform/2008-11/29/content_167170.htm [hereinafter Third Plenum Communiqué]; Hu Jintao: *Xianfa Wei Jianshe Xiaokang Shehui Tigong Falü Baozhang (Fu Jianghua Quanwen)* [Hu Jintao: *the Constitution Provides a Legal Guarantee for Building a Well-Off Society (Full Text of Speech Attached)*], CHINA.COM.CN, Dec. 12, 2002, <http://www.china.com.cn/chinese/2002/Dec/241944.htm>; Wu Bangguo: *Jianchi Weihe Xianfa Zuowei Guojia Genbenfa de Quanwei Diwei* [Wu Bangguo: *Persist in Upholding the Authoritative Status of the Constitution as the Nation’s Fundamental Law*], NEWS.SC.ORG, May 10, 2011, <http://china.newssc.org/system/2011/03/10/013097464.shtml>; Weihe Shuo Xianfa Shi Zhongguo Tese Shehui Zhuyi Falü Tixi de Hexin [Why We Say the Constitution Is the Core of the Socialist Legal System with Chinese Characteristics], XINHUA NET (Mar. 11, 2011, 2:29 PM), http://news.xinhuanet.com/observation/2011-03/11/c_121177013.htm.

³⁰ Clarke, *Puzzling Observations*, *supra* note 12, at 103–05; Jiang Shigong, *supra* note 21, at 13; Albert Chen, *Constitutions and Values in Three Chinese Societies*, Sept. 17, 2009 [hereinafter Chen, *Constitutions and Values*], at 50, 54, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474731; Surya Deva, *The Constitution of China: What Purpose Does it (Not) Serve?*, 2 JINDAL GLOBAL L. REV. 55, 74 (2011). *But see* YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER 84–86, 89–92 (1997) (asserting that the preamble, rather than operative provisions of the Constitution, is the “secret” to understanding the PRC Constitution).

³¹ William C. Jones, *The Constitution of the People’s Republic of China*, 63 WASH. U. L. QUART. 707, 712 (1985).

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 “programmatically 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.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.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.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.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,³⁷ and courts only occasionally referenced the Constitution in their decisions.³⁸ Instead, the NPC and the NPC Standing Committee (NPCSC) are charged with supervising the

³³ See generally Jiang Shigong, *supra* note 21; ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 49–73 (4th ed., 2011).

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.

³⁵ See generally *infra* Part IV.

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).

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 SHENCHA ZHIDU [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 Fayuan 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/sfjs/201002/t20100210_1065.htm.

³⁸ See *infra* Part III(C); Otto Malmgren, *Fragile Constitutionalism in China* 8–11 (Aug. 31, 2010) (unpublished ms.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1978169; Kellogg, *supra* note 16, at 228–34. See also Tong Zhiwei, *Xianfa Shiyong Ying Yixun Xianfa Benshen Guiding de Lujing* [Application of the Constitution Should Follow the Path of the Constitution's Own Provisions], ZHONGGUO FAXUE [CHINA LEGAL SCI.], no. 6, 2008, at 22, 28–29.

enforcement of the Constitution.³⁹ The NPCSC is responsible for interpreting the Constitution and annulling lower-level legislation that conflicts with the Constitution.⁴⁰ 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.⁴¹

Beginning in 1999,⁴² 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 manner⁴³

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

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.

⁴¹ Tong Zhiwei, *supra* note 38, at 22–23; *The Legislative System of China*, ZHONGGUO WANG [CHINA NET], Sept. 28, 2003 (“Legislation of the NPC and its Standing Committee: For a Better Legislative Institution”); Huang Li, *Gongmin Weiquan Ke Bu Keyi Yuanyin Xianfa [Can the Constitution Be Cited in Citizen Rights Defense?]*, NANFANG ZHOUMO [S. WEEKEND], Jan. 15, 2009, available at <http://www.chinaelections.org/NewsInfo.asp?NewsID=141533>.

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.”⁴⁴ 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.”⁴⁵

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.⁴⁶ 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.⁴⁷ 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.⁴⁸ However, *Qi Yuling* was a milestone

⁴⁴ XIANFA const’l amend. III (1999).

⁴⁵ Huang Songyou, *Xianfa Sifahua Ji Qi Yiyi—Cong Zuigao Renmin Fayuan Jintian de Yige «Pifu» Tanqi [Judicialization of the Constitution and its Significance: A Discussion Beginning with Today’s SPC “Reply”]*, RENMIN FAYUAN BAO [PEOPLE’S COURT DAILY], Aug. 13, 2001, available at <http://constitutionalism.fyfz.cn/art/399444.htm>. SPC Vice President Huang Songyou, the architect of the *Qi Yuling* decision discussed below, was elevated to the SPC in the spring of 1999. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Renming Mingdan [List of NPCSC Appointments], June 28, 1999, available at http://www.law-lib.com/law/law_view.asp?id=96647. SPC President Xiao Yang, also a Guangdong native, likely approved the *Qi Yuling* decision. Xiao Yang was appointed to the SPC in March 1998. For additional discussion, see Balme, *supra* note 34, at 20–21.

⁴⁶ Lifa Fa [Legislation Law] [hereinafter PRC Legislation Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 2000 QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUANHUI GONGBAO [STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.] no. 112 (LawInfoChina, Peking Univ. Beida Fabao series CLI.1.26942), at art. 90. During the drafting process of the PRC Legislation Law, Chinese scholars advocated the establishment of a constitutional and legislative supervision committee and included provisions to this effect in expert drafts of the law. Li Buyun, *Explanations of the Proposed Legislation Law of the People’s Republic of China*, in CONSTITUTIONALISM AND CHINA 224–25 (Li Buyun ed., 2006). Detailed provisions for a NPC Constitution Committee were included in early official drafts of the Legislation Law, but these provisions were abandoned after 1997. Li Yahong, *The Law-making Law: A Solution to the Problems in the Chinese Legislative System?*, 20 HONG KONG L. J. 120, 133–135 (2000).

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]*, FALU SIXIANG 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 Fayuan Guanyu Guyong Hetong "Gong Shang Gai Bu Fuze" Shifou Youxiao 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/xiangguanfangui/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 specified 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 Luqu Qi de Zhongzhuan Xuexiao jiu Du Qinfan Xingming Quan, Shou Jiaoyu Quan de Quanli 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 enhanced 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.⁴⁹ 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*.⁵⁰

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.⁵¹ Hu's speech emphasized the importance of constitutional enforcement and encouraged citizens to view the Constitution as a "legal weapon" to safeguard citizen rights.⁵² Senior Chinese judicial officials expanded on such messages.⁵³

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!"⁵⁴ 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

⁴⁹ Huang Songyou, *supra* note 45.

⁵⁰ Tong Zhiwei, *supra* note 38, at 35–36; Shen Kui, *supra* note 48, at 199; Balme, *supra* note 34, at 19–21.

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

⁵² *Hu Jintao Qiangdiao Jin Yibu Shuli Xianfa Yishi yu Quanwei (Fu Quanwen) [Hu Jintao Stressed Progressively Establishing Constitutional Consciousness and Authority (Full Text Attached)]*, ZHONGGUO XINWEN WANG [CHINANEWS.COM], Dec. 4, 2002, <http://www.chinanews.com/2002-12-04/26/250121.html>.

⁵³ *Zui Gao Yuan Xiao Yang: Lun Xianfa de Quanwei—Jinian Xianfa Banxing 20 Zhou Nian [SPC Xiao Yang: Discussing the Authority of the Constitution and Memorializing the 20th Anniversary of the Promulgation of the Constitution]*, FAZHI RIBAO [LEGAL DAILY], Dec. 4, 2002, available at <http://www.southcn.com/law/fzxw/200212040511.htm>.

⁵⁴ *Xianzheng Zhilu: Cong Zunzhong Xianfa Kaishi! [The Road to Constitutionalism: Begin By Respecting the Constitution!]*, NANFANG ZHOUMO [S. WEEKEND], Oct. 3, 2003, available at www.hongfan.org.cn/file/upload/2010/05/19/1274678369.pdf. The issue featured interviews with leading scholars who discussed the meaning of constitutionalism and its potential in China.

in China's legal reform effort. In the wake of this incident, a citizen rights defense movement gained new cohesion and momentum.⁵⁵

Such events raised the possibility that the Party-state might be prepared to infuse the Constitution, long dormant as a legally enforceable text, with new life. Although *Qi Yuling* generated significant controversy, prominent Chinese scholars argued for "judicialization" of the Constitution and raised numerous constitutional claims in the people's courts in an effort to build on the case.⁵⁶ Other scholars focused on the development of an improved constitutional review mechanism within the NPC.⁵⁷ In an effort to breathe life into the nascent NPCSC constitutional review procedure, citizens filed numerous constitutional review proposals and discussed the significance of constitutional review in both official and unofficial media.⁵⁸ Western observers explored the potential for constitutional review and the development of a "fragile" or "nascent" constitutionalism in China.⁵⁹

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,

⁵⁵ For a discussion of the Sun Zhigang case and its impacts, see *infra* Part IV(B). See also Deva, *supra* note 30, at 76 (discussing the impact of China's Constitution in "facilitating stakeholder activism").

⁵⁶ For a detailed discussion of the judicialization movement, see generally Kellogg, *supra* note 16. Some scholars promoting judicialization have been careful to distinguish between judicial application of the Constitution and constitutional review. *Id.* at 225–26.

⁵⁷ See generally Zhu Guobin, *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, 43 SUFFOLK U. L. REV. 625, 650–53 (2009); Tong Zhiwei, *supra* note 36, at 677–79.

⁵⁸ For a detailed discussion of citizen review proposal efforts, see generally Keith Hand, *Citizens Engage the Constitution: The Sun Zhigang Incident and Constitutional Review Proposals in the People's Republic of China*, in BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 22, at 221–42, and Keith Hand, *Can Citizens Vitalize the Constitution?*, 170 FAR EASTERN ECONOMIC REVIEW, no. 4, at 15–18 (May 2007). Other scholars have employed the research and analysis presented in the foregoing sources in their own work on constitutional reform in China. See, e.g., Richard Balme and Yang Lihua, *The Politics of Constitutional Reform in China: Rule of Law as a Condition or as a Substitute for Democracy?*, 5 ZEITSCHRIFT FÜR STAATS- UND EUROPAWISSENSCHAFTEN [J. FOR COMPARATIVE GOV. & EUROPEAN POL.], no. 3–4, at 463–68 (Dec. 2007) (republished in CROSSING BORDERS, CONSTITUTIONAL DEVELOPMENT AND INTERNATIONALISATION 153–178 (Floria Grotz & Theo A. J. Toonen eds., 2007) and THE CITIZEN AND THE CHINESE STATE (Perry Keller ed., 2011)).

⁵⁹ Balme, *supra* note 34, at 22 (tracing the emergence of a nascent constitutionalism); Kellogg, *supra* note 16; Randall Peerenboom, *Law and Development of Constitutional Democracy: Problem or Paradigm?*, 19 COLUM. J. ASIAN L. 185, 204 (2005–2006) (outlining China's "nascent" constitutionalism); Malmgren, *supra* note 38, at 1 ("fragile constitutionalism" is taking hold in China); Hand, *Citizens Engage the Constitution*, *supra* note 58. For further discussion of these dynamics, see generally BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 22.

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.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.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.⁶² Frustrated activists liken the submission of a constitutional review proposal to “throwing a rock into the ocean.”⁶³ Chinese “netizens” have reported online censorship of terms such as “constitutionalism.”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.⁶⁵ Although Chinese scholars actively

⁶⁰ Michael Dorf has raised the possibility that the Party-state initially viewed limited constitutional litigation as a “useful tool for controlling provincial and local authorities.” Michael Dorf, *What a Chinese Height Discrimination Case Says about Chinese (and American) Constitutional Law*, FINDLAW.COM, May 26, 2004, <http://writ.news.findlaw.com/dorf/20040526.html>.

⁶¹ John Pomfret, *China Orders Halt to Debate on Reforms*, WASH. POST, Aug. 7, 2003, at A1; Jiang Xun, *Scholar Put Under Round-the-Clock Watch for Voicing Opinion on Constitutional Reforms*, YAZHOU ZHOUKAN [ASIA WEEKLY], Oct. 26, 2003 available in Foreign Broadcast Information Service [hereinafter FBIS]. Lam concludes that Hu's emphasis on the Constitution began “petering out” in 2004. Lam, *Politicization*, *supra* note 2, at 45.

⁶² Wang Xiuzhe, *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).

⁶³ “Fagui Weixian Shencha Jianyi Quan” de Kunjing [The Difficulties of “the Right to Propose Constitutional Review of Regulations”], LÜSHI JIAOYU WANG [LAWYER EDUCATION NET], May 17, 2006, <http://www.chinalawedu.com/news/15300/157/2006/5/xi882811710171560023223-0.htm>.

⁶⁴ Ren Kejing, “Xianzheng” Mangan ma? [Is “Constitutionalism” Sensitive?], NANFANG ZHOUMO [S. WEEKEND] (Dec. 17, 2010, 5:46 PM), <http://www.infzm.com/content/53658>.

⁶⁵ See *Zhongguo Zhengfa Daxue Jiaoshou Xiao Han Bei Tingke Shijian Diaocha* [Investigation into the Suspended Courses of China University of Politics and Law Professor Xiao Han], NANFANG ZHOUMO [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 Jiangtan 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.⁶⁶

The Party-state has been particularly careful to limit further developments related to constitutional litigation in the courts. Party officials expressed concern about *Qi Yuling* and viewed constitutional litigation as a “latent threat.”⁶⁷ Following *Qi Yuling*, senior Party-state officials issued internal directives confirming that *Qi Yuling* should not be taken as a precedent.⁶⁸ Books on constitutional litigation were blocked from publication.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.⁷⁰ Finally, as noted above, the

2011 [hereinafter *Second Constitutionalism Forum*], at para. 1, available at <http://www.e-cpcs.org/newsinfo.asp?Newsid=23342> (noting scholars’ difficulty in scheduling a conference on constitutionalism at Beijing University); *Beijing Daxue Gonggao* [Beijing University Notice], Mar. 25, 2010, <http://www.pku.edu.cn/homepage/notice/bdtz.html?id=59007> (announcing the closure of five centers, including the Beijing University Law School Women’s Law Research and Service Center and the Beijing University Constitutionalism Research Center.)

⁶⁶ *Jiandu Fa: Minzhu Zhengzhi Shengzhang Dian* [Supervision Law: Development Point for Democratic Politics], NANFANG ZHOU MO [S. WEEKEND], Sept. 6, 2002, available at <http://www.chinaelections.org/NewsInfo.asp?NewsID=64130>. The final version of the Supervision Law included provisions on NPCSC review of the constitutionality and legality of Supreme People’s Court and Supreme People’s Procuratorate judicial interpretations. Zhonghua Renmin Gonghe Guo Geji Renmin Daibiao Dahui Changwu Weiyuanhui Jiandu Fa [Law on the Supervision of Standing Committees of People’s Congresses at Various Levels] [hereinafter PRC Supervision Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 27, 2006, effective Jan. 1, 2007) 2006 ZHUXI LING [PRESIDENTIAL ORDER] no. 53, at arts. 31–34 (LawInfoChina, Peking Univ. Beida Fabao series CLI.1.78894), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=5421>.

⁶⁷ Zhang Qianfan, *Zhongguo Xianzheng de Lujing yu Kunjing* [The Paths and Difficulties of China’s Constitutionalism], CAIJING WANG [FINANCE NET] (Jan. 28, 2011), http://blog.caijing.com.cn/expert_article-151521-16381.shtml.

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 Municipality 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 FAFA [BEIJING HIGHER PEOPLE’S CT. DOC.] no. 341, at § 10, available at <http://www.chinalawedu.com/falvfagui/fg23079/89204.shtml>. In its decision annulling the 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.

⁶⁹ *Second Constitutionalism Forum*, *supra* note 65, at para. 10 (comments of Jiang Ping).

⁷⁰ Harry Doran, *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.⁷¹

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.⁷² 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.⁷³ 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.⁷⁴

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.⁷⁵ Crushed by a mountain of medical

POST, May 22, 2004, available at <http://iw.newsbank.com>; *Woguo You Renda Jiandu Xianfa Shishi, Xianfa Reng Buneng Chengwei Susong Genju* [China Implements the Constitution through NPC Supervision, Constitution Still Cannot Constitute a Basis for Litigation], RENMIN WANG, Dec. 2, 2004, <http://www.people.com.cn/GB/shehui/1060/3028137.html>. Scholar Huang Jie claims that at a June 2003 symposium with constitutional law scholars held at the Great Hall of the People, NPCSC Chairman Wu Bangguo explicitly rejected a proposal to incorporate a system of judicial review into the Constitution. Huang Jie, *The Urgent Task of Establishing the Judicial Review System*, in CONSTITUTIONALISM AND CHINA 245 (Li Buyun ed., 2006).

⁷¹ See, e.g., Chen Hongyi, *supra* note 47, at 1–2; Tong Zhiwei, *supra* note 36, at 677–79; Huang Li, *supra* note 41.

⁷² Luo Gan, *Shenru Kaizhan Shehuizhuyi Fazhi Linian Jiaoyu, Qieshi Jiaqiang Zhengfa Duiwu Sixiang Zhengzhi Jianshe* [Deeply Carry Out Education on Socialist Rule of Law Concepts, Strengthen the Ideological and Political Construction of the Political-Legal Team], QIUSHI [SEEKING TRUTH], Apr. 11, 2006, § III(4) (asserting that “enemy forces” are using “the pretence of rights defense to engage in sabotage”), available at http://www.qstheory.cn/zxdk/2006/200612/200907/t20090708_8767.htm.

⁷³ Lam, *Politicisation*, *supra* note 2, at 45–46.

⁷⁴ See, e.g., *We Should Not Copy Western System: Wu*, RENMIN WANG, Mar. 10, 2009, <http://english.peopledaily.com.cn/90001/6610213.html>.

⁷⁵ This discussion of the Wang Denghui case is based primarily on two sources: Wang Jian, *Zhongguo Xianfa Ziyou Diyi An* [China First Case of Constitutional Freedom], MINZHU YU FAZHI [DEMOCRACY AND LAW], May 5, 2008, and ZHONGGUO XIANFA SHILI

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 plaintiff'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

YANJIU (SI) [STUDY OF CHINA'S CONSTITUTIONAL CASES (FOUR)] 1-28 (Han Dayuan, ed. 2010) [hereinafter STUDY OF CHINA'S CONSTITUTIONAL CASES (FOUR)].

⁷⁶ STUDY OF CHINA'S CONSTITUTIONAL CASES (FOUR), *supra* note 75, at 16.

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 <http://www.iolaw.org.cn/shownews.asp?id=17294>.

commentary).⁷⁸ 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.⁷⁹ 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.⁸⁰

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.⁸¹ 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.⁸²

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

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).

⁸¹ In extensive online searching, the author was unable to locate any official Chinese mass media sources that discuss the case in detail. *Xinhua* reprinted a *Beijing News* compilation of "2008 constitutional cases" that lists "Guangdong Court Holds That Enterprise Prohibition on Workers Spending the Night Outside the Facility Contravenes the Spirit of the Constitution." The list contains no substantive discussion of the *Wang Denghui* case. *2008 Shida Xianfa Shili Pingxuan Jiexiao* [Selection of China's Ten Major Constitutional Cases for 2008 Revealed], XINHUA NET (Dec. 27, 2008, 9:10 AM), http://news.xinhuanet.com/legal/2008-12/27/content_10565849.htm. The *People's Daily* Website mentioned the case in an article buried in its fashion section. See *Yuangong Xiaban Tuzhong Zaoyu Chehuo bei Fayuan Rending Shu Gongshang* [Worker in Car Accident on Commute from Work, Court Determines it Was a Work Injury], RENMIN WANG, Mar. 3, 2008, <http://lady.people.com.cn/GB/1089/6946133.html>.

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.⁸³ 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.⁸⁴ 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."⁸⁵ 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.⁸⁶ 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.⁸⁷ 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.

⁸⁴ Author Interviews; Huang Li, *supra* note 41; Zhu Guobin, *supra* note 57, at 652; Thomas E. Kellogg, *The Death of Constitutional Litigation in China*, 9.7 CHINA BRIEF (The Jamestown Found., Washington, D.C.), Apr. 2, 2009, at 4, http://www.jamestown.org/uploads/media/cb_009_7_02.pdf.

⁸⁵ Jiang notes that the majority of constitutional law scholarship in China is focused on the interpretation and application of the text of the Constitution according to Western models. Jiang Shigong, *supra* note 21, at 13–14, 34–36.

⁸⁶ *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.

⁸⁷ Jiang Shigong, *supra* note 21, at 16, 40–43.

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

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, 29. For populist pathways, see Stéphanie 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,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.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.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.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.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

violations and mediate constitutional disputes between different Party and state organs. After fundamental political reform or after the committee gains sufficient experience, China would establish a Kelsenian constitutional court. Ji Weidong, *Hexianxing Shencha Zhidu de “Liangbu Zou” Silu* [*The Two-Step Road for a Constitutionality Review System*], 2003 RENDA YANJIU [NPC STUDIES], no. 7, at 10–11, available at <http://wenku.baidu.com/view/002dae8fa0116c175f0e48fc.html>.

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

⁹³ Pan Wei, *Toward a Consultative Rule of Law Regime in China*, in *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* 3, 33–35 (Suisheng Zhao ed. 2006). Tom Ginsburg’s exploration of a Confucian constitutional model involving judicial remonstrance against powerful executives might be accommodated within such a framework. Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC. INQ. 763, 791–96 (2002).

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

⁹⁵ For comparative perspectives, see *infra* notes 147 to 163 and accompanying text.

⁹⁶ Larry Catá Backer, *A Constitutional Court for China Within the Chinese Communist Party: Scientific Development and a Reconsideration of the Institutional Role of the CCP*, 43 SUFFOLK U. L. REV. 593 (2010).

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.”⁹⁷ 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.⁹⁸ The hybrid models proposed to date are either unrealistic or fail to fully capture these interactive dynamics.

⁹⁷ Peerenboom’s study is focused primarily on the ideological tensions embedded in the Constitution and how they might be navigated, rather than on specific dispute resolution models. Randall Peerenboom, *Social Foundations of China’s Living Constitution* 40 (Jan. 26, 2010) (unpublished ms.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542463.

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.⁹⁹ As the legal expression of these fundamental political orderings, constitutional law possesses both political and legal dimensions.¹⁰⁰ Constitutional texts are the product of political bargaining and deliberation.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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.

¹⁰⁰ LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). See also RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* 1–12 (2007); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHICAGO-KENT L. REV. 991 (2006).

¹⁰¹ ELKINS ET AL., *supra* note 24, at 66–71; BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTIONS* 47–51 (1994). Drafts of both the 1954 and 1982 PRC Constitutions were published for public comment and discussed in drafting meetings by a wide range of experts. Glenn Tiffert, *Epistrophe: Chinese Constitutionalism and the 1950s*, in *BUILDING CONSTITUTIONALISM IN CHINA*, *supra* note 22, at 59, 66–68; Tony Saich, *The Fourth Constitution of the People's Republic of China*, 2 REV. OF SOCIALIST L. 113, 113–14 (1983). Saich cites Chinese sources claiming that more than 80% of China's adult population participated in discussion of the 1982 draft constitution.

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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

Mark Tushnet offers a similar formulation. Tushnet characterizes constitutional law as “political law.”¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ 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

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.

¹⁰⁹ KRAMER, *supra* note 100, at 24, 30–31. Tushnet emphasizes the guidance function of text and precedent, rather than the binding nature of past constitutional decisions. Tushnet, *supra* note 100, at 991, 992; TUSHNET, *supra* note 108, at 171, 187, 190, 192.

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” constitutionalism¹¹¹ 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.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ In 1978, the Party adopted the construction of a "socialist legal system" as a pillar of China's reform and opening program.¹²¹ In 1982, it incorporated the concept of the supremacy of the law into the Constitution.¹²² 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 1999.¹²³ As discussed

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.

¹¹⁷ William Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 25–28 (C.S. Hsu ed., 2003).

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 Taolun" Huodong Duben [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 pmb., 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

¹²⁴ PEERENBOOM, *supra* note 12, at 9–26.

¹²⁵ Wang Qinghua, *Zhongguo Xingzheng Susong: Duo Zhong Xin Zhuyi de Sifa* [China's Administrative Litigation: Polycentric Adjudication], 5 ZHONGWAI FAXUE [PEKING U. L. J.] 513, 517, 530–531 (2007), available at <http://www.chinalawedu.com/news/21601/21712/148/2008/12/wy8495383549622180021330-0.htm> (part one) and <http://www.chinalawedu.com/news/21601/21712/148/2008/12/wy95501449622180022840-0.htm> (part two). See also Balme & Dowdle, *supra* note 89, at 6; Deva, *supra* note 30, at 76 (explaining that the Constitution facilitates stakeholder activism and provides a reference point for reform demands). State publications have praised such efforts. See, e.g., Cao Lin, *Feichang Zeren Weihu Xianfa Quanwei* [Special Responsibility to Defend the Authority of the Constitution], GUANGMING RIBAO [GUANGMING DAILY], June 6, 2003 (praising legal scholars for “taking the path of citizen petitions to participate in politics” and “solving problems within the constitutional framework”). Chinese legal activists have acknowledged this dynamic. See, e.g., Erik Eckholm, *Petitioners Urge China to Enforce Legal Rights*, N.Y. TIMES, Jun. 2, 2003 at A3; Zhang Fan, *Lüshi Gei Renda Daibiao Zhunbei “Chengshi Fangwu Chaiqian Fa” Yian* [Lawyer Prepares Proposal on “Urban Housing Demolition and Relocation Law” for NPC Delegate], ZHONGGUO JINGJI SHIBAO [CHINA ECON. TIMES], Mar. 2, 2005, available at http://news.xinhuanet.com/zhengfu/2005-03/02/content_2638652.htm.

¹²⁶ Hand, *supra* note 16, at 145–47; Randall Peerenboom, *Middle Income Blues: The East Asian Model and Implications for Constitutional Development in China*, in BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 22, at 98; Zhang Qianfan, *supra* note 67, at § 2, para. 4.

contention.¹²⁷ 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.¹²⁸ Chinese commentators characterize this underlying constitutional issue as one of sovereignty.¹²⁹ 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?¹³⁰

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 (“[The] 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.¹³⁷ 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.¹³⁸ 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.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² The NPCSC is subject to similar political constraints.¹⁴³

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).¹⁴⁴

¹³⁷ See, e.g., *id.* at §§ 1, 3.

¹³⁸ See *infra* Part IV(A)(2).

¹³⁹ STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 294 (1999). Chinese courts are instituting a system of "guiding" cases. While the cases may act as de facto precedents, they have no formal binding effect. Zuigao Renmin Fayuan Guanyu Yinfa "Renmin Fayuan Di Sange Wunian Gaige Gangyao (2009–2013)" de Tongzhi [Supreme People's Court's Notice on "People's Courts' Third Five-Year Reform Outline (2009–2013)"] (issued by the Sup. People's Ct., Mar. 17, 2009, effective Mar. 17, 2009) 2009 FAFA [SUP. PEOPLE'S CT. CIRCULAR] no. 14 (LawInfoChina, Peking Univ. Beida Fabao series CLI.3.114912), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=114912>. Moreover, senior court leaders tightly control the selection of guiding cases. Author's Discussions with Chinese Judicial Officials (Summer 2008).

¹⁴⁰ See generally Susan Finder, *2010 Reforms in the Chinese Courts: Reforming Judicial Committees*, 3 BLOOMBERG LAW REPORTS—ASIA PACIFIC, no. 5 (2010).

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 Shuji 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.¹⁴⁵ 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.¹⁴⁶ A constitutional adjudication institution could adopt a similar, conservative balancing of constitutional rights and duties.¹⁴⁷ Popular concern about threats to social stability and

historical evolution of Political-Legal Committees) and Chen Youxi, *Sifa Duli Shenpan Ying Cong Youhua Zhengfawei Jiegou Rushou* [Independent Judicial Adjudication Should Commence by Optimizing the Structure of the Political-Legal Committee], NANFANG ZHOUMO [S. WEEKEND], Nov. 30, 2011, available at http://www.qstheory.cn/zz/fzjs/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 Interm. 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 *Jinshan Su 360 Dongshizhang Mingyu Qinquan An Zhongshen Luochui: Zhou Hongyi Bei Pan Shanchu Wuruxing Weibo Bing Pei 5 Wan Yuan* [Final Verdict in Defamation Case of Jinshan Against 360 CEO: Zhou Honghei 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.¹⁴⁸ 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,¹⁴⁹ or the NPC could simply amend the Constitution and negate the ruling with a two-thirds majority vote.¹⁵⁰ 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.¹⁵¹ Authoritarian governments effectively marginalized these institutions for decades.¹⁵² 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

¹⁴⁸ Peerenboom & Chen, *supra* note 27, at 148. Zhang Qianfan attributes the failed judicialization of China's Constitution in part to a lack of popular consciousness and support. Zhang Qianfan, *supra* note 67, at § 3, para. 5.

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).

¹⁵² See generally GINSBURG, *supra* note 151, at 106–09, 117–35, 208–13; Sean Cooney, *The Effects of Rule of Law Principles in Taiwan*, in *ASIAN DISCOURSES OF RULE OF LAW*, *supra* note 147, at 411, 420–22; Tsung-fu Chen, *The Rule of Law in Taiwan: Culture, Ideology, and Social Change*, in *UNDERSTANDING CHINA'S LEGAL SYSTEM*, *supra* note 117, at 378–85, 389–91.

the legal profession.¹⁵³ Many sensitive political cases were handled in military courts or through administrative processes.¹⁵⁴

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.¹⁵⁵ Until the late 1970s, the CGJ had no power to review the constitutionality of lower court decisions.¹⁵⁶ In both jurisdictions, national statutes required supermajorities of two thirds to three fourths of justices for the adoption of constitutional interpretations, making it unlikely that these institutions would challenge political actors.¹⁵⁷

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

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.

¹⁵⁴ GINSBURG, *supra* note 151, at 114; Tsung-fu Chen, *supra* note 152, at 390–92; Cho Kuk, *Korean Criminal Law and Democratization*, in *LEGAL REFORM IN KOREA* 75–77 (Tom Ginsburg ed., 2004).

¹⁵⁵ *History of the Justices Authority*, JUSTICES OF THE CONSTITUTIONAL COURT, JUDICIAL YUAN (May 26, 2009), http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p01_05.asp [hereinafter CGJ History].

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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰

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.¹⁶¹ 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.¹⁶² 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.¹⁶³

¹⁵⁸ GINSBURG, *supra* note 151, at 211–13.

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.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶ 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."¹⁶⁷ 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

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.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.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.¹⁷⁰ They also note that rights-based actions have catalyzed deliberative interactions.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.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.¹⁷³ For

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.

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. *Id.*

¹⁷⁰ *Id.* at 274–80.

¹⁷¹ *Id.* at 278.

¹⁷² *Id.* 282–84.

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*], NANFANG 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 Shaogulu' de Zhili Fangshi—Zouchu 'Zhongyang Zhi Guan, Difang Zhimin Jiu Geju* [*Preserving Social Stability: We Should Improve On the "Scattered Burning Furnances" Model of Governance—Leaving*

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

the Old Model of “The Center Governing Officials, and Local Government Governing the People”], NANFANG ZHOUMO [S. WEEKEND] (June 23, 2010, 9:52 PM), <http://www.infzm.com/content/46702/0> (discussing the necessity of sustained processes of negotiation, conflict and compromise, and popular validation).

¹⁷⁴ Cai Dingjian, *supra* note 133, at 28–29; Cai Dingjian, *supra* 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 backdrop 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.¹⁷⁸ As constitutional arguments are advanced and discussed, they generate awareness of the Constitution and build common understandings of constitutional rights.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ 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.¹⁸² However, constitutional argument builds awareness and promotes information exchange even in the absence of a positive state response.¹⁸³ 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.¹⁸⁴ Repeated

¹⁷⁸ ELKINS ET AL., *supra* note 24, at 76. Zhang Qianfan characterizes this as the trap that China's constitutionalism and rule of law has fallen into. Zhang Qianfan, *Zhongguo Xianzheng Xuyao "Fen Qing" Tuidong* ["Angry Youth" Must Push Forward China's Constitutionalism], RENDA YU YIHUI WANG [CENTER FOR PEOPLE'S CONGRESS AND FOREIGN LEGISLATURE STUDY], May 31, 2011, <http://www.e-cpcs.org/newsinfo.asp?Newsid=23373>.

¹⁷⁹ ELKINS ET AL., *supra* note 24, at 76.

¹⁸⁰ *Id.*; Michael W. Dowdle, *Beyond "Judicial Power": Courts and Constitutionalism in Modern China*, in BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 22, at 215; O'BRIEN & LI, *supra* note 15, at 92–93, 109–10.

¹⁸¹ Lorentzen and Scoggins 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 & Scoggins, *supra* note 167.

¹⁸² Hand, *supra* note 16, at 128–30; O'BRIEN & LI, *supra* note 15, at 103–04.

¹⁸³ 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.

¹⁸⁴ *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.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.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.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.¹⁸⁸ Some citizens may use legal argument as a form of political protest.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.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.¹⁹¹ In most cases,

pledged to use the legal system again and derived a sense of empowerment from their participation and future plans. Gallagher refers to this phenomenon as "informed disenchantment." Mary Gallagher, *Using the Law As Your Weapon!: Institutional Change and Legal Mobilization in China*, in *ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE* 54–84 (Neil J. Diamant et al. eds., 2005).

¹⁸⁵ Chen, *Constitutions and Values*, *supra* note 30, at 50.

¹⁸⁶ See generally Eva Pils, *Rights Activism in China: The Case of Lawyer Gao Zhisheng*, in *BUILDING CONSTITUTIONALISM IN CHINA*, *supra* note 22, at 243–60. See also Teng Biao, *supra* note 5; Hand, *supra* note 58, at 241.

¹⁸⁷ See Carl Minzner, *Xinfang: Alternative to Formal Chinese Legal Institutions*, 42 *STAN. J. INT'L L.* 103, 143–45 (2006); O'BRIEN & LI, *supra* note 15, 67–77.

¹⁸⁸ Hand, *supra* note 16, at 143–47, 159–60. Given the sensitivity of constitutional litigation, constitutional argument may also create pressure on courts to reach a favorable outcome on some basis other than the Constitution.

¹⁸⁹ Fu Hualing, *Challenging Authoritarianism through Law: Potentials and Limit*, 6 *NAT'L TAIWAN U. L. REV.* 339, 356–57 (2011).

¹⁹⁰ Dowdle, *supra* note 180, at 213–15; O'BRIEN & LI, *supra* note 15, at 103–10.

¹⁹¹ In some cases, both a party and the court referenced the Constitution. In many cases, the court referenced the constitutional argument of a party. In several cases, government institutions raised constitutional issues.

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

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, *Yingxiangxing 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

Constitution], SICHUAN WANBAO [SICHUAN EVENING NEWS], Nov. 13, 2003, republished on SINA.COM, <http://news.sina.com.cn/s/2003-11-13/05422124292.shtml> (arguing that using litigation to establish the concepts of constitutional supremacy and properly exercise rights is more important than winning or losing).

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.

¹⁹⁸ See, e.g., ZHONGGUO XIANFA SHILI YANJIU (YI) [STUDIES OF CHINA’S CONSTITUTIONAL CASES (VOL. 1)] (Han Dayuan ed., 2005) (subsequent volumes in this collection published in 2007, 2009, and 2010); 2007 NIAN ZHONGGUO DIANXING XIANFA SHILI PINGXI [ANALYSIS OF CHINA’S TYPICAL CONSTITUTIONAL CASES IN 2007] (Hu Jinguang ed., 2008)

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.¹⁹⁹

Domestic media publish annual compilations of top constitutional cases in which scholars offer simple discussions for a mass audience.²⁰⁰ 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.²⁰¹

[hereinafter 2007 TYPICAL CASES]; 2008 ZHONGGUO SHIDA XIANFA SHILI PINGXI [ANALYSIS OF CHINA'S TEN MAJOR CONSTITUTIONAL CASES IN 2008] (Hu Jinguang ed., 2008); ZHONGGUO SHIDA XIANZHENG SHILI YANJIU [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).

¹⁹⁹ 2007 TYPICAL CASES, *supra* note 198, at 4.

²⁰⁰ 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 Shijian* [2007: *China's Ten Major Constitutional Cases*], FAZHI RIBAO [LEGAL DAILY], Jan. 30, 2008, http://www.legaldaily.com.cn/zbk/2008-01/30/content_839455.htm; *Sanlu Shijian Bei Ping Wei 2008 Nian Shida Xianfa Shili zhi Shou* [The Sanlu Incident Is Analyzed as First of the Top Ten Major Constitutional Cases of 2008], XINJING BAO [BEIJING NEWS], Dec. 27, 2008, available at <http://news.sina.com.cn/c/2008-12-27/015916928868.shtml>; 2009 *Niandu Shida Yingxiangxing Xianfa Shili* [Ten Major Influential Constitutional Cases of 2009], JIANCHA RIBAO [PROCURATORIAL DAILY], Dec. 28, 2009, available at http://newspaper.jcrb.com/html/2009-12/28/content_33547.htm; 2010 *Niandu Zhongguo Shida Xianfa Shili* [China's Ten Major Constitutional Cases of 2010], XINHUA NET (Dec. 27, 2010, 9:27 AM), http://news.xinhuanet.com/politics/2010-12/27/c_12920603.htm.

²⁰¹ Pils, *supra* note 186, at 251.

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.²⁰² 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

²⁰² Such articles and commentaries are too numerous to list. A simple Google search for 宪法 (“*xianfa*”) or 宪政 (“*xianzheng*”) is sufficient to give the reader a sense of the range of discussion about the Constitution. For a small sampling from 2008–2011, see Cai Dingjian, *Xianfa jiu shi Na lai Yong de* [*The Constitution is there to be Used*], NANFANG ZHOUMO [S. WEEKEND] (Sept. 3, 2008, 10:42 PM), <http://www.infzm.com/content/16827>; Liu Hongbo, *Nashui Ren de Xianfa Quanli geng bu Ke Hushi* [*The Constitutional Rights of Taxpayers even more Cannot Be Ignored*], XINJING BAO [BEIJING NEWS], Dec. 3, 2009, available at <http://www.chinanews.com/cj/news/2009/12-03/1996839.shtml>; Tong Zhiwei, *Sixing Fuhe: Yong Fazhi Yuanze Gei Shengming Liuxia Zuihou Xiwang* [*Death Penalty Review: Use Legal Principles to Give Life a Final Hope*], NANFANG ZHOUMO [S. WEEKEND], June 10, 2010, at F3, available at <http://www.infzm.com/content/46155>; Zunzhong Panjue shi Gongmin he Zhengfu Jiguan de Zeren [*Respecting Judgments is the Responsibility of Citizens and Government Organs*], XINJING BAO [BEIJING NEWS], July 20, 2010, http://epaper.bjnews.com.cn/html/2010-07/20/content_127687.htm; Dujue “Yinyan Huozui”, *Baohu Gongmin de Yanlun Biaoda Quan* [*End “Speech Offenses,” Protect Citizens’ Freedom of Expression*], NANFANG ZHOUMO [S. WEEKEND] (July 20, 2010, 8:54 AM), <http://www.infzm.com/content/48268#copy>; Aizi Xuesheng Kao Jiaoshi bei Julu, *Zhuanggao Jiaoyu Ju Qiu Pingdeng Jiuye Quan* [*AIDS Student’s Application is Rejected after Testing to Become a Lecturer, Sues Education Bureau For Equal Right to Employment*], ZHONGGUO QINGNIAN ZAIXIAN [CHINA YOUTH ONLINE] (Aug. 27, 2010), http://article.cyol.com/edu/content/2010-08/27/content_3395218.htm; Zhang Qianfan, *Xianzheng Weilai Zaiyu Mingzhong Canyu* [*The Future of Constitutional Government Lies in Citizen Participation*], CAIJING WANG [FINANCE NET] (Jan. 6, 2011), http://blog.caijing.com.cn/expert_article-151521-15400.shtml.

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

²⁰³ Qin Guan, "Xianfa Jie": *Tisheng Quan Shehui Zunzhong Xianfa de Qiji* ["Constitution Day": A Turning Point for Raising the Entire Society's Respect for the Constitution], *XINJING BAO* [BEIJING NEWS], Apr. 22, 2008, available at http://news.xinhuanet.com/politics/2008-04/22/content_8024926.htm.

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/40551/3286618.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>; *Lüshi Cheng Tudi Chubei 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.jrb.com/jxsw/201005/t20100507_353208.html; Editorial, *Improper Stipulations*, *CHINA DAILY*, May 10, 2011, at 8, available at <http://wendang.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 forbid migrant workers from visiting its offices in groups for this purpose was not authorized by the Constitution or "any other law").

²⁰⁵ Qin Guan, *supra* note 203.

²⁰⁶ See, e.g., 12.4 *Jiaodian Fangtan, Zhengxun Minyi Ding Guiju* (*Shipin yu Wenzhi*) [12.4 Interview in Focus, Solicit Public Opinion to Set Rules (Video and Script)], *ZHANSHENG YIGAN WANG* [BEAT HBV NET] (Dec. 4, 2004), <http://www.hbver.com/Article/yljz/xyyz/200412/3361.html> (republishing the transcript of a Dec. 4, 2004 *Focal Point* program with extensive discussion of the PRC Constitution and constitutionalism); *Jiaodian Fangtan: Women de Fangzi Zenme Shuo Chai jiu Chai* [Interview in Focus: How Can [They] Raze our Homes on [Their] Say-So], *ZHONGYANG WANG* [CENTRAL NET] (Apr. 4, 2010), <http://space.tv.cctv.com/video/VIDE1270388198219882> (transcript of this *Focal Point* program—aired on April 4 and 5, 2010 by CCTV, and discussing a demolition case in Yangzhou municipality, with multiple references to the Constitution—is available at <http://news.cntv.cn/program/jiaodianfangtan/20100406/102221.shtml>); *Xinwen 1+1, Li Changkui An: Qing yu Fa, Zui yu Fa* [News 1+1, the Li Changkui Case: Feeling and Law, Crime and Punishment], *CNTV.COM* (July 13, 2011), <http://news.cntv.cn/society/20110713/109021.shtml> (describing how the PRC Constitution provides for adjudication in accordance with law); *Xinwen 1+1, Hei Mingdan, Yao Hei Mingbai* [News 1+1, Blacklist, The Black Must be Explicit], *CCTV.COM* (Nov. 11, 2009), <http://space.tv.cctv.com/video/VIDE1257951717897884> (citing Article 38 of the PRC Constitution in critique of an airline's blacklist); *Xinwen 1+1, Henan Lingbao, Ni Gai Ruhe Miandui Minzhong de Zhiyi?* [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.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ 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.²¹⁰ They are also tools for raising consciousness. While Party-

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).

²⁰⁷ Min Jiang, *Spaces of Authoritarian Deliberation: Online Public Deliberation in China*, in *THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA*, *supra* note 14, at 261–83; Benjamin Liebman & Tim Wu, *China's Network Justice*, 8 *CHI. J. INT'L L.* 257, 271–86 (2007–2008).

²⁰⁸ Charter 08 [Lingba Xianzhang] (Dec. 10, 2008), *available at* <http://www.hrichina.org/content/238>. For a description of the authorities' decision to prosecute Liu Xiaobo—one of Charter 08's principal authors—on charges of attempting to subvert the state in the wake of the distribution and signing of the Charter online, see Sharon LaFraniere, *China Indicts Prominent Dissident*, *N.Y. TIMES*, Dec. 11, 2009, <http://www.nytimes.com/2009/12/12/world/asia/12china.html>.

²⁰⁹ Guanyu Yaoqiu Quxiao "Hulian Wang Xinwen Fuwu Guanli Guiding" de Jianyi Shu [Proposal on Demanding Cancellation of the "Provisions on the Administration of Internet News Information Services"] (Mar. 26, 2006). An English-language translation of the proposal is available online. *See Petition on Behalf of the Aegean Sea Website et al. to Repeal Provisions on the Administration of Internet News Information Services* (Mar. 28, 2006), *available at* <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=47693> (proposing that the NPCSC conduct a constitutional review of a regulation cited by local and national officials in shutting down several popular websites, and promising to submit the proposal to a "model constitutional court" if the agency does not complete its review within a certain time period).

²¹⁰ For four additional recent examples, see Ai Xiaoming, *Xianfa Mengxiu, 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. We particularly look forward to judges having the courage to interpret and apply 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

<http://www.bullogger.com/blogs/XIAOMINGAI/archives/361031.aspx>; China Human Rights Defenders, "Respect Freedom of Expression, Release Xinjiang Journalist Hailaite Niyazi!" (July 30, 2010), <http://chrdnet.com/2010/07/30/a-public-letter-by-chinese-citizens-urging-the-release-of-uyghur-journalist-hailaite-niyazi/>; *Women Weile Xinyang: Wei Zhengjiao Chongtu zhi Quanguo Renda de Gongmin Qingyuan Shu* [We Are for Beliefs: Petition to the NPC on the Conflict between Politics and Religion], BOXUN (Mar. 12, 2005), http://news.boxun.com/cgi-bin/news/gb_display/print_version.cgi?art=/gb/china/2011/05&link=201105122325.shtml; Yu Jie, *Censorship Everywhere in China—My Second Interrogation by the Chinese Police*, LAOGAI.ORG (July 7, 2010), <http://www.laogai.org/blog/prominent-dissident-yu-jie-s-recent-interrogation-english-translation> (recounting exchanges with interrogator in which Yu Jie advanced constitutional arguments).

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

²¹¹ Xu Zhiyong, *Ba Xianfa Biancheng Changshi—zai Fada Xianfa Weiquan yu Xianfa Jieshi Yantao Hui Shang de Fayan* [Transform the Constitution into Common Sense—Comments at the China University of Politics and Law Rights Defense and Constitutional Interpretation Workshop], XU ZHIYONG BLOG (June 27, 2008, 12:57 PM), <http://blog.yam.com/xuzhiyong/article/23208195>.

²¹² See, e.g., Zhang Zuhua, Weixian Shencha Zhi Wu Cheng Yi Zhang Huabing, MINZHU ZHONGGUO [DEMOCRATIC CHINA], April 2006, available at http://boxun.com/hero/2006/zzh/20_1.shtml; *Wo de Dushu Biji zhi Si: Xianfa Ge An de Xianxiang yu Fansi (4)* [My Fourth Reading Notes: The Phenomenon and Rethinking of Constitutional Cases (4)], RENMIN WANG (Sept. 29, 2009: 6:00 PM), <http://opinion.people.com.cn/GB/52655/10142314.html>.

²¹³ XIANFA pmb., art. 5. Article 5 affirms that "no laws, administrative regulations, or local rules and regulations may contravene the Constitution."

²¹⁴ Id. at arts. 5, 33, 53, 76, 89. The NPCSC has authorized the SPC to interpret ordinary laws, but not the Constitution, to address issues related to application in concrete cases. Quanguo Renmin Daibiao Changwu Weiyuanhui Guanyu Jiaqiang Falü Jieshi Gongzuo de Jueyi [Resolution of the NPCSC on Strengthening the Work of Legal Interpretation] (issued by the Standing Comm. Nat'l People's Cong., June 10, 1981, effective June 10, 1981), at art. 2 (LawInfoChina, Peking Univ. Beida Fabao series CLI.1.1006), available at http://www.law-lib.com/law/law_view.asp?id=2249.

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."²¹⁵ 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."²¹⁶

The ultimate success of citizen movements elsewhere in East Asia and in Eastern Europe helps to sustain this guarded optimism.²¹⁷ Reformers are not naïve about the obstacles to reform and acknowledge uncertainty about outcomes.²¹⁸ However, there seems to be a general recognition that without consciousness 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

²¹⁵ Jiang Ping, *supra* note 5.

²¹⁶ Teng Biao, *supra* note 5. For a similar sentiment, see Rebecca MacKinnon's description of her discussions with rights defense lawyers and their long-term goals. Rebecca MacKinnon, *What does Charter 08 Mean? Too soon to tell...*, RCONVERSATION (Jan. 20, 2009, 12:54 AM), <http://rconversation.blogs.com/rconversation/2009/01/what-does-charter-08-mean-too-soon-to-tell.html>.

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 Zhengzhi Wenming ji Gexian er Fendou—Teng Biao Lüshi 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.²¹⁹ The cost of ignoring or even suppressing claims by individuals or small groups is low.²²⁰ 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.²²¹ Party leaders also recognize that they need the voluntary support of other social groups to advance their modernization agenda and preserve governing legitimacy.²²² As perceived stability challenges in China have grown, central leaders have emphasized the concept of a harmonious society, the need to be more responsive to citizen complaints, and the importance of diffusing “mass incidents” before they fester.²²³ In recent years, Party-state officials have exhibited some willingness to address a range of collective disputes through consultation, negotiation, and mediation rather than through violence and repression.²²⁴

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

²¹⁹ O'BRIEN & LI, *supra* note 15, at 32–33, 61–62; Yang Su & Xin He, *Street as Courtroom: State Accommodation of Labor Protest in South China*, at 3, 15, 17, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1447131.

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.

²²³ Hu Shuli, *Heeding the Lessons of China's Civil Unrest*, CAIJING [FINANCE] (July 7, 2009), <http://english.caijing.com.cn/2009-07-07/110194415.html>; Chris Buckley, *China Vows to Punish Officials Who Fuel Protests*, REUTERS (July 25, 2008, 2:35 AM), <http://uk.reuters.com/article/2008/07/25/uk-china-protest-idUKPEK3407420080725>; Minzner, *supra* note 1, at 943, 947–48.

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.²²⁵ 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.²²⁶

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.²²⁷ Over a period of several days, an estimated 10,000 to 15,000 residents participated in the demonstration.²²⁸ 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.”²²⁹ Subsequently, residents in Shanghai, Guangzhou, and Dalian used similar tactics to pressure local governments to shelve projects that raised environmental or property concerns.²³⁰

²²⁵ The description of the Xiamen incident is based on the following accounts: *Fujian Xiamen PX Xiangmu Shijian* [*The Fujian Xiamen PX Project Incident*], in 2007 TYPICAL CASES, *supra* note 198, at 94–109; *Official Media on Popular Opinion in the Xiamen PX Affair*, DANWEI.ORG (June 18, 2007, 10:51 AM), http://www.danwei.org/state_media/xiamen_px_sms_china_newsweek.php (translating Xie Liaobing, *Xiamen PX Incident: Expression of Popular Opinion in the New Media Era*, CHINA NEWSWEEK, June 6, 2007, and other official media on the PX Incident); Zhang Qianfan, *supra* note 67, at § 5(2); Edward Cody, *Text Messages Giving Voice to Chinese*, WASH. POST, June 28, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/27/AR2007062702962.html>.

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*], NANFANG ZHOUMO [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

Over Factory Spreads in China, WASH. POST, Mar. 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/03/AR2008030301072.html>.

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 ZHOU MO [S. WEEKEND] (Dec. 19, 2007, 8:38 PM), <http://www.infzm.com/content/8664>.

²³⁴ Chinese media sources listed the PX incident in compilations of constitutional events. See, e.g., 2007 *Zhongguo Shida Xianfa Shili Chulu: Heizhuan Yao, PX Xiangmu deng Ruxuan* [China’s Ten Major Constitutional Cases for 2007 Revealed: Black Brick Kiln, PX Project, and Others are Chosen], XINHUA NET (Jan. 7, 2008, 9:02 AM), http://news.xinhuanet.com/politics/2008-01/07/content_7376578.htm; 2007: *Zhongguo Shida Xianfa Shijian* [2007: China’s Ten Major Constitutional Incidents], FAZHI RIBAO [LEGAL DAILY] (Jan. 30, 2008), http://www.legaldaily.com.cn/zbk/2008-01/30/content_839455.htm. This article was reprinted on other websites including that of *China Daily* and *Procuratorial Daily*.

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.²³⁵ 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.²³⁶ 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.²³⁷ 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. *Intrastate 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.²³⁸ The PRC Legislation Law, a constitutional statute adopted after seven years of contentious bargaining, provides detailed rules and procedures for resolving conflicts.²³⁹ In China's reform era, the number of such legislative conflicts has grown rapidly.²⁴⁰ 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.²⁴¹ The NPCSC's practice in applying these procedures highlights the premium that Chinese institutions place on consultative processes even when constitutional authorities are clear.

²³⁸ The State Council is vested with the power to annul rules issued by ministries, commissions, and local governments. XIANFA art. 89. Local people's congresses are empowered to annul local government rules and the resolutions of lower-level people's congresses. XIANFA arts. 67, 89, 104. These reviews involve different procedures and are not addressed here.

²³⁹ 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).

²⁴⁰ Constitutionality Review Procedure Clarified, *supra* note 193; Zeng Jinsheng, *Li Huijuan Shijian Zai Diaocha* [Another Investigation of the Li Huijuan Incident], SHIDAI CHAO [CHINESE TIMES], no. 10, 2004, at 38–39, available at <http://www.people.com.cn/GB/paper83/12252/1102665.html>.

²⁴¹ Xingzheng Fagui, Difangxing Fagui, Zizhi Tiaoli he Danxing Tiaoli, Jingji Tequ Fagui Beian Shencha Gongzuo Chengxu [Working Procedures for Filing and Review of Administrative Regulations, Local Regulations, Autonomous Region Regulations and Rules, and Special Economic Zone Regulations] (promulgated by the Standing Comm. Nat'l People's Cong. Oct. 16, 2000, effective Oct. 16, 2000, amended Aug. 15, 2003 & Dec. 16, 2005) [hereinafter Working Procedures], available at <http://falvshen.fyfz.cn/art/336265.htm>. 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).²⁴² 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.²⁴³ 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.²⁴⁴ 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.²⁴⁵ Representatives of other state and local

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.

²⁴⁵ Zhonghua Renmin Gonghe Guo Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Yishi Guize [Rules of Procedure for the NPCSC] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 24, 1987, effective Nov. 24, 1987, amended

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 2005.²⁴⁶

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.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.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.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.²⁵⁰

Apr. 24, 2009) (LawInfoChina), available at http://www.npc.gov.cn/huiyi/cwh/1108/2009-04/24/content_1499846.htm.

²⁴⁶ Zhu Guobin, *supra* note 57, at 636–38; WANG ZHENMIN, *supra* note 37, at 117–25. This complex review process resembles the consultative process for adopting NPC legislation. See generally Michael W. Dowdle, *The Constitutional Development and Operations of the NPC*, 11 COLUMBIA J. ASIAN L. 1 (1997).

²⁴⁷ A decision by any of the various committees or leaders *not* to advance the matter effectively ends the review process. WANG ZHENMIN, *supra* note 37, at 121–22.

²⁴⁸ Prior to the adoption of the Legislation Law, the NPCSC avoided issuing written opinions and instead coordinated with lower-level institutions by phone. *Id.* at 114–15, 120, 126. 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).

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://zfxgk.lf.gov.cn/content.jsp?code=741543379/2008-00052&name=>.

²⁵⁰ Zhu Guobin, *supra* note 57, at 637–38. See also WANG ZHENMIN, *supra* note 37, at 126.

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.²⁵¹ 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.²⁵²

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.²⁵³ 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>.

²⁵² *Henan Zhongzi An—Fayuan yu Renda Guanxi* [Henan Seed Case—The Relationship Between Courts and People's Congresses], XIANFA XUE [CONSTITUTIONAL LAW STUDIES] (Apr. 12, 2006), <http://xfx.jpkc.gdcc.edu.cn/show.aspx?id=196&cid=66>; Qiu Feng, *Cong Li Huijuan Dao Fagui Shencha Beianshi* [From Li Huijuan to Legislative Review and Recording Office], NANFANG WANG [SOUTHERN NET] (June 24, 2004, 9:54 PM), <http://www.southcn.com/weekend/top/200406240081.htm>.

²⁵³ Han Junjie, *supra* note 251.

illegal action.”²⁵⁴ 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.²⁵⁵ 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.²⁵⁶ Scholars debated the case and its implications, with some noting in media interviews that Judge Li had been treated too harshly.²⁵⁷ A group of lawyers also filed a legislative review proposal asking the NPCSC to invalidate the conflicting local regulation.²⁵⁸

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.²⁵⁹ 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.²⁶⁰ 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.²⁶¹ The Luoyang Municipal People’s Congress subsequently

²⁵⁴ *Id.*

²⁵⁵ 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.

²⁵⁶ Han Junjie, *supra* note 251.

²⁵⁷ Tsinghua University organized a seminar on the case that many scholars attended. *Id.*

²⁵⁸ *Lüshi Jianyi Quanguo Renda dui “Luoyang Zhongzi An” Jinxing Lifa Shencha [Lawyers Propose that the NPC Undertake Legislative Review of the “Luoyang Seed Case”]*, RENMIN FAYUAN WANG [CHINA COURT NET] (Nov. 30, 2003, 3:23 PM), <http://www.chinacourt.org/public/detail.php?id=92886> [hereinafter *Lawyers Propose Review*].

²⁵⁹ 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.

²⁶⁰ Yardley, *supra* note 255.

²⁶¹ *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.²⁶² In April 2004, the Henan Provincial People’s Congress annulled the conflicting regulation and adopted a new local regulation to implement the Seed Law.²⁶³ 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.²⁶⁴ 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.²⁶⁵ 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

²⁶² *Id.*

²⁶³ See Malmgren, *supra* note 38, at 7 (provincial people’s congress passed the new regulation on April 1, 2004).

²⁶⁴ Zuigao Renmin Fayuan Guanyu Yinfa “Guanyu Shenli Xingzheng Anjian Shiyong Falü Guifan Wenti de Zuotanhui Jiyao” de Tongzhi [SPC Notice on the “Summary of a Discussion Meeting on Problems in Applying Legal Standards in Adjudicating Administrative Cases”] (issued May 18, 2004, effective May 18, 2004) 2004 FA [SUP. PEOPLE’S CT. NOTICE] no. 96, available at <http://www.chinalawedu.com/news/1300/12/21723/2006/4/li05621540241924600211475-0.htm>.

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 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

²⁶⁶ *Sifa Panjue Dapo Gongyeyan Xingzheng Longduan* [Judicial Decision Breaks Industrial Salt Administrative Monopoly], CAIXIN WANG [CAIXIN NET] (June 9, 2011, 6:17 PM), <http://china.caixin.cn/2011-06-09/100267770.html>. For the SPC's instructions, see Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Guanyu Jingying Gongye Yong Yan Shifou Xuyao Banli Gongye Yan Zhunyun Zheng deng Qingshi de Dafu [Reply of the PRC Supreme People's Court Concerning Whether it is Necessary to Have Import-Export Licenses for Engaging in Business in Industrially-Used Salt] (issued by the Sup. People's Ct., 2010) 2010 XING TAZI [PROVINCIAL CIVIL CASES] no. 82, available at <http://www.ccin.com.cn/ccin/news/2011/06/14/183685.shtml>. The author is indebted to Professor Donald Clarke for his translation of this reply.

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

²⁶⁹ Teng Biao, Sun Zhigang Shijian: Zhishi, Meiti yu Quanli [The Sun Zhigang Incident: Knowledge, Media, and Power] (Oct. 22, 2004) (unpublished ms.) (on file with author); Tong Zhiwei, *Ziyou, Chengxu, Guize—Sun Zhigang An de Falü Sikao* [Freedom, Practice, and Rules—Reflections on the Legal Issues in the Sun Zhigang Case], ZHONGGUO FAXUE [CHINA LEGAL SCI.], no.7, 2003, at 6. An NPC official noted that if the NPCSC found a conflict, it would most likely issue an opinion to the State Council and allow the State Council to decide on an appropriate response. Niu Longyun, *Cong Sun Zhigang Shijian Toushi Zhongguo Weixian Shencha Zhi* [Gaining Perspective on China's Constitutional Review System Through the Sun Zhigang Incident], LIAOWANG ZHOUKAN [OUTLOOK WKLY.], June 5, 2003, <http://www.china.com.cn/chinese/OP-c/341247.htm>.

²⁷⁰ *New NPC Body to Address Law Conflicts*, RENMIN WANG, June 21, 2004, http://english.peopledaily.com.cn/200406/21/eng20040621_146986.html [hereinafter *New NPC Body*].

²⁷¹ Tong Zhiwei, *supra* note 269, at 6.

²⁷² Hand, *supra* note 16, at 127–30.

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.²⁷³ The incident also encouraged a wave of new constitutional claims in the courts and constitutional review proposals.²⁷⁴

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.²⁷⁵ In 2005, the NPCSC adopted revised Working Procedures for resolving legislative conflicts and expanded constitutional review to include SPC judicial interpretations.²⁷⁶ These reform steps were tied explicitly to the Sun Zhigang incident and collective concerns about the need for more robust constitutional review procedures.²⁷⁷ 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

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.

²⁷⁵ Liao Weihua, *Zhongguo Shouci Chengli Zhuanmen Jigou Jinxing Weixian Shencha* [China for the First Time Establishes a Special Body to Engage in Constitutional Review], XINJING BAO [BEIJING NEWS], June 19, 2004, available at <http://www.boxun.com/news/gb/china/2004/06/200406191347.shtml>.

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.²⁷⁸ 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.”²⁷⁹ 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,²⁸⁰ lawsuits, and public

²⁷⁸ Hand, *supra* note 16, at 158–62; Zhang Qianfan, *supra* note 67, at § 4, para. 3, 4; Cai Dingjian, *supra* note 133, at 14–15.

²⁷⁹ XIANFA arts. 10(3), 13(3). Under China’s current legal framework, only the state or village collectives may own land. However, citizens may own long-term land-use rights and structures on the land. XIANFA arts. 6, 10, 13; Tudi Guanli Fa [PRC Land Administration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 25, 1986, rev’d Dec. 29, 1988, Aug. 29, 1998 & Aug. 28, 2004, effective Aug. 28, 2004), arts. 2, 8, 10 (LawInfoChina, Peking Univ. Beida Fabao series CLI.1.54997), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=3673>.

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.²⁸¹ 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.²⁸² 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.²⁸³ Unlawful takings, embezzlement,

Hangzhou Baiwei Gongmin Lianming Tijiao Quanguo Renda de Jianyishu [Proposal for Constitutional Review of the State Council and Hangzhou Municipality Demolition and Relocation Regulations: A Proposal a Hundred Hangzhou Citizens Sign and Submit to the National People's Congress] (July 14, 2003); *Zhiyi Zuigaoyuan 38 Hao Wenjian, Xi'an Gongmin Shenqing Weixian Shencha* [Calling into Question SPC Document no. 38, a Xi'an Citizen Applies for Constitutional Review], SINA.COM (Dec. 8, 2004, 10:17 AM), <http://news.sina.com.cn/o/2004-12-08/10174464663s.shtml>; Letter from Qiu Jiandong, Fujian Province Longyan City Hai Ping Mian Law Office, to the Standing Comm. of the Nat'l People's Cong., Guanyu Yifa Qidong Weixian Shencha Chengxu, Shencha Zuigao Renmin Fayuan Sifa Jieshi de Gongmin Jianyishu [Citizens' Proposal for Initiating a Constitutional Review Procedure to Examine the SPC's Judicial Interpretations in Accordance with Law] (Jan. 9, 2008), available at <http://news.boxun.com/news/gb/china/2008/01/200801101247.shtml>; Shen Kui et al., Guanyu dui "Chengshi Fangwu Chaiqian Guanli Tiaoli" Jinxing Shencha de Jianyi [Proposal to Engage in Constitutional Review of the "Urban Building Demolition and Relocation Management Regulations"] (Dec. 7, 2009), available at http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=51366; Zhang Xingkui, Dui Tudi Chubei Zhidu he "Tudi Chubei Guanli Banfa" Jinxing Weixian Shencha De Jianyi [A Proposal for Constitutional Review of the Land Reserve System and the "Land Reserve Management Measures"] (Apr. 26, 2010), available at <http://www.world-china.org/newsdetail.asp?newsid=3082>.

²⁸¹ Chinese sources also document cases of citizens clutching copies of the Constitution as they protest forcible takings of their homes. Zhang Qianfan, *supra* note 67, at § 2, para. 1. In 2003, a Hangzhou teacher protesting a taking was arrested for walking around in a white jacket emblazoned with the words "[e]veryone has a responsibility to safeguard the Constitution." *Hangzhou Tuixiu Jiaoshi Shen Chuan Bai Dagua Xuanchuan Xianfa Bei Juliu 10 Tian* [Retired Hangzhou Teacher Detained for 10 Days for Wearing a White Coat Promoting the Constitution], BOXUN (Jan. 25, 2004), <http://boxun.com/news/gb/china/2004/01/200401252306.shtml>.

²⁸² CONG.-EXEC. COMM'N ON CHINA [CECC], 2004 ANNUAL REPORT, 92 [hereinafter CECC 2004 REPORT], available at www.cecc.gov/pages/annualRpt/annualRpt04/CECCannRpt2004.pdf; Yuan Jian, *Chaiqian Zhong de Zhengzhi Jingji Xue* [Political and Economic Study of Demolition and Relocation], NANFANG ZHOUMO [S. WEEKEND] (Dec. 2, 2009, 11:12 PM), <http://www.infzm.com/content/38294>.

²⁸³ Willy Lam, *Beijing's Record Revenue Haul Exacerbates Central-Local Tensions*, 10.14 CHINA BRIEF (The Jamestown Found., Washington, D.C.), July 9, 2010, at 3, http://www.jamestown.org/uploads/media/cb_010_67.pdf.

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.²⁸⁴ Such abuses have generated widespread public anger and social instability in both urban and rural China.²⁸⁵

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.²⁸⁶ 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.²⁸⁷ The

²⁸⁴ CECC 2004 REPORT, *supra* note 282, at 91–94; *Demolished: Forced Evictions and the Tenants' Rights Movement in China*, HUMAN RIGHTS WATCH, Mar. 24, 2004, at 8–16, <http://www.hrw.org/sites/default/files/reports/china0304.pdf> [hereinafter *Demolished*]; Michael Wines & Jonathan Ansfield, *Trampled in a Land Rush, Chinese Resist*, N.Y. TIMES, May 26, 2010, <http://www.nytimes.com/2010/05/27/world/asia/27china.html?pagewanted=all>.

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.

²⁸⁶ Liu Feng, *Jianshe Bu: Jinnian Shangbannian Zhengdi Chaiqian Shangfang Chaoguo Qunian Zongliang* [Construction Bureau: Petitions on Land Requisition and Demolition and Relocation in the First Half of this Year Exceed the Number for All of Last Year], RENMIN WANG (July 5, 2004, 4:58 PM), <http://www.people.com.cn/GB/guandian/2618209.html>; *Explosive Public Indignation Arising From Forced Evictions Alarms Central Government*, MING PAO, Nov. 12, 2003, available in FBIS. State Council circulars acknowledged that property disputes were “serious, widespread, and influencing social stability and the normal order of production and life.” See, e.g., Guowuyuan Bangongting Guanyu Renzhen Zuohao Chengzhen Fangwu Chaiqian Gongzuo Weihu Shehui Wending de Jinji Tongzhi [State Council General Office Urgent Notice on Earnestly Conducting Building Demolition and Relocation Work in Cities and Towns and Safeguarding Social Stability] (promulgated by the St. Council Gen. Office, Sept. 19, 2003, effective Sept. 19, 2003) 2003 GUO BAN FA MING DIAN [ST. COUNCIL GEN. OFFICE PUB. NOTE] no. 42, available at http://www.law-lib.com/law/law_view.asp?id=81071.

²⁸⁷ In addition to the circular listed in note 286, see Guotu Ziyuan Guanli Xitong Xingzheng Wei Min Cuoshi [Measures on Administering the State Land and Resources Management System for the People]; Guotu Ziyuan Guanli Xitong Gongzuo Renyuan Jinling [Prohibitions on Personnel from the State Land and Resources Management System] (promulgated by the Ministry of Land and Res., Jan. 14, 2004, effective Mar. 1, 2004) 2004 GUOTU ZI FA [ST. LAND & RES. NOTICES] no. 11, available at <http://www.nnland.gov.cn/show.aspx?id=162&cid=282>; Guanyu Zuohao “Lianghui”

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.²⁸⁸ 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.²⁸⁹

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.²⁹⁰ The letter ignited public controversy and derailed plans to adopt the Property Law at the March 2006 NPC session.²⁹¹ A second open letter from Professor Gong,

Qijian Guotu Ziyuan Xinfang Gongzuo de Jinji Tongzhi [Urgent Notice on Conducting Land and Resources Petition Work During the "Two Meetings" Period] (promulgated by the Ministry of Land and Res., Feb. 11, 2004, effective Feb. 11, 2004) (no official reporter info. available), available at <http://www.chinaacc.com/new/63/74/2004/2/ad8416245011112400226946.htm>;

Chengshi Fangwu Chaiqian Gujia Zhidao Yijian [Guidance Opinion on Valuation of Urban Building During Demolition and Relocation] (promulgated by the Ministry of Constr., Dec. 3, 2003, effective Jan. 1, 2004) 2003 JIAN ZHU FANG [CONSTR. & HOUS. NOTICES] no. 234, available at <http://www.people.com.cn/GB/jingji/1037/2235641.html>.

²⁸⁸ XIANFA amends. (promulgated at the Second Sess. of the Tenth Nat'l People's Cong., Mar. 14, 2004), available at http://www.npc.gov.cn/pc/11_4/2007-12/05/content_1617611.htm (making amendments, for example, to Article 10 to specify that the State may expropriate and requisition land "and provide compensation" in accordance with law, and Article 13 to indicate that the State may "expropriate or requisition private property for its use and provide compensation").

²⁸⁹ 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).

²⁹⁰ Open Letter from Gong Xiantian, Professor, Beijing Univ., Yi Bu Weibei Xianfa he Beili Shehui Zhuyi Jiben Yuanze de "Wuquan Fa" Caoan [A Property Law (draft) that Violates the Constitution and Basic Principles of Socialism], Aug. 12, 2005, translated by Eva Cheng for LINKS: INTERNATIONAL JOURNAL OF SOCIALIST RENEWAL and available therein at <http://links.org.au/node/221>.

²⁹¹ Yi Fengxin Dangzhu Wuquan Fa Caoan? [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

Draft?], NANFANG WANG [SOUTHERN NET] (Feb. 23, 2006, 1:40 PM), <http://www.southcn.com/weekend/top/200602230112.htm>; Zhao Lei, *Gong Xiantian: Yingxiong Haishi Zuiren?—“Ta Zhuding bei Zairu Zhongguo Lifa Shi”* [*Gong Xiantian: Hero or Sinner?—“Destined to Be Entered into the Annals of China’s Legislative History”*], NANFANG ZHOUMO [S. WEEKEND] (Feb. 23, 2006, 12:59 PM), <http://www.southcn.com/weekend/commend/200602230093.htm>; Irene Wang, *Bill to Reignite Ownership Debate: NPC Decision Paves Way for Law on Private Property Amid Row over Selling Out to Capitalism*, S. CHINA MORNING POST, Nov. 10, 2006 (available on Westlaw at 2006 WLNR 19494283). For a discussion of the constitutional implications of Professor Gong's efforts, see Hand, *supra* note 58, at 17–18.

²⁹² Beida Jiaoshou Gong Xiantian Zai Jiu Wuquan Fa Cao an xiang Renda Di Gongkai Xin [*Peking University Professor Gong Xiantian Again Sends an Open Letter to the NPC Over the Draft Property Law*], ZHONGGUO WANG [CHINA NET] (Dec. 21, 2006), http://www.china.com.cn/news/txt/2006-12/21/content_7537943.htm; Gong Xiantian, *Zhi Hu Jintao, Wu Bangguo Gongkai Xin* [*Open Letter to Hu Jintao and Wu Bangguo*], CHINALAWINFO.COM (Dec. 26, 2006), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=35906.

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).

²⁹⁴ Cheng Jishan, *Lengjing Kandai Wuquan Fa Shenyi Jincheng Yanchi* [*A Sober Look at the Delay in Deliberations over the Property Law*], XINHUA NET (Feb. 21, 2006, 1:57 PM), http://news.xinhuanet.com/comments/2006-02/21/content_4207585.htm; *Wu Bangguo: Xiugai Hou de Wuquan Fa Cao an Fuhe Zhongguo Guoqing he Shiji* [*Wu Bangguo: After Revision, the Draft Property Law Is Consistent with the Reality of China’s National Condition*], ZHONGGUO XINWEN WANG [CHINA NEWS NET] (Mar. 11, 2007), <http://www.chinanews.com/gn/news/2007/03-11/888570.shtm> [hereinafter *Wu Bangguo: Property Law Consistent*].

²⁹⁵ Chinese official media published scholarly defenses of the constitutionality of the statute and websites offering detailed explanations of the draft, the legislative process, and controversial issues. Hand, *supra* note 58, at 17. For scholarly defenses, see, e.g., *20 Duo Wei Zhiming Faxue Jia Congshen Wuquan Fa Baohu Yuanze Wanquan Fuhe Xianfa* [*More Than 20 Legal Scholars Reaffirm that the Property Law’s Protection Principles Are Fully in Accord with the Constitution*], ZHONGGUO WANG [CHINA NET] (Jan. 16, 2007), http://www.china.com.cn/news/txt/2007-01/16/content_7664928.htm; Zhang Qianfan, *Xuezhe Guandian: Wuquan Fa Zhong de Xianfa Wenti* [*Scholar’s View: Constitutional*

the NPCSC directly engaged citizen constitutional arguments in the public sphere. The Party-state eventually suppressed further public debate on the Property Law.²⁹⁶ 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.²⁹⁷

As Chinese officials considered further revisions to takings regulations, unlawful takings, petitions, and protests continued.²⁹⁸ Several of these incidents generated widespread public attention and outrage.²⁹⁹

Problems in the Property Law], XINHUA NET (May 22, 2006, 2:29 PM), http://news.xinhuanet.com/comments/2006-05/22/content_4583677.htm. For official websites on the Property Law, see, e.g., JUJIAO WUQUAN FA [FOCUSING ON THE PROPERTY LAW], available at <http://npc.people.com.cn/GB/28320/50638/index.html>; and ZHONGHUA RENMIN GONGHEGUO WUQUAN FA [PRC PROPERTY LAW], available at http://www.gov.cn/ziliao/flfg/2007-03/19/content_554452.htm. NPC officials also issued public statements confirming the constitutionality of the revised law. See, e.g., *Renda Changweihui Fagongwei: Wuquan Fa Caoan Fuhe Xianfa Guiding* [NPCSC Legal Affairs Commission: Property Law Draft Is Consistent with Provisions of the Constitution], XINHUA NET (Dec. 29, 2006, 10:01 PM), http://news.xinhuanet.com/legal/2006-12/29/content_5548199.htm; *Wu Bangguo: Property Law Consistent*, *supra* note 294.

²⁹⁶ Joseph Kahn, *China Backs Property Law, Buoying Middle Class*, N.Y. TIMES, Mar. 16, 2007, <http://www.nytimes.com/2007/03/16/world/asia/16china.html>.

²⁹⁷ Hand, *supra* note 58, at 18.

²⁹⁸ 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. *Shangban Nian Quanguo Faxian Weifa Yongdi An 2.2 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, *Chuli "Tufaxing Qunti Shijian" Bixu Zunshou 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://guanचा.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.

²⁹⁹ In 2005, for example, shocking video footage of a forcible eviction involving an armed attack on villagers leaked out. Philip P. Pan, *Chinese Peasants Attacked in Land Dispute: At Least 6 Die as Armed Thugs Assault Villagers Opposed to Seizure of Property*, WASH. POST, June 15, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/06/14/AR2005061401542_pf.html. Chinese media reported the incident. See, e.g., *Shu Bai Ren Chi Lieqiang Gou Dao, Xiji Dingzhou Cunmin Duo 6 Ming* [Hundreds of People Attack Dingzhou Villagers With Hunting Rifles and Sharpened Pipes, Leaving Six Dead], XINJING BAO [BEIJING NEWS] (Jun. 13, 2005, 2:08 AM), <http://news.thebeijingnews.com/china/2005/0613/005@105208.htm>. In 2007, the plight of a family resisting eviction in Chongqing became a cause célèbre in China. Kent Ewing, *The Coolest Nail House in History*, ASIA TIMES ONLINE, Mar. 31, 2007, http://www.atimes.com/atimes/China_Business/IC31Cb01.html. In late 2007 and 2008, more than 120,000 farmers in four Chinese provinces signed statements protesting land abuses and declaring ownership over their land. Josephine Ma & Vivian Wu, *Village Land Claim Could Shake Core Principle of Collectivism*, S. CHINA MORNING POST, Dec. 24,

Citizens actively constitutionalized such incidents and filed new constitutional review proposals challenging the legal framework for takings.³⁰⁰ 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.³⁰¹ 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.³⁰² 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.³⁰³ The scholars viewed this response

2007 (available on Westlaw at 2007 WLNR 25326845); Jamil Anderlini, *Losing the Countryside*, FINANCIAL TIMES, Feb. 20, 2008, <http://www.ft.com/intl/cms/s/0/3aaecf56-df56-11dc-91d4-0000779fd2ac.html#axzz1bpG5pZCH>.

³⁰⁰ 2007: *China's Ten Major Constitutional Cases*, *supra* note 200; 2007 TYPICAL CASES, *supra* note 198, at 1–5. Citizens filed new constitutional review proposals related to land issues in 2008, 2009, and 2010. See generally *supra* note 280.

³⁰¹ For an English translation of the transcript of CCTV “News 1+1” special on the incident, see *The Chengdu Self Immolation*, DONG NAN XI BEI [EAST SOUTH WEST NORTH], available at http://www.zonaeuropa.com/20091204_1.htm; *Wei Kang Chaiqian er Zifen Chengdu Nü Qiye Jia Shang Zhong Qushi [Self-Immolating to Protest Demolition and Relocation: a Chengdu Entrepreneur Dies from Serious Injuries]*, NANFANG ZHOUMO [S. WEEKEND] (Dec. 1, 2009, 3:02 PM), <http://www.infzm.com/content/38147>; *Xinjing Bao: “Tang Fuzhen Shijian” Heyi Ruci Zaogao [Beijing News: How Could the “Tang Fuzhen Incident” Be Such a Mess]*, RENMIN WANG (Dec. 4, 2009, 8:16 AM), <http://opinion.people.com.cn/GB/10507600.html>.

³⁰² 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.

³⁰³ *Jiayan Shencha Chaiqian Tiaoli de 5 Wei Beida Xuezhue Huoyao Renda Zuotan: Qidai Renda Huiyu Gongmin Jianyi “Chengxuhua” [5 Peking University Scholars Who Advised on Review of the Demolition and Relocation Regulations Receive Invitation for Discussions at the NPC: Expect an NPC Response on “Proceduralization” Proposed by Citizens]*, RENMIN WANG (Dec. 29, 2009, 9:54 AM), <http://politics.people.com.cn/GB/1026/10671523.html> [hereinafter 5 *Scholars Receive Invitations*]; *Xin “Banqian Tiaoli” Nengfou Zhongjie Baoli Chaiqian? [Can the New “Relocation Regulation” End Violent Demolitions and Relocations?]*, DONGFANG ZAOBAO

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.”³⁰⁴ The scholars were also invited to share their expertise on takings issues on Chinese central television and in official print and online media.³⁰⁵ One month later, the State Council released a draft regulation for public comment that addressed several key constitutional concerns that the scholars had raised.³⁰⁶ 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.”³⁰⁷

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.³⁰⁸ As this

[E. MORNING NEWS], Mar. 10, 2010, available at http://www.news365.com.cn/jj/201003/t20100310_2643140.htm; *Fazhi Ban Xiugai Chaiqian Tiaoli Lunzhenghui Liu Da Yiti Pilu* [Six Major Topics Revealed for Discussion in Legal Affairs Commission Roundtable on Demolition and Relocation Regulation Amendment], DONGFANG ZAobao [E. MORNING NEWS], Dec. 27, 2009, available at <http://news.sina.com.cn/c/2009-12-17/024019276058.shtml>.

³⁰⁴ 5 Scholars Receive Invitations, *supra* note 303.

³⁰⁵ See, e.g., *Beida 5 Xuezhzhe zhi Wang Xixin, Shen Kui: Xiugai Chaiqian Tiaoli Yao Nachu Chengyi* [Of the 5 Peking University Scholars, Wang Xixin and Shen Kui: Demolition and Relocation Regulation’s Amendment Must be Sincere], RENMIN WANG, Jan. 4, 2010, available at <http://news.sohu.com/20100129/n269907103.shtml>; *Xinwen 1+1, Chaiqian Bianfa, Zhengzai Jiasu* [News 1+1, Demolition and Relocation Legal Amendments Are Presently Gaining Speed], CNTV.COM (Mar. 31, 2010), available at <http://news.cntv.cn/program/xinwen1jia1/20100331/105034.shtml> (full transcript of this program is available at <http://news.cntv.cn/program/xinwen1jia1/20100401/106607.shtml>). See also Jiaodian Fangtan Jiedu “Guoyou Tudi Shang Fangwu Zhengshou yu Buchang Tiaoli [Focal Point Interprets: “Regulation on Expropriation of and Compensation for Buildings on State-Owned Land”], Jan. 27, 2011, available at <http://news.cntv.cn/china/20110127/113677.shtml> (video and transcript available).

³⁰⁶ “Xin Chaiqian Tiaoli” Zheng Minyi, Shouci Xianding Gonggong Liyi Fanwei [Public Comments are Solicited on “New Demolition and Relocation Regulations,” Scope of Public Interest is Defined for the First Time], XINHUA NET (Jan. 28, 2010, 11:45 PM), http://news.xinhuanet.com/legal/2010-01/28/content_12894935.htm. In particular, the draft included a definition of public interest, requirements that the government itself formally expropriate property rights and obtain agreements for compensation before issuing demolition permits to developers, and provisions requiring compensation to be paid or substitute housing to be provided before forced demolition begins. *Id.* (citing draft regulation articles 3, 8–16, 20–21, and 28).

³⁰⁷ *Can the New Relocation Regulation End Violent Demolitions and Relocations?*, *supra* note 303.

³⁰⁸ *Id.*; Guo Shaofeng, *Xin Chaiqian Tiaoli Bu Hui Si* [New Demolition and Relocation Regulations Will Not Die], XINJING BAO [BEIJING NEWS], July 27, 2010, available at

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

http://opinion.china.com.cn/opinion_70_370.html; Huang Xiuli, *Xin Zhengshou Tiaoli Nanchan, Chaiqian Tiaoli Bian "Dingzihu"* [New Expropriation Regulations Are Difficult to Produce: Demolition and Relocation Regulations Become "Nail Units"], NANFANG ZHOUMO [S. WEEKEND], July 1, 2010, at A4, available at <http://www.infzm.com/content/47018>.

³⁰⁹ Huang Xiuli, *supra* note 308.

³¹⁰ *Can the New Relocation Regulation End Violent Demolitions and Relocations?*, *supra* note 303; Letter from Jiang Mingan et al., Professors, Beijing Univ. Law Sch. NPC & Legis. "Guoyou Tudi Shang Fangwu Zhengshou yu Buchang Tiaoli" (Di Er Ci Zhengqiu Yijian Gao) Xiuding Jianyishu [Amendment Proposal (in the Second-Round Solicitation of Views) on the "Regulation for Expropriation and Compensation for Buildings on State-Owned Land"], Dec. 28, 2010, available at <http://law.hqu.edu.cn/show.aspx?id=2017&cid=23>. In total, citizens submitted more than 100,000 comments on the two drafts. *New House Demolition Rules Balance Development*, CHINA DAILY (Jan. 27, 2011, 9:12 PM), http://www.chinadaily.com.cn/china/2011-01/27/content_11930061.htm (available on Westlaw, titled "New House Expropriation Rules Balance Development, Home Owners' Interests").

³¹¹ Chinese sources discussed the complexity of this process. See, e.g., Huang Xiuli, *supra* note 308; Ruan Zhanjiang, *Chaiqian Ruhe "Wu Kui yu Baixing"* [How Can Demolition and Relocation "Be Worthy of the Common People"?], XINJING BAO [BEIJING NEWS] (Aug. 16, 2010, 8:59 AM), available at <http://star.news.sohu.com/20100816/n274234424.shtml>; Yuan Jian, *supra* note 282.

³¹² *Guojia Xin Chaiqian Tiaoli Gongbu Shixing, Zhengshou Fangwu Xian Buchang Hou Banqian* [New National Demolition and Relocation Regulations Published and Implemented, Compensation to Be Paid Prior to Relocation When Expropriating Buildings], ZHONGGUO WANG [CHINA NET], Jan. 22, 2011, http://www.china.com.cn/policy/txt/2011-01/22/content_21796175.htm. For the full text of the new regulation, see *Guoyou Tudi Shang Fangwu Zhengshou Buchang Tiaoli* [Regulation for Expropriation and Compensation for Buildings on State-Owned Land], (promulgated by the State Council, Jan. 21, 2011, effective Jan. 21, 2011), ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN LING [PRC ST. COUNCIL DIRECTIVE] no. 590, available at http://www.gov.cn/zwgk/2011-01/21/content_1790111.htm.

³¹³ *New House Demolition Rules Balance Development*, *supra* note 310.

³¹⁴ See, e.g., Cheng Xueyang, *Jinbu, Yuandi Tabu, yu Tuibu: 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.³¹⁵ 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

and Retreat: Evaluating "Regulation for Expropriation and Compensation for Buildings on State-Owned Land," Second-Round Proposal], HUAQIAO FAXUEYUAN [HUAQIAO LAW SCHOOL], Dec. 29, 2010, available at <http://law.hqu.edu.cn/show.aspx?id=2017&cid=23> (also available on author's blog at <http://miaomiaoshusheng.fyfc.cn/art/870431.htm>); Hu Shuli, *Zhuan Xiaqi [Caixin Guancha] Zhongjie "Xingzheng Qiangchai" [Moving to Next [Caixin Observes] Finalizing "Administrative Forced Demolition"]*, HUSHULI.BLOG (Jan. 22, 2011, 11:41 AM), <http://hushuli.blog.caixin.com/archives/14041>; *Difang Zhengfu Zhengji Chongdong he Fubai Xingwei Huo Jiakong Xin Chaiqian Tiaoli [Local Government Achievements, Impetuousness and Corrupt Behavior May Make a Figurehead Out of the New Demolition and Relocation Regulations]*, SOHU.COM (May 17, 2011, 1:04 AM), <http://news.sohu.com/20110517/n307616086.shtml>; Zhang Qianfan, *Xianzheng Weilai Zaiyu Minzhong Canary [The Future of Constitutionalism Is the Participation of the People]*, CAIJING WANG BOKE [FINANCE NET BLOG] (Jan. 6, 2011, 2:53 PM), http://blog.caijing.com.cn/expert_article-151521-15400.shtml.

³¹⁵ Geoff Dyer, *Chinese Cities to Pilot Property Tax*, FIN. TIMES, Jan. 27, 2011, <http://www.ft.com/intl/cms/s/0/1fa40714-2a38-11e0-b906-00144feab49a.html#axzz1eDDVKCd5>.

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.³¹⁶ 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.³¹⁷

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 1990.³¹⁸ 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.³¹⁹ 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

³¹⁶ See, e.g., Su Ling, *Zhengshou Fangchan Shui: Weishenme? Ping Shenme?* [Collecting Real Estate Tax: Why? On What Basis?], NANFANG ZHOUMO [S. WEEKEND] (June 9, 2010, 9:41 PM), <http://www.infzm.com/content/46182>.

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.

³¹⁸ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted Apr. 4, 1990, effective July 1, 1997 (H.K.) [hereinafter Basic Law], available at <http://www.basiclaw.gov.hk/en/basiclawtext>. The NPC issued a concurrent decision permitting the establishment of Special Administrative Regions under the PRC Constitution. Quanguo Renmin Daibiao Dahui Guanyu Zhonghua Renmin Gonghe Guo Xianggang Tebie Xingzheng Qu Jiben Fa de Jueding [Decision of the Nat'l People's Cong. on the Basic Law of the H.K. Special Admin. Region of the PRC] (promulgated by the Nat'l People's Cong., Apr. 4, 1990, effective Apr. 4, 1990) (LawInfoChina), available at http://www.basiclaw.gov.hk/en/basiclawtext/attached_2.html.

³¹⁹ Basic Law chs. I & II. This formula is commonly referred to as "one country, two systems."

“mini-constitution.”³²⁰ 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.”³²¹

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.”³²² However, ultimate authority to interpret the Basic Law is vested with the NPCSC.³²³ Although the scope of the NPCSC’s interpretive power under the Basic Law was the subject of controversy in several early cases,³²⁴ 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.”³²⁵

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

³²⁰ Johannes Chan, *Basic Law and Constitutional Review: The First Decade*, 37 H.K. L. J. 407, 409 (2007). For characterizations of the Basic Law, see, e.g., Wang Zhenmin, *Constitutional Conflict and the Role of the National People’s Congress*, FOUNDATION FOR LAW, JUSTICE AND SOCIETY, at 2, www.fljs.org/uploads/documents/Zhenmin%231%23.pdf; Jiang Shigong, *supra* note 21, at 40 (characterizing the Basic Law as a constitutional statute).

³²¹ Basic Law art. 159.

³²² Basic Law art. 158(2).

³²³ Basic Law art. 158(1).

³²⁴ See generally Chan, *supra* note 320; Danny Gittings, *Hong Kong’s Courts Are Learning to Live with China*, H.K. J., July 1, 2010, http://www.hkjournal.org/archive/2010_fall/2.htm.

³²⁵ Lau Kong Yung v. Director of Immigration, [1999] 2 H.K.C.F.A.R. 300 (C.F.A.) (H.K.), paras. 57–62, available at http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=18930&AH=&QS=&FN=

federations, chambers of commerce, and business groups.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.”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.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.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.”³³⁰ In 2007, the NPCSC issued a decision confirming that universal suffrage would not be adopted

³²⁶ About LegCo: Legislative Council Today, LEGCO.GOV.HK, http://www.legco.gov.hk/general/english/intro/about_lc.htm. Functional constituencies tend to be conservative and pro-Beijing. Olivia Chung, *A Messy Affair in Hong Kong*, ASIA TIMES ONLINE, June 29, 2010, <http://www.atimes.com/atimes/China/LF29Ad02.html>.

³²⁷ Basic Law annex II, § III.

³²⁸ Ma Ngoc, *The Beginning of a Thaw—or a Fatal Split in the Democracy Movement?*, H.K. J., July 1, 2010, at 1–7, 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.

³²⁹ Quanguo Renda Changweihui Guanyu “Zhonghua Renmin Gonghe Guo Xianggang Tebie Xingzheng Qu Jiben Fa” Fujian Yi Di Qi Tiao he Fujian Er Di San Tiao de Jieshi [Interpretation of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region (HKSAR) of the PRC by the NPCSC] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 6, 2004, effective Apr. 6, 2004) (LawInfoChina, Peking Univ. Beida Fabao series CLI.1.52226), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=3462>.

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 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, *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 2012.³³¹ 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 2020.³³²

In the wake of this NPCSC decision, pro-democracy groups in Hong Kong were divided over the steps to pressure the mainland government.³³³ 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.³³⁴

³³¹ Quanguo Renda Changweihui Guanyu Xianggang Tebie Xingzheng Qu 2012 Nian Xingzheng Zhangguan he Lifa Hui Chansheng Banfa ji Youguan Puxuan Wenti de Jueding [Decision of the NPCSC on Methods for Selecting the Chief Executive and forming the Legislative Council of the Hong Kong Special Administrative Region in 2012 and Issues on Universal Suffrage] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective Dec. 29, 2007) (LawInfoChina, Peking Univ. Beida Fabao series CLI.1.100661), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=6597>.

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-cd2012.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

both members representing functional constituencies and members representing geographic constituencies are required for passage. *Id.*

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.

³³⁸ NAT'L DEMOCRATIC INST. FOR INT'L AFFAIRS, NDI HONG KONG REPORT NO. 8: THE PROMISE OF DEMOCRATIZATION IN HONG KONG: THE IMPACT OF JULY'S PROTEST DEMONSTRATIONS ON THE NOVEMBER 23 DISTRICT COUNCIL ELECTIONS—A PRE-ELECTION REPORT 2 (2003).

that set out in the 2007 NPCSC decision.³³⁹ 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.

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.³⁴⁰ 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 (*hukou*) system,³⁴¹

³³⁹ Ma Ngoc, *supra* note 328, at 4–5.

³⁴⁰ 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*, CHINA INTERNET INFORMATION CENTER (Sept. 23, 2004), <http://www.china.org.cn/english/2004/Sep/107886.htm>.

³⁴¹ Hu Xingdou, Professor, Beijing Inst. of Tech. Dep't of Econ.: Dui Eryuan Hukou Tizhi ji Chengxiang Eryuan Zhidu Jinxing Weixian Shencha de Jianyishu [Proposal to Conduct Constitutional Review of the Dual Residence Registration System and the Dual System for Cities and Towns] (Nov. 6, 2004), *available at* <http://www.huxingdou.com.cn/hukouweixian.htm>; Henan 10 Ming Lüshi Zhi Xin Renda, Jianyi Chexiao Zanzhu Zheng [Ten Lawyers Send a Letter to the NPC and Propose Cancellation of Temporary Residence Permits], SINA.COM (Dec. 26, 2006, 7:52 PM),

allocations of people's congress delegates that disadvantage rural residents,³⁴² disparate injury compensation standards for urban and rural residents,³⁴³ 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.³⁴⁴ 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.³⁴⁵ While the gesture was almost certainly an effort to quiet

<http://news.sina.com.cn/c/1/2006-12-26/195211890939.shtml>. In March 2010, thirteen Chinese news outlets published editorials on the constitutionality of the residence registration system. See Don Clarke, *The Famous Hukou Editorial*, CHINA LAW PROF BLOG (Mar. 26, 2010), http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/the-famous-hukou-editorial.html.

³⁴² 2007 TYPICAL CASES, *supra* note 198, at 80–93.

³⁴³ Letter from Hu Xingdou, Professor at Beijing Inst. of Tech., and Li Fangping, Atty., to the SPC: Guanyu Xiaochu Chengxiang Chabie Daiyu, Tongyi Renshen Sunhai Peichang Biaozhun de Gongmin Jianyishu [Citizen Proposal on Dismantling the Disparate Treatment of City and Countryside and Unifying the Compensation Standard for Personal Injury] (Mar. 12, 2006), <http://www.huxingdou.com.cn/renshenpeichang.htm>; Proposal from Zhou Yuzhong, Head of Zhongshi Law Office, Guangdong Province: Guanyu Qingqiu Dui Zuigao Renmin Fayuan "Guanyu Renshen Sunhai Peichang Anjian Shiyong Falü Ruogan Wenti de Jieshi" (Fashi (2003) 20 Hao) Jinxing Shencha de Gongmin Jianyishu [Proposal Requesting Constitutionality Review of the SPC "Interpretation of Some Issues in Applying the Law in Personal Injury Cases" (2003 SUP. PEOPLE'S CT. INTERP. no. 20)] (Jan. 1, 2007), available at <http://blog.lawstar.com/blog/cgi/shownews.jsp?id=750002447>. For further analysis of these efforts, see Hand, *supra* note 58, at 238–39.

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/cb_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 Sinanzhe Jiashu Zhi 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.³⁴⁶ Under Mao Zedong, the Party continued to practice mediation in part as a tool of political education.³⁴⁷ Maoist mediation exhibited some coercive elements.³⁴⁸ 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.³⁴⁹

Over the last decade, however, China has steadily revived the status of mediation as a preferred mechanism for resolving a broad range of disputes.³⁵⁰ Political-legal institutions initiated this revival in 2002.³⁵¹ As concerns about social stability and related threats to Party power intensified, Party leaders strengthened their emphasis on mediation.³⁵² By 2007, the SPC had introduced the work principle of “giving priority to

³⁴⁶ See Randall Peerenboom & Xin He, *Dispute Resolution in China: Patterns, Causes, and Prognosis*, 4 EAST ASIA L. REV. 1, 24 (2009); Zuo Weimin, *Tanxun Jiufen Jiejue de Xin Moshi—yi Sichuan “Da Tiaojie” Moshi wei Guanzhu Dian* [Exploring New Models for Dispute Resolution—with a Special Focus on “Grand Mediation” in Sichuan], 2010 FALU SHIYONG [J. OF L. APPLICATION], no. 2–3, at 112, available at <http://www.studa.net/faxuelilun/101125/1422188.html>.

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 Zhu Suli, *supra* note 12, at 5–6.

³⁵⁰ See generally Minzner, *supra* note 1, pt. I; Peerenboom & Xin He, *supra* note 346, at 24–26.

³⁵¹ Peerenboom & Xin He, *supra* note 346, at 26.

³⁵² See, e.g., Zui Gao Renmin Fayuan Guanyu Renmin Fayuan Minshi Tiaojie Gongzuo Ruogan Wenti de Guiding [SPC Provisions on Several Issues in the Civil Mediation Work of the People’s Court] [hereinafter SPC Provision on Civil Mediation Work] (issued by the Sup. People’s Ct., Aug. 16, 2004, effective Nov. 1, 2004) 2004 FA SHI [SUP. PEOPLE’S CT. INTERP.] no. 12, available at [http://eng.chinalawinfo.com/NetLaw/display.aspx?db=law&sen=rLdDdW4drLdDdWndrhdydWdd/hdvdWnd9DdFdWcdrDdvdWud/Ld5dWrd/LdGdWud/ddTdWud9Dd+&Id=3735&Wang%20Quanbao,%20Shanghai%20de%20%22Datiaojie%22%20Shiyan%20Shanghai%20de%20%22Grand%20Mediation%20Experiment%22,%20ZHONGGUO%20XINWEN%20ZHOUKAN%20CHINA%20NEWSWEEK%20\(Sept.%2016,%202010,%202:26%20PM\),%20available%20at%20http://newsweek.inewsweek.cn/magazine.php?id=412](http://eng.chinalawinfo.com/NetLaw/display.aspx?db=law&sen=rLdDdW4drLdDdWndrhdydWdd/hdvdWnd9DdFdWcdrDdvdWud/Ld5dWrd/LdGdWud/ddTdWud9Dd+&Id=3735&Wang%20Quanbao,%20Shanghai%20de%20%22Datiaojie%22%20Shiyan%20Shanghai%20de%20%22Grand%20Mediation%20Experiment%22,%20ZHONGGUO%20XINWEN%20ZHOUKAN%20CHINA%20NEWSWEEK%20(Sept.%2016,%202010,%202:26%20PM),%20available%20at%20http://newsweek.inewsweek.cn/magazine.php?id=412) (noting Luo Gan’s 2004 speech as a pivotal point in the future of mediation).

mediation and combining mediation and adjudication.”³⁵³ 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 social stability and harmony, and of giving play to the professional role of the people’s courts.³⁵⁴

In the context of this drive, Chinese leaders have revived Maoist dispute resolution practices that emphasize populism and political education.³⁵⁵ 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.³⁵⁶

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.³⁵⁷ 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

³⁵³ Zuigao Renmin Fayuan Guanyu Jin Yi Bu Fahui Susong Tiaojie Zai Goujian Shehui Zhuyi Hexie Shehui Zhong Jiji Zuoyong de Ruogan Yijian [Several Opinions of the SPC on Progressively Giving Play to the Positive Role of Litigation Mediation in the Building of a Socialist Harmonious Society] [hereinafter SPC Opinions on Positive Role of Mediation] (issued by the Sup. People’s Ct., Mar. 6, 2007, effective Mar. 6, 2007) (LawInfoChina, Peking Univ. Beida Fabao series CLI.3.89041), available at <http://www.chinabaik.com/law/zy/sf/fy/1338426.html>.

³⁵⁴ Zuigao Renmin Fayuan Guanyu Jin Yibu Guanचे Tiaojie Youxian, Tiaopan Jiehe Gongzuo Yuanze de Ruogan Yijian [SPC Several Opinions on Further Implementing the Work Principle of “Giving Priority to Mediation and Combining Mediation with Judgment”] [hereinafter SPC Opinion on Giving Priority to Mediation] (issued by the Sup. People’s Ct., June 7, 2010, effective) 2010 FAFa [SUP. PEOPLE’S CT. CIRCULAR] no. 16, para. 1, available at http://www.court.gov.cn/qwfb/sfwj/yj/201008/t20100811_8489.htm.

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).

³⁵⁶ Minzner, *supra* note 1, at 943–46, 955–59, 963.

³⁵⁷ SPC Opinion on Positive Role of Mediation, *supra* note 353, at § 2.

common concern to society; or (6) involve extreme emotions.³⁵⁸ Chinese leaders have promoted mediation by people's mediation committees, administrative organs, and other government and social entities in addition to court mediation.³⁵⁹

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.³⁶⁰ The sheer volume of cases has placed significant stress on the judicial system.³⁶¹ 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.³⁶² 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.³⁶³ 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.³⁶⁴

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

³⁵⁸ *Id.* at § 5.

³⁵⁹ For discussions linking people's mediation, administrative mediation, and judicial mediation, see *infra* Part V(C) and accompanying notes.

³⁶⁰ Zuo Weimin, *supra* note 346, at 112; Geng Baojian, *Xingzheng Jiufen Jiejue Jizhi de Lujing Xuanze: Yi Ge Duoyuanhua de Shejiao* [A Choice in the Path for the Mechanism of Resolving Administrative Disputes: A Multifaceted View], in ZHONGGUO JICENG XINGZHENG ZHENGYI JIEJUE JIZHI DE JINGYAN YANJIU [AN EMPIRICAL STUDY OF ADMINISTRATIVE DISPUTE RESOLUTION IN LOCAL CHINA] 250–54 (Wang Qinghua ed., 2010).

³⁶¹ For Chinese discussions of these pressures, see, e.g., Zuo Weimin, *supra* note 346, at 112; Zhu Suli, *supra* note 12, at 5–7; Zhao Lei, *Zhongguo Zui Mang de Fating* [China's Busiest Judicial Tribunal], NANFANG ZHOUMO [S. WEEKEND] (Dec. 4, 2008, 8:39 AM), <http://www.infzm.com/content/20845>.

³⁶² Peerenboom, *supra* note 1, at 191; Zhu Suli, *supra* note 12, at 5–7, 15–16. From 2000–2010, the enforcement rate was around 43%. Zuo Weimin, *supra* note 346, at 112.

³⁶³ Willy Lam, *Beijing's Blueprint for Tackling Mass Incidents and Social Management*, 11.5 CHINA BRIEF (The Jamestown Found., Washington, D.C.), Mar. 25, 2011, at 3, http://www.jamestown.org/uploads/media/cb_11_5.pdf.

³⁶⁴ See, e.g., Zhou Yongkang, *Shenru Tuijin Shehui Maodun Huajie, Shehui Guanli Chuangxin, Gongzheng Lianjie Zhifa, Wei Jingji Shehui You Hao You Kuai Fazhan Tigong Gengjia Youli de Fazhi Baozhang* [Deeply Push Forward the Settlement of Social Contradictions, Innovation in Social Management, Clean and Just Law Enforcement, and Provide a More Powerful Legal Guarantee for Better and Faster Economic and Social Development], 4 QIU SHI [SEEKING TRUTH], Feb. 16, 2010.

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

³⁶⁵ See, e.g., Zuigao Renmin Fayuan Guanyu Jin Yi Bu Zuohao 2009 Nian Renmin Fating Gongzuo de Tongzhi [SPC Notice on Progressively Improving the Work of People's Tribunals in 2009] (issued by the Sup. People's Ct., Feb. 11, 2009, effective Feb. 11, 2009) 2009 FAFA [SUP. PEOPLE'S CT. CIRCULAR] no. 94, at para. 5(5) (LawInfoChina, Peking Univ. Beida Fabao series CLI.3.113487), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=7466>.

³⁶⁶ Wang Qinghua, *supra* note 125, at 514–15, 532; Wang Shengjun, *Shenru Xuexi Shijian Kexue Fazhan Guan, Jianchi Wei Daju Fuwu Wei Renmin Sifa [Deeply Study the Implementation of a Scientific Development Outlook, Persist in Judicial Administration for the People and the Overall Situation]*, FAZHI RIBAO [LEGAL DAILY], Feb. 16, 2009 available at <http://cpc.people.com.cn/GB/64093/64094/8809139.html>; Zuigao Renmin Fayuan Yinfa "Guanyu Jianli Jianquan Susong yu Fei Susong Xiang Xianjie de Maodun Jiufen Jiejue Jizhi de Ruogan Yijian" de Tongzhi [SPC Distributes Notice on "Several Opinions on Constructing a Contradiction and Dispute Resolution Mechanism that Links Litigation with Non-Litigation"] [hereinafter SPC Opinion on Linking Litigation and Non-Litigation] (issued by the Sup. People's Ct., July 24, 2009, effective July 24, 2009) 2009 FAFA [SUP. PEOPLE'S CT. CIRCULAR] no. 45, para. 17 (LawInfoChina, Peking Univ. Beida Fabao series CLI.3.119924), available at http://www.court.gov.cn/qwfb/sfwj/yj/201003/t20100330_3550.htm; Political-Legal Textbook, *supra* note 118 (Party political-legal training manual integrating emphasis on Party leadership, mass opinion, social stability).

³⁶⁷ Wang Qinghua, *supra* note 125, at 521.

³⁶⁸ Fuller, *supra* note 26, at 395–410 ("Polycentric problems can often be solved . . . by parliamentary methods which include an element of contract in the form of a political 'deal'").

³⁶⁹ 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.³⁷⁰ Losing parties may undermine compliance by exacting revenge or pursuing alternative channels of resistance.³⁷¹ In contrast, consultative processes at least have the potential to facilitate reciprocal acceptance and greater willingness to explore adaptive solutions.³⁷²

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.³⁷³ 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.³⁷⁴ 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.³⁷⁵

Chinese legal scholars emphasize such dynamics. Chinese judges are obliged to decide cases in accordance with the law.³⁷⁶ The injection of

Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases, 2009 UTAH L. REV. 797, 802–4 (2009).

³⁷⁰ Menkel-Meadow, *supra* note 369, at 2670. See also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 982 (1979).

³⁷¹ Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J. L. & POL'Y 37, 49 (2002).

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.

³⁷⁴ Carrie Menkel-Meadow, *The Variable Morality of Constitutional (and Other) Compromises: A Comment on Sanford Levinson's Compromise and Constitutionalism*, 38 PEPP. L. REV. 903, 912–13 (2011).

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

³⁷⁶ FAGUAN FA [Judges Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1995, effective July 1, 1995, amended June 30, 2001) (LawInfoChina, Peking Univ. Beida Fabao series CLI.1.35754), arts. 1, 3, 5, 7, available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1861>.

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.³⁷⁷ 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.³⁷⁸ As such, Chinese scholars argue that mediation facilitates the consideration of both legal and non-legal outcomes.³⁷⁹

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.³⁸⁰ 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.³⁸¹ 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.³⁸²

³⁷⁷ Wang Qinghua, *supra* note 125, at 517; *Zuigaoyuan Hen Shengqi, Guotuting Hen “Danding,” Shaanxi Guotuting Kangfa Shijian Diaocha* [SPC Very Angry, MLR Very “Calm,” and an Investigation into the Incident Where the Shaanxi Land Administration Bureau Resisted the Law], NANFANG ZHOUMO [S. WEEKEND] (Aug. 4, 2010, 10:33 PM), <http://www.infzm.com/content/48526>.

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).

³⁷⁹ Feng Qijiang, *Xingzheng Shenpan Tiaojie zhi Yunzuo yu Jiantao* [Operation and Review of Mediation in Administrative Adjudication], ZHONGGUO FAYUAN WANG [CHINA COURT NET] (Jan. 5, 2006, 7:06 PM), <http://www.chinacourt.org/html/article/200601/05/191312.shtml>.

³⁸⁰ See Zhu Suli, *supra* note 12, at 11–13 (criticizing the legalism 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 Contradictions], NANFANG ZHOUMO [S. WEEKEND] (Mar. 4, 2010, 11:42 AM), http://nfnfdaily.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.³⁸³ Although the ALL formally prohibits “mediation,” political-legal institutions have actively promoted judicial “reconciliation” or “coordination” of administrative lawsuits.³⁸⁴ 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.³⁸⁵

to incorporate facts and interests beyond those advanced by the parties and ensure that state policy is implemented. Damaska, *supra* note 11, at 87, 169. In Damaska’s purely “activist” ideal type, compromise and mediated solutions are problematic. *Id.* Post-Mao China does not fit the activist ideal type perfectly. For an activist but pragmatic Chinese Party-state, mediated outcomes may be useful if they facilitate the injection of extra-legal factors and the realization of core objectives such as stability maintenance and Party political control.

³⁸³ Zhonghua Renmin Gonghe Guo Xingzheng Susong Fa [PRC Administrative Litigation Law] [hereinafter ALL] (promulgated by the Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990) (LawInfoChina, Peking Univ. Beida Fabao series CLI.1.4274), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1204>. Constitutional violations are not included within the scope of ALL review. ALL arts. 2, 11.

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, *Guanyu Xingzheng Susong Hejie Zhidu 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 [SHAANXI 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.³⁸⁶ Administrative organs pressure courts not to accept administrative cases, interfere with the adjudication process, and refuse to implement judgments.³⁸⁷ According to official statistics, enforcement rates in administrative lawsuits dropped from 74% in 1992 to 21% in 2004.³⁸⁸ Administrative organs also intimidate lawyers and plaintiffs.³⁸⁹ 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.³⁹⁰ The difficulties courts face in adjudicating administrative cases and enforcing judgments in turn undermine judicial authority and can generate destabilizing citizen discontent and petitions.³⁹¹

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.³⁹² Many administrative orders (China’s ubiquitous “red-hatted” documents) occupy a legal grey zone and do not fall clearly within the scope of the

Orders, XINHUA NET (Apr. 3, 2007), available at http://www.legalinfo.gov.cn/english/News1/content/2009-01/20/content_1024056.htm?node=7604.

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.

³⁸⁷ See generally Wang Qinghua, *supra* note 125, 521–30. Chinese sources often refer to these problems as the “three difficulties.” Zhang Xiaohua, *supra* note 384; *Reconciliation Produces a Double Win*, *supra* note 384. For an English-language discussion of such issues, see Joseph Kahn, *When Chinese Sue the State, Cases Are Often Smothered*, N. Y. TIMES, Dec. 28, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9A02E5D71230F93BA15751C1A9639C8B63&pagewanted=all>.

³⁸⁸ ZHONGGUO FALÜ FAZHAN BAOGAO [CHINA LEGAL DEVELOPMENT REPORT] 247 (Zhu Jingwen, ed. 2007).

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 Daibiao Tijiao Yian Xiugai Xingzheng Susuogong Fa—Xingzhen Susong Fa Ying Baohu Gongmin Quanyi er Fei Zhengfu 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.

ALL.³⁹³ 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.”³⁹⁴ Collectively, these pressures have contributed to a high rate of withdrawal of administrative lawsuits.³⁹⁵

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.³⁹⁶ 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.³⁹⁷

As this passage indicates, while administrative organs have numerous reasons to resist administrative litigation, their interest in efficient

³⁹³ Cheng Gang, *supra* note 391.

³⁹⁴ Wang Qinghua, *supra* note 125, at 513.

³⁹⁵ Feng Qijiang, *supra* note 379 (citing typical annual withdrawal rates of about 33%); Geng Baojian, *supra* note 360, at 252 (citing 57% withdrawal rate one year and citizen belief that officials simply protect each other).

³⁹⁶ See generally Zhang Xiaohua, *supra* note 384; Wang Qinghua, *supra* note 125, at 519–21.

³⁹⁷ Zhang Xiaohua, *supra* note 384. For a very similar passage discussing the experience of courts in Shaanxi, see *Reconciliation Produces a Double Win*, *supra* note 384.

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.⁴⁰⁵ China's leaders introduced grand mediation in 2002 and have progressively intensified their emphasis on the model over the past decade.⁴⁰⁶ In April 2011, Party-state institutions issued a joint notice on grand mediation, and the model features prominently in official notices on dispute resolution.⁴⁰⁷

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.

⁴⁰⁵ See, e.g., Zhu Suli, *supra* note 12, at 5; Chen Hanfei & Mou Naidong, "Da Tiaojie" *Jizhi Zhong Fayuan de Juese Dingwei* [Defining the Role of Courts in the "Grand Mediation" Mechanism], 11 XINAN ZHENGFA DAXUE XUEBAO [SW U. POL. SCI. L.J.] 128, 134 (2009); Guanyu Shenru Tuijin Maodun Jiufen Da Tiaojie Gongzuo de Zhidao Yijian [Guiding Opinion on Deepening and Pushing Forward Grand Mediation Work for Contradictions and Disputes] [hereinafter Guiding Opinion on Grand Mediation] (jointly issued by the Centr. Comm. for Comprehensive Mgmt. of Pub. Sec., the Sup. People's Ct. & 15 other agencies, Apr. 22, 2011), at para. 1, available at <http://www.dffy.com/faguixiazai/ssf/201105/22812.html>.

⁴⁰⁶ Wu Yingzi, "Da Tiaojie" de Gongneng Ji Xiandu [Functions and Limits of "Grand Mediation"], 20 ZHONGWAI FAXUE [PEKING U. L.J.] 309 (2008). See Wang Hongchao & Wang Shiwei, *Chengdu Shi Dayi Xian "Da Tiaojie" Xinjiu Liandong Gongzuo Jizhi Bijiao* [Comparison of the New and Old Integrated Work Mechanism for Grand Mediation in Dayi County, Chengdu City], 11 XINAN ZHENGFA DAXUE XUEBAO [SW U. POL. SCI. L.J.] 122, 127 (2009) (LawInfoChina, Peking Univ. Beida Fabao series CLI.A.1144226) (explaining that the structure and operation of the grand mediation mechanism has evolved over time).

⁴⁰⁷ Guiding Opinion on Grand Mediation, *supra* note 405. For examples of other circulars, see Guowuyuan Guanyu Jiaqiang Fazhi Zhengfu Jianshe de Yijian [State Council Opinion on Strengthening the Construction of Rule of Law Government] (issued by the St. Council, Oct. 10, 2010, effective Oct. 10, 2010) 2010 GUO FA [ST. COUNCIL NOTICES] no. 33, para. 23, available at http://www.gov.cn/zwzk/2010-11/08/content_1740765.htm; SPC Opinion on Giving Priority to Mediation, *supra* note 354, at paras. 26, 27.

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.⁴⁰⁸ 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.⁴⁰⁹ 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.⁴¹⁰

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.⁴¹¹ 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.⁴¹² 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.⁴¹³ Court leaders sit

⁴⁰⁸ Guiding Opinion on Grand Mediation, *supra* note 405, at paras. 19, 20, 21. For a detailed description of a county grand mediation structure with over twenty Party-state entities, see Wang Hongchao & Wang Shiwei, *supra* note 406, at 123–24.

⁴⁰⁹ Zuo Weimin, *supra* note 346, at 112–13.

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.⁴¹⁴

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.⁴¹⁵ 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.⁴¹⁶ Legal provisions give courts a source of argument and crucial support in shaping such consultations.⁴¹⁷ 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.⁴¹⁸

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.⁴¹⁹ 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

⁴¹⁴ Wang Hongchao & Wang Shiwei, *supra* note 406, at 124.

⁴¹⁵ Long Zongzhi, *Chongjian Minzhong Dui 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 ZHOUMO [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.⁴²⁰ 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.⁴²¹ 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.⁴²²

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.

⁴²⁰ See, e.g., *Ebian Xian Yunyong "Da Tiaojie" Jizhi Chenggong Huajie Yiqi Sheji Sanfang de Zhandi Buchang Jiufen* [Ebian County Utilizes "Grand Mediation" Mechanism to Successfully Settle a Land Compensation Dispute Involving a Third Party], EBIAN XINWEN WANG [EBIAN NEWS NET] (Apr. 19, 2010), <http://eb.leshan.cn/zt/HTML/2071.html>.

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

⁴²³ *Baker v. Carr*, 369 U.S. 186 (1962).

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.⁴²⁶ 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.⁴²⁷ 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.⁴²⁸ 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.⁴²⁹ 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.⁴³⁰

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.

⁴²⁸ Randall Peerenboom, *Economic and Social Rights: The Role of Courts in China*, 12 SAN DIEGO INT’L L.J. 303, 319–20 (2011).

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.⁴³¹ 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.⁴³² Finally, Party leaders have introduced the concepts

⁴³¹ See, e.g., Chen Shenyong, *The Native Resources of Deliberative Politics in China*, in THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA, *supra* note 14, at 161–73; Jiang Shigong, *supra* note 21, at 31–37; Dowdle, *Of Parliaments*, *supra* note 17, at 164–68, 174–80; He Baogang, *Participatory and Deliberative Institutions in China*, in THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA, *supra* note 14, at 175–96; CHINESE PEOPLE'S POLITICAL CONSULTATIVE CONFERENCE, <http://www.china.org.cn/english/archiveen/27750.htm>. For Chinese emphasis on negotiation and consultation, and avoidance of adjudicative institutions in the resolution of international disputes, see JUNWU PAN, TOWARD A NEW FRAMEWORK FOR PEACEFUL SETTLEMENT OF CHINA'S TERRITORIAL AND BOUNDARY DISPUTES 113, 115 (2009).

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.⁴³³ 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 of 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.⁴³⁴ 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

Jamie Horsley, *The Development of Public Participation in the People’s Republic of China*, in *THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA* *supra* note 14.

⁴³³ Alice Miller, *Beijing Prepares to Convene the 17th Party Congress*, *THE CHINA LEADERSHIP MONITOR*, Oct. 5, 2007, at 5–7.

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.⁴³⁵

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 an 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

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.⁴³⁶ 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.⁴³⁷ 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.⁴³⁸ Concessions to address collective constitutional demands may also encourage citizens to make further demands through collective action, thus leading to further instability.⁴³⁹

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.⁴⁴⁰ 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.⁴⁴¹ 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

⁴³⁶ Cai Yongshun, *Social Conflicts and Modes of Action in China*, 59 THE CHINA J. 418 (2008); Cai Dingjian, *supra* note 133, at note 82; Wang Qinghua, *supra* note 125, at 525; Peerenboom & Xin He, *supra* note 346, at 56; Fu Hualing, *supra* note 189, at 357. Chinese social scientist Yu Jianrong argues that a "rigid stability" based on a closed political system and absolute social order poses a great risk of undermining social stability. Yu Jianrong, Professor and Dir. of the CASS Rural Dev. Inst. Soc. Issues Research Ctr., Annual Yanshan Lecture at China Univ. of Admin. and Law: Rigid Stability—an Explanatory Framework for China's Social Situation (May 9, 2009), *available at* http://www.boxun.us/news/publish/china_comment/Rigid_Stability_An_Explanatory_Framework_for_China_s_Social_Situation (translated by David Kelly).

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.⁴⁴² 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.⁴⁴³ 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.⁴⁴⁴ 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.⁴⁴⁵

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.⁴⁴⁶ 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.⁴⁴⁷ 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.

⁴⁴⁶ 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.*

⁴⁴⁷ 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.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.

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

⁴⁴⁸ Menkel-Meadow, *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.⁴⁴⁹ 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.⁴⁵⁰ 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."⁴⁵¹

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

⁴⁴⁹ GINSBURG, *supra* note 151, at 157, 241–42, 256–58.

⁴⁵⁰ *Id.* at 241–42.

⁴⁵¹ *Id.* at 258.

country's new democratic constitution.⁴⁵² The Court played a crucial role in consolidating and defending the new constitution against the conservative impulses of the existing political-legal class.⁴⁵³

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.⁴⁵⁴ 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.⁴⁵⁵ 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.

⁴⁵² Enrique Lopez, *Judicial Review in Spain: The Constitutional Court*, 41 LOY. L.A. L. REV. 529, 531–32 (2008).

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.⁴⁵⁶

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.⁴⁵⁷ The Party-state, through a combination

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.⁴⁵⁸ 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.

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.