ARGUING CHINESE CONSTITUTIONALISM: THE 2013 CONSTITUTIONAL DEBATE AND THE "URGENCY" OF POLITICAL REFORM

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Some scholars, both Chinese and Western, have argued that the Chinese Constitution is no longer a classic "sham constitution," and that it is in fact starting to fulfill, at least in a limited way, its power-delineating and rights-protecting functions. They believe that signs have emerged that show that, at times, the Chinese Constitution does in fact influence the outcome of legislative debates, for example.

This article argues that such optimism is misplaced, and that, at present, the Chinese Constitution does not carry any meaningful legal weight. It does, however, perform an important political function: it is a tool for the Chinese Communist Party to engage in legitimacy-enhancing constitutional reform rhetoric. At the same time, would-be reformers outside the ruling elite also use constitutionalist rhetoric to try to push the Party to live up to its reformist promises. At present, however, these attempts by reformers outside the system have yet to bear any fruit.

In this article, I use the analytical framework of authoritarian constitutionalism to investigate the 2013 constitutionalism debate inside China. I argue that this debate demonstrated the ways in which the Party uses the constitution as a "false blueprint," one that suggests a destination at which the Party has no intention of arriving. The debate also demonstrated a growing consensus among moderate reformist scholars on the need for reform. In response to this consensus, the Party has had to turn to ultra-conservative voices to keep the moderates in check. This balancing act highlights the difficulties that the Party faces in using the constitution to bolster continued one-party rule.

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I. INTRODUCTION

Former Wenzhou City Vice-Mayor Ye Jiren might seem like an unlikely poster child for constitutional reform. Accused of misuse of power over the illegal allocation of land to a local company, Ye was convicted and sentenced to three years in prison in August 2013. According to local authorities, the misallocation of city land to the Shopping Basket Development Company cost the government more than 115 million RMB or, roughly, 18.5 million US dollars in lost revenues.[1]

And yet, Ye's case is deeply troubling. He was held in a form of extra-legal incommunicado detention known as *shuanggui*, or double regulation, for over a year, from March 2011 to May 2012. Ye alleged that he was tortured during that time and pressured into

[1] Zhao Xiaoyan (赵小燕), *Wenzhou Yuan Fushizhang Ye Jiren Lanyong Zhiquan Huo Xing San Nian, Jiashu Ni Shangsu* (温州原副市长叶际仁滥用职权获刑三年，家属拟上诉) [*Former Wenzhou Deputy Mayor Ye Jiren Sentenced to Three Years for Abuse of Power—Family Plans to Appeal*], ZHONGGO XINWEN WANG (中国新闻网) [CHINA NEWS NET] (Aug. 16, 2013), http://www.chinanews.com/gn/2013/08-16/5173481.shtml.

making a false confession.[2] Furthermore, he claimed that the mistreatment continued when he was later transferred to police custody. He was only allowed to see his lawyer, Wang Zhanxin, on September 7, 2012, roughly a year and a half after being detained. In April 2013, more than two years after he had first been detained, his case finally went to trial.

Ye maintained his innocence during his initial trial and claimed on appeal that he faced abuse so intense that he adopted a six-character mantra: *busi, bucan, buchi*: don't die, don't become crippled, and don't go insane.[3]

In September 2013, his case was cited by one of China's most prominent constitutional law scholars, Central Party School Professor Cai Xia, as evidence of the increasing sense of insecurity among Party members.[4] While the general public might believe that government officials possess great power, Cai argued that they can, in fact, be quite vulnerable. When they enter into *shuanggui*, they leave all legal protections behind.

Ye's case shows that officials, no less than average citizens, might find themselves in need of the rights protections found in the Chinese Constitution. Cai suggested that government officials caught in moments of candor would probably echo the sentiments of many academics, intellectuals, and activists who have called for immediate and wide-ranging reform.[5] She went on to argue that constitutional reforms which would better protect individual rights, regardless of circumstances, would in fact find much support from within the Party.

Cai's talk was but one of many conversations on the need for constitutional reform in China that took place in 2013. To be sure, China is no stranger to public discussion on constitutional reform, but the first ten months of 2013 saw a level of conversation on constitutionalism not seen in China in nearly a decade. The debate drew hundreds of participants, including academics, public intellectuals, journalists, rights activists, state-affiliated think tank

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[2] Wang Zhanxin & Zhuang Xinting, *This Is a Classic Unjust and False Case* (July 11, 2013), http://qing.blog.sina.com.cn/3435245570/ccc1b002330040eq.html.

[3] Cai Xia (蔡霞), *Xianzheng Minzhu Caineng Shi Zhongguo Changzhi Jiuan* (宪政民主才能使中国长治久安) [*Only Constitutionalism Can Bring Long-term Peace and Stability to China*), GONGSHI WANG (共识网) [CONSENSUS NET] (Sept. 2, 2013), http://www.21ccom.net/articles/zgyj/xzmj/article_2013090291129.html.

[4] *Id.*

[5] *Id.* ("the feeling of crisis within the Party is also quite strong").

researchers, and government officials. Virtually every prominent constitutional scholar weighed in, including several law school deans and a number of respected elder scholars whose ties to senior Party leaders are well known.

Just as importantly, the debate reached a large number of private citizens. It is likely that millions of citizens followed the debate, which raged first and foremost online and on *Weibo*,[6] China's version of Twitter. The debate also (at least briefly, before state censors blocked further discussion) played out on the pages of China's top newspapers and magazines, in the elite classrooms of Beijing, and in private salons across China.[7]

The tenor of the debate has been described as "highly ideological," with each side possessed of "theological" certainty.[8] One participant expressed regret over elements of "personal attack" and "demonization" in the debate.[9]

And, as perhaps may be expected of a debate whose battle lines have remained static for years, few if any participants confessed to being convinced by any of the arguments of other camps.[10] One prominent scholar prided himself and his comrades for "maintaining our composure, and not retreating, even a half step."[11]

Broadly speaking, three different camps took part in the debate: the Socialist Constitutionalists, the Liberals, and the Leftists, who were also referred to as Anti-Constitutionalists. As their name

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[6] At one point in late May, more than 7 million posts on Weibo referred to the constitution, a number that was reduced to 1.9 million by government censors soon thereafter. Li Qi & William Wan, *China's Constitution Debate Hits a Sensitive Nerve*, WASH. POST (June 3, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/06/03/chinas-constitution-debate-hits-a-sensitive-nerve.

[7] The fact that many of the key interventions in the debate were posted online—including transcripts of public talks and roundtable discussions—meant that the debate attracted a truly global Chinese-speaking audience, and attracted interventions from members of the Chinese diaspora, both in other parts of Asia and in the West.

[8] Zheng Yongnian (郑永年), *Zhongguo de Xianzheng Zhi Zheng Shuoming le Shenme?* (中国的‘宪政’之争说明了什么?) [*What Does China's 'Constitutional Governance' Debate Mean?*], AI SIXIANG (爱思想) [LOVE THOUGHT] (June 18, 2013), http://www.aisixiang.com/data/64914.html.

[9] *Id.*

[10] An extensive—though by no means exhaustive—review of the written record of the debate by this author failed to generate even one example of a participant admitting to being convinced by arguments made by an opposing camp, or of having one's mind changed by the arguments of another side.

[11] Hua Bingxiao (华炳啸), *Fanxian Pai de Lilun Pingkun Ji Qi Sixue* [反宪派的理论贫困及其死穴] (*The Theoretical Impoverishment and Achilles' Heel of the Anti-Constitutionalists*), AI SIXIANG (爱思想) [LOVE THOUGHT] (July 3, 2013), http://www.aisixiang.com/data/65356.html.

suggests, the Socialist Constitutionalists support constitutional reform under the leadership of the Communist Party. Though they do not question the Party's monopoly on political power, they believe that that power should be exercised through, and checked by, constitutional norms.

The Liberals are skeptical that meaningful reform can take place under the existing constitutional framework, which, they often point out, constitutionally enshrines the leadership position of the CCP. More generally, they profess greater skepticism of the Party's willingness to enact constitutional reforms that will limit its own power, and therefore have thought more deeply about how to mobilize the Chinese public to push reluctant CCP leaders to move forward.

The Anti-Constitutionalists are the smallest of the three groups. Their arguments are based on classic socialist legal theory, which holds that there is no need to use constitutional norms to constrain either Party or state authority since both the Party and government institutions, particularly People's Congresses, are the voice of the people. Using rhetoric that is redolent of an earlier era in Chinese political history, they roundly excoriate Western constitutional systems as tools of oppression of the proletariat, and repeatedly suggest that those Chinese scholars who do support constitutional reform are in fact agents of foreign powers.

The debate between these groups was triggered, almost certainly unintentionally, by China's top leader, Party Secretary Xi Jinping. Xi Jinping called for improved constitutional implementation in a speech marking the 30th anniversary of China's constitution on December 5, 2012.[12]

While the constitutional anniversary speech has become something of a political ritual, reformist scholars latched onto it nonetheless as an opportunity to push for reform. As the debate raged over several months, members of various ideological camps made repeated reference to Xi's remarks. Each camp tried to claim Xi for itself, even as senior Party leaders, including Xi himself, made statements and took actions very much at odds with a constitutional reform agenda.

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[12] Yinan Zhao, *Uphold Constitution, Xi Says*, CHINA DAILY (Dec. 5, 2012), http://usa.chinadaily.com.cn/china/2012-12/05/content_15985894.htm (quoting Xi Jinping: "We must firmly establish, throughout society, the authority of the Constitution and the law and allow the overwhelming masses to fully believe in the law").

In the early months of 2013, the debate moved steadily rightward, as moderate and liberal reformers found common ground on a core constitutional reform agenda.[13] This consensus was interrupted by a left-wing intervention in May. The left-wing attack featured both Leftist academic voices and, later in the summer, government officials. Leftist voices were able to occupy most of the public ideological space throughout the summer with help from state censors. The censors both pushed anti-constitutionalist pieces in the state media and online, and also censored pro-constitutional pieces in all outlets.[14] By late August, the Leftist rhetoric became rather heated: Leftists accused would-be constitutional reformers of seeking to overthrow the Communist Party.

Moderates, who often refer to themselves as Socialist Constitutionalists, did not take this Leftist thrust lying down. Instead, they responded with a massive number of commentaries and reasserted their views in scores of articles over several months. Most of the commentaries could not be published in either official media outlets or more market-oriented periodicals. By fall, the Leftist push eased, and the Socialist Constitutionalist moderates were allowed to have the last word, at least as far as the 2013 constitutionalism debate was concerned. The conversation had gone full circle, and the status quo ante was reaffirmed.

The Party's highly ambivalent response to this wide-ranging constitutional conversation varied from month to month, mixing elements of tolerance and repression. For the first few months of 2013, the academic conversation was allowed to proceed, with only minimal interference. At the same time, Party censors, ever vigilant about public involvement in such debates, blocked attempts by prominent media outlets to weigh in on the debate, most famously in the so-called *Southern Weekend* Incident in early January 2013. When the debate showed signs of garnering too much public attention, officials warned some of the most high profile participants to move on to other, less sensitive, topics.[15]

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[13] In the Chinese context, conservatives are those who support the Party and often favor preservation the status quo; they occupy the left side of the political spectrum; those advocating liberal reforms, including constitutional reforms, are considered to be on the right.

[14] Zheng, *supra* note 8. *See also* Qian Gang, *The Uncertain Death of 'Constitutionalism*, CHINA MEDIA PROJECT (Sept. 2, 2013), http://cmp.hku.hk/2013/09/02/33944/.

[15] Author interviews, Beijing, October 2013 (on file with author).

As always, certain red lines were enforced. When one Shanghai-based academic issued a critique that touched on sensitive aspects of Party history, including abuses during the pre-reform era and the 1989 Tiananmen Square crackdown, he was dismissed from his university post. This made him the only academic participant in the debate to lose his job over pro-constitutionalist statements.[16]

Without doubt, 2013 was the high water mark of constitutional conversation in China over the past decade.[17] But was the debate mere academic talk, or something more? This article argues that the Chinese constitutional debate of 2013 served as a proxy for debate over the future of political and legal reform in China.[18] As such, it offers important insights about shifting views among Chinese intellectuals about prospects for political-legal reform.

A close reading of the debate reveals, first and foremost, a high degree of consensus among legal scholars and intellectuals on the need for wide-ranging constitutional reforms. For many, calls for constitutional reform were directly tied to a sense of a growing crisis in Chinese governance manifested by official corruption, abuse of power, and social unrest.

Equally important, the debate, and the Party's response to it, highlighted the leadership's view of the constitution as a political tool, rather than a legal blueprint. Rather than seeking substantive engagement with those calling for constitutional reform, the Party sought to manage the debate, using its usual array of tools, including censorship, promotion of anti-constitutional voices, and, when needed, direct intimidation, to ensure that the debate stayed within

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[16] Andrew Jacobs, *Chinese Professor Who Advocated Free Speech is Fired*, N.Y. TIMES (Dec. 10, 2013), http://www.nytimes.com/2013/12/11/world/asia/chinese-professor-who-advocated-free-speech-is-fired.html?_r=0. Although university officials explicitly linked Zhang's dismissal to his constitutional writings, others saw his firing as retribution for his work as a rights lawyer in Shanghai. Author interviews, December 2013 (on file with author).

[17] The last such national conversation on constitutional reform took place in 2003, in the wake of the Sun Zhigang case. *See* Keith J. 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 221 (Balme and Dowdle, eds., 2009).

[18] As one commentator put it, "a seemingly academic, terminological debate is actually a political struggle . . . political interests are using an academic disguise to wage a fierce battle." Ge Weikun (葛惟昆), *Xianzheng Zhi Zheng, Shi Di'er Ci Zhenli Biaojun Zhi Zheng* (宪政之争，是第二次真理标准之争) [*The Constitutionalism Debate Is the Second Criterion of Truth Debate*], GONGSHI WANG (共识网) [CONSENSUS NET] (Dec. 16, 2013), http://www.21ccom.net/articles/zgyj/xzmj/article_2013121697087.html.

acceptable limits. In essence, when asked to respond to those voices arguing in favor of constitutional development, the Party had nothing politically inspiring or new to say.[19] It favored political management over substantive engagement, even with moderate voices who largely support the Party.

This study of the 2013 Constitutionalism Debate is not only of interest to scholars of Chinese politics and law. Because the debate illustrates the ways in which authoritarian regimes use constitutions and constitutionalism to enhance their own political legitimacy, it also contributes to the study of comparative constitutionalism and to the growing discourse on authoritarian constitutionalism.

While the 2013 Constitutionalism Debate garnered much attention in China, and also some Western media and scholarly attention, this article is the first in-depth analysis that looks at the debate through the theoretical lens of authoritarian constitutionalism. It is also one of the first in-depth studies of the political uses of constitutionalism in an authoritarian state, both from the perspective of the regime and from the perspective of would-be reformist elements outside the regime itself.

As many scholars have noted, constitutions can in fact play a number of different roles in authoritarian political systems. This is contrary to the conventional view that authoritarian constitutions are, in essence, dead letters. The fact that the Chinese Constitution was at the center of debate over political reform in 2013 speaks to its relevance as a *political* document, one that can and does play a significant role in elite discourse over the path and pace of political reform.

From the Party's perspective, however, the constitution is a double-edged sword. It seeks to use the Constitution and constitutional discourse as a source of political legitimacy: Party leaders know that constitutional rhetoric is attractive to Chinese intellectuals, citizens, and even reform-minded Party members.[20] But

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[19] Zheng, *supra* note 8. Zheng argued that the constitutional debate highlighted the "decline of official discourse." In Zheng's view, "for the past several years, official ideology no longer produces new theories or concepts," and is instead focused on maintaining ideological control, even as Chinese society undergoes rapid change. This emphasis on control over new thinking aptly describes the Party's apparent goals in the 2013 constitutional debate.

[20] The potential political benefits to a regime of touting its constitutionalist credentials have long been clear to both scholars and politicians alike. In 1962, the political theorist Giovanni Sartori noted that, "[i]n our minds, constitution is a 'good word.' It has favorable

it has no interest in political reforms that would institutionalize, and thus constrain, the Party's use of power. Therefore, the challenge for the Party is to constantly present itself as in transition by taking steps toward constitutional reform without ever actually getting there. It must present the 1982 Constitution as a genuine blueprint for political system reform,[21] even though it has no intention of making use of it. I call this the *false blueprint* paradigm of authoritarian constitutionalism.

For many, the fact that the CCP sees the 1982 Constitution as a tool to reinforce its political legitimacy, and not as a roadmap for political system reform, comes as no surprise. Many scholars have long argued that the Chinese Constitution is a classic "sham" constitution, which bears little resemblance to established political practice in China.[22] Yet, the past several years have seen the emergence of a new stream of scholarly literature which argues that China is in the early stages of constitutional development. In the words of one scholar, "recognizable constitutional structures are, in fact, beginning to appear in China."[23] I argue that this growing body of scholarship misunderstands political and legal development trends in China, and misclassifies those limited reforms that have taken place as "constitutional" when they are better understood much more narrowly, as specific, technical legal reforms whose influence on future constitutional developments are uncertain at best.

These scholars also misunderstand the largely political goals of the CCP when it engages in pro-constitutionalist rhetoric: for the Party, the 1982 Constitution is not a means by which power can be put in a "cage of regulations," but, rather, a tool for enhancing its own political legitimacy. The Party, therefore, has to walk its own fine line. As I document in this article: it must regularly publicly proclaim that the Chinese state is "in transition" to constitutional governance,

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emotive properties, like freedom, justice or democracy. Therefore, the word is retained, or adopted, even with the association between the utterance 'constitution' and the behavioral response it elicits . . . becomes entirely baseless." Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 855 (1962).

[21] Tom Ginsburg & Alberto Simpser, *Introduction* to CONSTITUTIONS IN AUTHORITARIAN REGIMES 1, 8 (Tom Ginsburg & Alberto Simpser, eds., 2013). As discussed in more detail below, Ginsburg and Simpser argue that authoritarian constitutions can serve as blueprints for future reforms, "describing things not as they are but as they might be."

[22] David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863 (2013).

[23] Michael Dowdle, *Of Comparative Constitutional Monocropping: A Reply to Qianfan Zhang*, 8 INT'L J. CONST. L. 977 (2010).

without actually arriving at the final destination.[24] I call this the *authoritarian constitutional dilemma*.

This article proceeds in five sections. In Part I, I analyze the existing scholarly literature on authoritarian constitutionalism, and the ways in which China fits into the authoritarian paradigm. I also argue that the CCP uses the Chinese Constitution as a source of political legitimacy, even though it largely fails to adhere to its key provisions.

In Part II, I describe and analyze the first stage of the debate, which ran from December 2012 to May 2013. I argue that this first stage of the debate highlights the ways in which external actors attempt to use constitutionalist rhetoric to push the Party to engage in political reforms. I also describe and analyze the constitutional theories of the top two constitutionalist schools in China, the Socialist Constitutionalists and the Liberal Constitutionalists.

In Part III, I describe the second phase of this debate, in which the Leftists, or anti-constitutionalists, came to the fore. Rather than writing such voices off as irrelevant fringe elements, I argue that such voices are in fact a key tool of the state used to cool down constitutional debates before they potentially gain too much momentum and thus spin out of control. I further argue that the use of this tool demonstrates the extent to which the Party values its control over the constitutional document—for the Party, the 1982 constitution may be legally irrelevant, but it is by no means politically so.

In Part IV, I analyze the responses to this Leftist push, and describe the wind-down of the 2013 debate. I argue that, from the Party's perspective, the goal was to return to the status quo ante, in which mainstream voices can praise the Constitution and call for constitutional reform, but must stay within politically acceptable limits. In the concluding section, I describe the revival of state-led constitutionalist rhetoric in late 2014. This revival shows that the Party was anxious to return to legitimacy-enhancing constitutionalist rhetoric after a long hiatus.

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[24] Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5 (2002). Though Carothers describes the overuse of the term transition in the context of development of democracy, much of what he describes is also relevant to the study of constitutional development.

II. THEORETICAL CONCERNS: AUTHORITARIAN CONSTITUTIONALISM AND CHINA

Any debate over the political and legal relevance of the Chinese Constitution, or of authoritarian constitutions in general, starts with a simple question: why bother? What positive role can a constitution play for a regime that, in most cases, has no intention of following its precepts?[25] Why are constitutions of such value to authoritarian rulers that virtually every authoritarian regime—to the neo-totalitarian Kim dynasty in North Korea to the soft authoritarian regimes in Malaysia and Singapore—adopts one?[26] For its part, China has adopted four separate constitutions during the sixty-seven year history of the People's Republic, and has amended the most recent 1982 Constitution four times, in 1988, 1993, 1999, and 2004. Surely such extensive attention to constitutional drafting and re-drafting suggests that authoritarian rulers see some benefit to creating and maintaining a constitutional document.

Ginsburg and Simpser identify four key functions of constitutions in authoritarian states: they can act as *operating manuals*, *billboards*, *blueprints*, and *window dressing*.[27]

Not every element of an authoritarian constitutional document is false. For many authoritarian rules, maintaining a constitutionally-mandated allocation of authority between different state actors can be beneficial, even though doing so may limit the ruler's freedom of action. As Ginsburg and Simpser point out, adherence to such a constitutional structure might lessen the likelihood of friction or even conflict among different governmental actors, and also encourage cooperation between intra-state elements by laying out clearly-defined rules of the game.[28] Ginsburg and Simpser call this the "operating manual" function of an authoritarian constitution.

Admittedly, this function does have some limited applicability in the Chinese context. Chinese officials, including many would-be reformists, put great stock in the preeminent constitutional role of China's legislative body, the National People's

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[25] Ginsburg & Simpser, *supra* note 21, at 2.

[26] For an extended analysis of whether a genuine form of authoritarian constitutionalism could exist in certain soft authoritarian regimes, *see* Mark Tushnet, *Authoritarian Constitutionalism: Some Constitutional Issues*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 36, 36–49 (Tom Ginsburg & Alberto Simpser, eds., 2014).

[27] Ginsburg & Simpser, *supra* note 21, at 6.

[28] *Id.*

Congress (NPC) The NPC is granted extensive powers under the 1982 Constitution, but given the Party's complete control of all state organs and the fact that no state actor can exercise its constitutionally-vested powers independent of Party interference, the operating manual function to Chinese constitutional practice is only slightly relevant.

Even those provisions of the Chinese Constitution which are facially adhered to—those that limit senior officials to two terms in office, for example—are not fully implemented.[29] Throughout the reform era, it has been the practice of top officials to continue to exercise power for years, even decades, after they formally relinquished their posts.[30]

In both authoritarian and liberal systems, perhaps the most common function of constitutional documents is the billboard function. Because a nation's constitution occupies a prominent place – at least rhetorically, if not in practice, in authoritarian systems – in the domestic political order, an amendment that signals a change in the authoritarian ruler's governing philosophy or policy direction can be seen as both authoritative and definitive. Such a change can capture the attention of both the domestic polity and international observers. This signals to both audiences that they should look closely at a change that the regime itself sees as significant.

The CCP has made liberal use of the billboard function throughout its tenure. The 1954 Constitution, the PRC's first such document, emphasized the leadership position of the Communist Party, signaling the importance that the CCP placed on consolidating its rule.[31] The 1975 Constitution, with its extensive use of radical leftist rhetoric, is little more than a billboard for various extreme Cultural Revolution-era slogans.[32] The adoption of the 1982

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[29] Article 79 of the Constitution, for example, limits the President and Vice-President of the PRC to two five-year terms. XIANFA art. 79 (China) (1982).

[30] It is true, however, that succession politics have become more and more institutionalized over the past two decades. *See* Andrew J. Nathan, *Authoritarian Resilience*, 14 J. DEMOCRACY 6 (2003). However, this institutionalization process has largely been conducted by the Party rather than the state. If the Party were to alter its approach, presumably the state structure would follow. More importantly, Party hierarchies, including informal ones, continue to trump the formal constitutional power structure and rules.

[31] William C. Jones, *The Constitution of the People's Republic of China*, 63 WASH. U. L. REV. 707, 712 (1985) ("[t]he 1954 constitution showed that the new government regarded itself as firmly established. Military and political control were complete.").

[32] Jerome Alan Cohen, *China's Changing Constitution*, 76 CHINA Q. 794 (1978). Interestingly, Cohen notes that the 1975 Constitution, adopted just as the Cultural Revolution

Constitution, with its stronger pro-market reform and rule of law rhetoric, was seen by many observers as the Party's way of sending a message to both the Chinese public and to the international community that China's post-Mao leadership team was serious about economic and legal reform.[33] Future amendments, including a series of amendments in 2004 which reaffirmed the state's role in protecting human rights and strengthened language relating to private property rights,[34] generally sought to reinforce these pro-market and legal reform messages.

Ginsburg and Simpser describe the window dressing role as "one in which the text is designed to obfuscate actual political practice."[35] The rights provisions of the Chinese Constitution, which are not legally enforceable and which are, in practice, regularly violated, are one key example of window dressing. One probable reason why authoritarian constitutions include such provisions is that they are now considered *de rigueur*: without them, a constitution is seen as incomplete. For many, the absence of such provisions would likely be so glaring as to undermine the entire document.[36] In other words, leaving out such window dressing would subvert the key legitimacy-enhancing goals of the constitutional drafting project.

Finally, Ginsburg and Simpser argue that authoritarian constitutions can serve as blueprints for future reforms, "describing things not as they are but as they might be."[37] As an example, Ginsburg and Simpser cite Mexico's 1917 constitution, which contained a number of progressive economic and social rights provisions including rights to land and education for the Mexican peasantry. Although not legally actionable at the time of their

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was winding down, may have incorporated many radical political slogans that, by the time the Constitution was formally promulgated, were losing favor. *Id*. at 802–803. Pragmatists were gaining ground on the radicals within the Party leadership, and they dimmed the lights on the radical billboard that had been so painstakingly constructed.

[33] Hungdah Chiu, *The 1982 Chinese Constitution and the Rule of Law*, 11 REV. SOCIALIST L. 143 (1985). *See also* Jones, *supra* note 31.

[34] QIANFAN ZHANG, THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS 57 (2012).

[35] Ginsburg & Simpser, *supra* note 21, at 7.

[36] *See* Tom Ginsburg, Zachary Elkins & James Melton, *The Content of Authoritarian Constitutions*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 143 (Tom Ginsburg & Alberto Simpser, eds., 2014) ("there are very few statistically significant differences between authoritarian and democratic constitutions when controlling for other factors . . . [this convergence] indicates a continual process of lagged adaptation by authoritarians, who seek to model their texts on those of their democratic counterparts").

[37] Ginsburg & Simpser, *supra* note 21, at 8.

drafting, these provisions nonetheless may have influenced subsequent Mexican land reforms which did in fact redistribute a significant amount of farmland to Mexican peasants.[38]

One could argue that steps by the CCP to enhance the authority of the National People's Congress[39] and the quality and integrity—if not the independence—of the judicial system[40] are examples of the application of the blueprint role in the Chinese context. In my view, the incomplete, even stalled nature of these reforms means that the blueprint model is somewhat limited in its application in contemporary China.[41] While state organs exercise greater authority than they did at the onset of the reform era, it remains the case that all virtually all important decisions are made by Party officials, and are then ratified by state organs.[42]

Also, the notion of a blueprint implies a desire to reach a certain constitutionally-described destination. As I argue below, there is little if any evidence to suggest that state-led reforms are in fact geared toward creating the constitutionally-mandated governance structure. For that reason as well, the blueprint concept has limited application in the Chinese context.

That does not mean, however, that the idea of the constitution as an authoritarian reformist blueprint is irrelevant to the Chinese context. The fact that the Chinese Constitution lays out a system of constitutional governance and rights protection similar to fully-developed liberal constitutional regimes allows the CCP to use the

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[38] James J. Kelly, Jr., *Article 27 and Mexican Land Reform: the Legacy of Zapata's Dream*, 25 COLUM. HUM. RTS. L. J., 541 (1994).

[39] Michael William 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 (2002). *See also* KEVIN J. O'BRIEN, REFORM WITHOUT LIBERALIZATION: CHINA'S NATIONAL PEOPLE'S CONGRESS AND THE POLITICS OF INSTITUTIONAL CHANGE (2008).

[40] Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620-638 (2007). *But see* Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, *in* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 69, 74 (Peerenboom, ed., 2010) (arguing that while the independence of individual judges in the Chinese court system remains weak, the "collective independence of the Chinese courts has been strengthened through increased budgets, more streamlined and efficient processes, and efforts to increase the authority of the courts").

[41] *See* Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011).

[42] Christopher K. Johnson and Scott Kennedy, *China's Un-Separation of Powers: The Blurred Lines of Party and Government*, FOREIGN AFFAIRS (July 24, 2015), https://www.foreignaffairs.com/articles/china/2015-07-24/chinas-un-separation-powers.

constitutional document as a legitimacy-enhancing tool.[43]

It is this legitimacy-enhancing function that creates a fifth role. In this Article, I argue that, for the CCP, and likely for other authoritarian regimes as well, the constitution has a fifth function that is related to, but is somewhat distinct from, the other four. That fifth function is a *false blueprint*. As noted above, the CCP has shown little if any intention of actually moving forward with a set of reforms that would, formally and finally, institutionalize the exercise of political power within state organs. Instead, the Party seeks to use the Constitution to legitimize its rule by maintaining the political fiction that China is transitioning to constitutional governance.

This false blueprint function also highlights another purpose of the window-dressing language found in authoritarian constitutions. If an authoritarian constitution is going to be successfully presented to elite audiences and the general public as a false blueprint, it needs to contain provisions that lay out a transition to a constitutionalist governance structure by increasing protections for individual rights. Without such window dressing language, the state cannot—disingenuously—point its citizens towards a final outcome.

Maintaining the false blueprint requires the CCP to walk a very fine line: it needs to regularly extoll the values found in the 1982 Constitution, while obscuring the fact that it has no intention of living up to them. In other words, it has to talk the talk of constitutionalism, all while avoiding walking the walk. It needs to be perpetually "in transition" without ever arriving anywhere.[44] I call this the *authoritarian constitutional dilemma*.

Perhaps, unsurprisingly, such a balancing act gets more and more difficult over time. More and more observers—including academics, intellectuals, and activists—start to lose faith in the Party's commitment to reforms that they pledge to make over and over again. In other words, authoritarian governments face a significant *temporal challenge* of authoritarian constitutional legitimacy. How (and whether) an authoritarian regime can maintain

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[43] For an excellent study of the ways in which the CCP uses institutional reform to enhance its political legitimacy, s*ee* Bruce Gilley, *Legitimacy and Institutional Change: the Case of China*, 41 COMP. POL. STUD. 259 (2008). Gilley focuses less on the Chinese Constitution, and more on broader political reforms that, in some cases, dovetail with constitutional norms. *See also* BRUCE GILLEY, THE RIGHT TO RULE: HOW STATES WIN AND LOSE LEGITIMACY (2009).

[44] Carothers, *supra* note 24. Though Carothers is focused on transition to liberal democracy, many of his insights are relevant to constitutional development within a one-Party system.

the legitimacy-enhancing benefits of constitutionalist rhetoric over time is a very interesting question, one that China's experience, both in 2013 and over the past thirty years of reform, can shed light on.

For a number of reasons, the CCP faces particularly significant difficulties in maintaining the public's belief in the false paradigm. First and foremost, the CCP has been offering up Constitutional reform rhetoric for quite some time. For over thirty years, since the passage of the 1982 Constitution, the CCP has touted its efforts to develop constitutionalism. Over that time, the Party has twice proclaimed December 4 as a day of reflection on the importance of constitutional values. In 1982, the CCP dubbed December 4 as "Implement Constitution Day," and in 2014, December 4 became "National Constitution Day." In effect, the Party was trying to get double the political mileage out of the same propaganda tool.

A second difficulty for the CCP in maintaining public buy-in for the false blueprint is the emergence of a much more diverse and pluralistic intellectual class that can expose the public to a much broader range of ideas. In particular, the emergence of a growing number of liberal constitutional voices—a group that did not really exist a generation ago—poses a significant challenge to the Party's efforts to maintain the public façade of its false blueprint. As the 2013 debate demonstrated, Liberals are often the only group willing to directly and publicly question the sincerity and validity of the Party's constitutionalist rhetoric. But for those liberal voices, it would be much easier for the Party to maintain its false constitutionalist credentials.

Finally, the Internet revolution also makes it more difficult for the Party to maintain public belief in the false blueprint. In contemporary China, constitutional reform can become a question of public debate, and views can be expressed—more often than not, indirectly—about whether or not constitutional reform will move forward anytime soon. This is exactly what happened in 2013: an unprecedented number of individual citizens followed the academic debate online, many expressing their own support for constitutional implementation as they did so.

Though I discuss only the case of China in this article, the ideas I raise here, including the false blueprint paradigm, the authoritarian constitutional dilemma, and the temporal challenge of authoritarian constitutionalism, are relevant to the study of authoritarian constitutionalism more generally. The former Egyptian authoritarian ruler Hosni Mubarak, for example, amended the

Egyptian constitution in 2005 and 2007, claiming that such reforms were putting Egypt on the path to fuller electoral democracy.[45] He, too, sought to put forward a false blueprint for constitutional development. Just days before his ouster in 2011, Mubarak put forward further constitutional reforms in a last-ditch effort to mollify thousands of street protesters who demanded his resignation. Those efforts failed in part because, after three decades in power with little to show in the way of institutional reforms, Mubarak's constitutionalist promises rang hollow. In some ways, Mubarak's downfall represented an extreme case of the temporal challenge: he simply could not maintain the political viability of constitutional reform rhetoric over time.

A. The False Blueprint in China: Constitutional Reform or Rhetorical Tool?

In this section, I argue that failure to understand the role of the Chinese Constitution as a legitimacy-enhancing false blueprint has led some scholars to overstate either the potential for constitutional reform within the existing structure, or the extent to which constitutional reform (as opposed to legal reform) has already taken place. While such efforts might seem constructive in that they seek to highlight the developmental potential of the existing Chinese Constitution, even within the limits of one-party rule, nonetheless such approaches can have a downside: they can put a positive gloss on the status quo, which, in turn, helps the Party legitimize authoritarian rule.

At the risk of stating the obvious, China has made much progress on legal reform over the thirty years since the reform and opening era began. But framing what may often be genuine reforms as evidence of *constitutional* development may overstate the nature of the change, and also falsely suggest a potential for robust institutional development along constitutional lines. Because the Party embarked on another round of constitution-based public messaging in late 2014,[46] it makes sense to look very closely at what

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[45] Kristen Stilt, *Constitutions in Authoritarian Regimes: The Egyptian Constitution of 1971*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 111 (Tom Ginsburg & Alberto Simpser, eds., 2014).

[46] *Rules of the Party*, THE ECONOMIST (Nov. 1, 2014), http://www.economist.com/news/china/21629528-call-revive-countrys-constitution-will-not-necessarily-establish-rule-

reformist efforts have achieved – and what they have not achieved—over the past decade, and how best to classify those reforms that have taken place.

In essence, despite the limited progress that China has made on legal reform over the past decade, China's constitution remains a sham constitution,[47] one that, on balance, simply does not describe the system of governance in place in China today.[48] Its rights provisions remain unenforceable, and the allocation of powers to different state entities it describes is fundamentally compromised by Communist Party oversight—not to say usurpation—of the exercise of those powers. Nor can China's constitution be called aspirational: given the lack of a functional interpretative mechanism, it seems unlikely that constitutional rights provisions that are currently inactive will be given life anytime soon.[49]

This may seem like an uncontroversial contention. But in recent years, a small but growing body of scholarly literature has questioned the Chinese Constitution's moribund status. A number of authors, both Chinese and Western, have sought to draw attention to various reformist efforts in which the constitution was invoked, in order to argue that China is taking steps toward genuine constitutional governance.[50] Michael Dowdle, for example, has stated that "recognizable constitutional structures are, in fact, beginning to appear in China," and cautions that less careful observers of China's constitutional development might miss the "powerful potentiality" of the constitutional document.[51]

To be sure, the majority of these authors warn that it is too early to say whether China will continue to develop into a full-blown constitutional state (even if one that is still authoritarian in character).[52] They do, however, believe that there is more

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law-rules.

[47] Law & Versteeg, *supra* note 22.

[48] Xin He, *The Party's Leadership as a Living Constitution in China*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 245 (Tom Ginsburg & Alberto Simpser, eds., 2014) ("China's constitution . . . does not tell how the state actually operates").

[49] Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631 (2009).

[50] Dowdle, *supra* note 23. *See also* Dowdle, *supra* note 39, at 2 ("China provides us with a prime example of significant constitutional development in an otherwise authoritarian regime . . . [readers should pay attention to] significant evidence of constitutional development in China").

[51] Dowdle, *supra* note 23.

[52] Stephanie Balme & Michael W. Dowdle, *Introduction* to BUILDING CONSTITUTIONALISM IN CHINA 2 (Stephanie Balme & Michael W. Dowdle , eds., 2009)

constitutional activity than meets the eye, and that closer scrutiny is needed.

I believe that these scholars run the risk of overstating recent developments. I also question whether framing what progress has been made as truly constitutional in nature makes sense. My concern is this: constitutional framing may mischaracterize essentially *political* debates as *legal* or *constitutional* ones; may overstate the impact and permanence of those changes that have taken place; and may overstate the capacity of the system for long-term constitutional development at the institutional level.

To be sure, countries that are in transition to constitutionalism may not yet possess all of the elements of constitutional governance.[53] But in order to be in transition, a system must be actively developing the institutions (judicial or otherwise) that will interpret the constitution, and apply such interpretations to laws, regulations, and the state use of power more generally. Such a system would also be beginning to adopt some set of institutional checks and balances, so that each branch of government was constrained in its use of power, both by the constitutional document itself, and by the exercise of power by the other branches.[54] Without these two core elements – or at least the beginnings of these core elements—then it is hard to argue that constitutional development is underway.

It is true that, contrary to what once was the established view, authoritarian systems can in fact successfully integrate into their governance structures constitutional norms that genuinely constrain authoritarian rulers. As Barros has shown, the Chilean military junta under the leadership of Augusto Pinochet subjected itself to institutionalized constraints; Barros refers to the Chilean experience as a key example of what he calls "authoritarian self-limitation."[55]

("[w]hat we find in China . . . is a transitional constitutionalism whose future success is by no means certain, but whose dynamics and possibilities are significantly more interesting and robust than generally is recognized at present").

[53] *Id*. *See also* Tushnet, *supra* note 26.

[54] This application of core elements to transitional constitutions is by no means unique to this article. Giovanni Sartori, for example, argues that, in essence, a constitution is "a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a 'limited government.'" Sartori, *supra* note 20, at 855. Though Sartori was speaking of constitutionalist systems in general, his emphasis on institutions that restrict the use of political power is, I believe, at the heart of what a developing constitutional system must be aiming for in order to be truly in transition towards genuine constitutionalism.

[55] ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA,

In some ways, the Chilean experience sheds light on the lack of progress in China. While the Chinese Party-state has been forced, on occasion, to take action in response to external reformist pressures,[56] it has never fully implemented any reforms that would institutionalize political power along constitutional lines. The past three decades are rife with examples of half-measures and abortive reforms that, if they had been zealously implemented and built upon, might have served to constrain Party power in some meaningful way.[57] The fact that the CCP has not done this speaks to its own lack of interest in authoritarian self-limitation.

Perhaps the clearest signal of the Party's lack of interest in subjecting itself to institutional constraints comes from the Party itself. In his comprehensive survey of the CCP's responses to the collapse of the Soviet Union, Shambaugh shows that the CCP engaged in an intensive study of the demise of the Soviet system in order to learn from—and, the CCP leadership hoped, avoid—the mistakes that Soviet leaders made.[58] According to Shambaugh, the studies carried out by various Party-affiliated think tanks and scholars identified a range of economic, political, and cultural factors that led to the collapse of the Soviet Union, not least among them the "dogmatic, ossified, inflexible, (and) bureaucratic ideology and thinking" of many top Soviet leaders, with the exception of Gorbachev.[59]

Shambaugh also notes that official studies pointed to the dangers of many of the "Rightist" (liberal) reforms instituted by Gorbachev, including "advocacy of pluralist ideology," "negating the leadership position of the Communist Party," separating Party and

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AND THE 1980 CONSTITUTION 16–28 (2002).

[56] *See* discussion of the Sun Zhigang case, *infra* at 21–23.

[57] One key example is the Administrative Litigation Law (ALL). Enacted in 1989, the ALL was meant to serve as a key vehicle for allowing citizens to play a role in limiting abuse of power by local officials. Yet a range of factors contributed to the effective neutering of the ALL, and it is largely seen by Chinese scholars as having failed in its initial ambition to serve as a meaningful constraint on local governments. Some scholars have argued in fact that the key goal of the ALL is not to make local governments accountable to the people they serve, but rather to make local governments more accountable to the center. *See* Xin He, *Administrative Law as a Mechanism for Political Control in Contemporary China*, *in* BUILDING CONSTITUTIONALISM IN CHINA 144-45 (Stephanie Balme & Michael W. Dowdle, eds., 2009).

[58] DAVID SHAMBAUGH, CHINA'S COMMUNIST PARTY: ATROPHY AND ADAPTATION (2008).

[59] *Id.* at 67.

government functions, and "negating democratic socialism."[60] Real constitutional reform would invoke all of these concerns, so much so that, as outlined below, Leftist attacks on proponents of constitutional reform in mid-2013 would recite very similar charges against their adversaries. This suggests that the Party has not forgotten what it perceives as the lessons of the Soviet experience.

Shambaugh's study shows that, whatever congruence there may be between specific reforms and a comprehensive constitutional reform agenda, the end goal of the CCP in enacting those specific reforms differs fundamentally from the reformist goal of a true constitutional system in which power is institutionally constrained.[61] Shambaugh's study strongly suggests that the Party believes a genuine embrace of constitutionalism, rather than reinforcing its own position, might well lead to the collapse of the one-party system altogether, just as similar reforms did in the Soviet Union.

B. Constitutional Rhetoric or Constitutional Reform?

Without doubt, it can be tempting to see various specific instances of liberal reform as part of a larger picture of long-term constitutional development. In my own prior writing on Chinese constitutionalism, I have analyzed attempts by would-be reformers to "judicialize" the Chinese Constitution, and in so doing to make state action subject to at least a limited form of judicial review.[62] I have also analyzed cases of judicial innovation by Chinese judges who, contrary to the general understanding of their quasi-constitutional role, have applied constitutional norms to specific cases. These actions, in essence, have created additional legal requirements for

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[60] *Id.* at 68–70.

[61] *Id.* at 3 ("the CCP has zero interest in transitioning to a Western, or even an Asian, democratic system of competitive parties"). Though Shambaugh does not specifically address constitutional reforms, his study generally makes clear that far-reaching liberal reforms that would limit Party authority have been rejected. Constitutionalism would certainly be in this category.

[62] Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT'L J. CONST. L. 215 (2009). In particular, I argued that growing public rights consciousness generated in part by constitutional litigation might force the Party-state's hand: "If more and more Chinese citizens begin to see constitutional rights as both relevant to their own lives and legally enforceable, then the government may face growing public pressure to respond with more far-reaching reforms." *Id.* at 245-46.

certain litigants not found in Chinese laws and regulations.[63] I have argued that Chinese courts should be given more space to engage in more such innovation, and that their actions might serve as a key element in a renewed push by the Party-state to the build a rule of law system.[64]

Though these articles are—I hope—still relevant contributions to the study of Chinese law, they did not, at least as of this writing, serve as a predictor of the developmental path of the Chinese Constitution. In the end, the Party-state chose not to follow up on the openings highlighted by the cases I described. Indeed, in one instance, the Supreme People's Court formally annulled the 2001 Qi Yuling case, which remains the only attempt at full-fledged top-down constitutional reform.[65] The failure to build on these successes speaks to the Party's reluctance to cross the Rubicon of constitutional development, and develop a mechanism by which the Party-state is genuinely circumscribed in its exercise of political power. Until that Rubicon has been crossed, it will be hard to argue that the Chinese Constitution is a truly meaningful legal document.

Similarly, many analysts have focused on various incidents in which constitutional arguments have played a role to argue that the Chinese Constitution has in fact become operationalized. Ginsburg and Lin, for example, highlight various cases in which the officials have made reference to the constitution in order to resolve various legislative disputes. For them, these cases show that the Chinese Constitution "plays an increasingly important role within the party-state."[66] In their view, "China's top legislature has routinely engaged in interpreting the Constitution during the legislative process, and has already accumulated a rich body of constitutional norms."[67]

It is true that, in the various examples they cite, the Constitution seems to have played some role. That said, most of the cases that they cite are of relatively limited significance from a constitutional development perspective, in the sense that they do not limit state power or create a new interpretative norm that must be

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[63] Thomas E. Kellogg, *"Courageous Explorers"? Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141 (2007).

[64] *Id*. at 187–88.

[65] Thomas E. Kellogg, *The Death of Constitutional Litigation in China?*, 9 JAMESTOWN CHINA BRIEF, no. 7, at 4, 2009, https://jamestown.org/wp-content/uploads/2009/04/cb_009_7_02.pdf.

[66] Yan Lin & Tom Ginsburg, *Constitutional Interpretation in Lawmaking: China's Invisible Constitutional Enforcement Mechanism*, 63 AM. J. COMP. L. 467, 467 (2015).

[67] *Id*. at 469.

followed in future. In general, in the various cases that Ginsburg and Lin describe, state authorities use the Constitution to justify state action; they fail to uncover a case in which the legislature reluctantly concluded that an action it wanted to take was constitutionally prohibited.

Ginsburg and Lin also fail to grapple with the (much more numerous) cases in which the NPC fails to grapple with constitutional questions raised during the legislative process. In 2014, for example, the NPC Standing Committee passed a Counter-Espionage Law. That law, which replaced the 1993 National Security Law, allowed for the seizure of various assets being used for espionage by Chinese or international organizations.[68] Such provisions would seem to implicate several constitutional rights protections, including the right to be protected against unlawful search,[69] and the right to privacy of personal communications.[70]

Though the law did state that "counterespionage work must be carried out in accordance with the law and respect and protect human rights, as well as protect the legal rights of civil society organizations,"[71] nonetheless no prophylactic protections were put into place to ensure that the Law would not be misused by state authorities to conduct surveillance against or seize the assets of civil society organizations engaged in various forms of advocacy work. Indeed, as far as is known, constitutional values failed to influence the legislative drafting process in any way.

Perhaps most importantly, Ginsburg and Lin overstate the legal value of constitutional arguments raised during the legislative process. In fact, such arguments, regardless of their strength, are not binding on future legislative action.[72] For example, Ginsburg and Lin discuss various cases in which the NPC and the National People's Congress Standing Committee (NPCSC) have been called upon to clarify the meaning of constitutional provisions relating to public

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[68] Didi Kristen Tatlow, *China Approves Security Law Emphasizing Counterespionage*, N.Y. TIMES, Nov. 2, 2014, http://www.nytimes.com/2014/11/03/world/asia/china-approves-security-law-emphasizing-counterespionage.html.

[69] XIANFA art. 39 (China) (1982).

[70] XIANFA art. 40 (China) (1982).

[71] *China passes Counterespionage Law for Comprehensive State Security*, XINHUA (Nov. 1, 2014), http://news.xinhuanet.com/english/china/2014-11/01/c_133759158.htm.

[72] Ginsburg and Lin also do not address the question of failure to implement laws, and the lack of a constitutional mechanism to address failed implementation by local or provincial governments.

ownership of natural resources and land, a key issue in China in recent years.[73] As Ginsburg and Lin themselves point out, in drafting laws that give meaning to these constitutional provisions, the NPC and the Standing Committee have taken a largely ad hoc, "case-by-case" approach, and have even given "strikingly different answers" in response to different laws as to the meaning of public ownership of different resources.[74] No jurisprudence was developed by the NPC and the NPCSC during the law-drafting process, and even the legal norms that were codified in laws were not applicable to future laws.

In essence, constitutional arguments put forward during the legislative process are more rhetorical and political in nature than they are legal or constitutional. In practice, if the Party decided that it wanted to reverse recent property law reforms to reclassify the ownership of various natural resources, or to strengthen the ownership rights of the state versus private property rights holders, it would face few legal barriers in doing so. Such action may well be politically unlikely, but it is by no means legally or constitutionally impermissible.

Without doubt, Ginsburg and Lin's examination of the rhetorical role of the Chinese Constitution in the legislative process contributes to a fuller understanding of how laws are made in China. It is also undoubtedly a positive sign that constitutional arguments carry some rhetorical weight in certain NPC deliberations. But it seems like an overstatement to suggest that the cases they examine demonstrate that the NPC and the NPCSC "have been fairly active in illuminating constitutional meanings in China"[75] or to suggest that the legislative process has become "a major venue for constitutional evolution."[76]

C. Popular Constitutionalism Chinese Style? The Limits of Bottom-Up Reforms

The lack of state-led constitutional activity has led a number of both Chinese and Western scholars to shift their attention to Chinese society itself as the likely key force for constitutional development. Indeed, bottom-up reforms have achieved more than

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[73] XIANFA art. 9–10 (China) (1982).
[74] Lin & Ginsburg, *supra* note 66, at 14.
[75] *Id.* at 16.
[76] *Id.* at 18.

top-down efforts over the past several years. For the foreseeable future, such efforts—often labeled as Chinese examples of "popular constitutionalism"[77] —represent the best hope for new reforms.[78]

That said, however, labeling those reforms that have been achieved through social mobilization efforts as moments of meaning constitutional development is problematic. Given that virtually all of the reforms that have been achieved by citizen activism are limited in their broader impact, and are, at the end of the day, not binding on future Party or state action, the constitutional moniker may not fit.

Take, for example, the 2003 Sun Zhigang case. In April 2003, the tragic death of a young student named Sun Zhigang in detention stirred nationwide outrage.[79] Sun had been detained under the so-called Custody and Repatriation regulations, which allowed local officials to detain individuals found residing in places other than their official place of residence as designated on their household registration, or *hukou*.[80]

After Sun's death, apparently at the hands of local detention center officials, made newspaper headlines nationwide, three young scholars in Beijing—Teng Biao, Xu Zhiyong, and Yu Jiang—submitted a constitutional review proposal to the NPCSC, which is formally empowered to interpret the Chinese Constitution. They argued that the Custody and Repatriation regulations were both illegal and unconstitutional, in that they violated the Constitution, the Legislation Law, and the Administrative Punishment Law.[81]

Within weeks of the scholarly petition, the State Council announced that it was scrapping the regulations, replacing them with

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[77] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004). Kramer argues that, in the early years after its inception in 1789, the American constitutional republic featured an active and dynamic role for the American people in constitutional development. It was they, Kramer argues, and not merely the courts, the Congress, or the executive, who "were responsible for seeing that [the Constitution] was properly interpreted and implemented. The idea of turning this responsibility over to judges was simply unthinkable."

[78] Thomas E. Kellogg, *Western Funding for Rule of Law Initiatives in China: the Importance of a Civil Society-Based Approach*, CHINESE PERSPECTIVES, no. 3, 2012, at 53, https://chinaperspectives.revues.org/5954.

[79] For an excellent account of the Sun Zhigang case and its aftermath, *see* Keith J. 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. TRANSNAT'L L. 114 (2006).

[80] *Id.* at 120.

[81] *Id.* at 124.

voluntary measures to aid migrants.[82] The State Council announcement was rightly hailed as an important victory for Chinese constitutionalism, and has since been seen as a key milestone in China's constitutional development.

It was indeed an important victory, but was it a developmental milestone? It is true that, as a result of public pressure largely framed in constitutional language, the Chinese government scrapped a pernicious form of arbitrary detention that, facially speaking, would seem to violate Chinese constitutional rights provisions. But for all of its success, the Sun Zhigang case did not change the meaning of the Chinese Constitution: it did not, for example, create a constitutional norm prohibiting arbitrary detention. Though Custody and Repatriation was scrapped, a number of other forms of arbitrary detention remained on the books, some of which remain in effect to this day.[83] In addition, the constitutional petition issued by Xu, Teng, and Yu did not create a new process for petitioning for constitutional change: the NPCSC has failed to take any formal constitutional action on all subsequent constitutional petitions addressed to it.

Even in Sun's case, the Party-state took great pains to deny the constitutional implications of its own actions. In a historic first, the NPCSC did formally accept the constitutional review petition authored by the three scholars.[84] However, rather than publicly responding to the constitutional petition or stating that it was issuing an interpretation of the Chinese Constitution, the State Council merely voided the regulations without any constitutional explication or explanation whatsoever. While it is true that the Party did initially allow extensive public discussion of the case online and in the Chinese media,[85] it likely did so in order to bolster its own constitutional credentials at a time when its public credibility had been damaged, rather than as a signal of any willingness to accept additional reforms.[86] The Party's decision to act through the State

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[82] *Id.* at 128.

[83] CHANGING THE SOUP BUT NOT THE MEDICINE: ABOLISHING RE-EDUCATION THROUGH LABOR IN CHINA, AMNESTY INTERNATIONAL (2013), https://www.amnesty.org/en/documents/asa17/042/2013/en. *See also* "AN ALLEYWAY IN HELL": CHINA'S ABUSIVE "BLACK JAILS," HUMAN RIGHTS WATCH (2009).

[84] Hand, *supra* note 79, at 149.

[85] Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PA. E. ASIA L. REV. 51 (2012).

[86] The government also enacted some minor improvements to the NPCSC's legislative review process, in particular by creating a new office to review and resolve legislative

Council rather than the NPCSC also meant that no formal constitutional precedent was set. This meant that the Party-state remained free of formal constitutional constraints on its authority.

A better understanding of the Sun Zhigang case might be arrived a through a study of the underlying political dynamics, rather than through an emphasis on its legal-constitutional dimensions. In essence, the Sun Zhigang case was a significant political victory, which showed, more or less for the first time, that the Party could be forced to bow to political pressure to enact progressive reforms, assuming that pressure was sufficiently strong and sustained.

From the Party's perspective, an excessive emphasis on the legal-constitutional elements of the Sun Zhigang case and other such cases might obscure what is actually happening. At times the Party is forced to compromise, but it always preserves its monopoly on political power and its ability to exercise that power without any institutional constraints. While it is true that such forms of negotiation and compromise are an important development, nonetheless they are just that: forms of political contestation and negotiation, which, sadly, are all too rare[87] and have virtually no permanent institutional impact. Perhaps the best that one can say about the constitutional implications of cases like the Sun Zhigang tragedy is that they constitute important victories for constitutionally enumerated values. Nonetheless, they have not brought China any closer to actual constitutional enforcement. Therefore framing them as part a process of ongoing constitutional development—rather than as discrete and often important victories for liberal reformers—may not make sense.

This is not to say that efforts by academics, lawyers, and activists are not deeply important—of course they are. Such efforts have been especially successful in terms of educating the public on how constitutions should work to limit state power and protect individual rights. But there are limits to what such approaches can

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conflicts. Hand, *supra* note 79, at 152. Over the first decade of its existence, however, that office, known as the Bei'an Shi, has failed to play a meaningful role, either in resolving legal conflicts, or in constitutional development more generally. Chinese constitutional scholar Guobin Zhu, for example, concludes that "the symbolic significance of the (Bei'an Shi) reaches farther than the actual significance." Guobin Zhu, *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, 43 SUFFOLK U. L. REV. 625 (2010).

[87] Qianfan Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, 8 INT'L J. CONST. L. 950, 968–76 (2010).

accomplish, first and foremost because they are not easily reproducible.[88] Given that only extreme miscarriages of justice—most likely including death—are enough to capture public attention, the model, such as it is, comes with a high human cost.

Overall, China's experience over the last decade or more speaks more to the limits of bottom-up constitutional development strategies within an authoritarian system than it does to the potential of such strategies to produce fundamental systemic change. From a ruler's perspective, China's experience indicates that authoritarian governments have to carefully balance the legitimacy-enhancing benefits of legal reform with the concern that such reforms could, if taken too far, eventually limit the authoritarian ruler's power and undercut the ruler's political legitimacy.[89] Such a balancing act requires constant vigilance, and, when necessary, repressive retrenchment, to pull back—or if need be, forcibly retire—those scholars, lawyers, and activists who would push reforms farther than the Party is willing to see them go.[90]

III. THE DEBATE BEGINS: DECEMBER 2012–MAY 2013

The first stage of the debate ran from December 2012 to May 2013, and was, in essence, a conversation between two groups: the Liberals and the Socialist Constitutionalists. While both Liberals and Socialist Constitutionalists agreed on the need for constitutional reform, and even largely agreed on several of the key elements of constitutional reform—including a constitutional review mechanism,

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[88] *Id*. at 968–972 ("[r]ather than improving the institutional capacity of the regime to prevent abuses of power, the Sun Zhigang model, in essence, provides only a trigger for initiating a remedial process. The process itself is not only too late, in view of the occurrence of the tragedy and the inability to prevent conflict, but is seriously limited, as well, in its capacity to correct the wrongs produced by an anachronistic institutional arrangement naturally prone to corruption and abuses of power.").

[89] *See* Fu Hualing et al., *Challenging Authoritarianism Through Law: Potentials and Limit*, 6 NAT'L TAIWAN U. L. REV. 339, 358 (2011) ("there are inequality and injustice [in China] and people who have suffered are entitled to legal remedies. But a legal mobilization, as rights lawyers have envisaged and are practicing, is too interruptive to political stability that is essential for the survival of the Party/state. Injustice as prevalent as it is, can only be brought to solution at a pace and according to a method with which the CCP is comfortable. Lawyers cannot be the representative of the interest of the people. Only the Party can.").

[90] One such moment of retrenchment took place in July 2015, when the Party-State detained or harassed close to three hundred lawyers and activists, in one of the largest attacks on civil society in China in recent memory. *See* Andrew Jacobs & Chris Buckley, *China Targeting Rights Lawyers in a Crackdown*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html.

enhanced basic rights protections, and greater institutional independence for each of the three branches of government—they disagreed on how advance the cause of reform. Most Socialists, articulating the mainstream academic view, argued in favor of working through the existing system and sought areas of compromise, or, even better, agreement with the CCP. Liberals, on the other hand, expressed skepticism over the willingness of the Party to embrace any meaningful constitutional reforms, and therefore questioned theories of change that put the Party, rather than bottom-up social pressure for reform, at the forefront.

The debate over constitutionalism began on December 4, 2012, with a speech by Xi Jinping on the 30th anniversary of the 1982 anniversary of the Constitution. Speaking to a large audience in the Great Hall of the People, Party Secretary Xi extolled the supremacy of China's constitution and called for greater attention to constitutional implementation.[91]

Notably, Xi highlighted the basic rights provisions of the 1982 Constitution, and called for protection of the people's "personal rights, private property rights, and other political rights according to the law."[92] Xi even obliquely suggested a need for institutional change, a long-sought goal of reform-minded academics. Xi said "[w]e must establish mechanisms to restrain and supervise power . . . power must be responsible and must be supervised."[93]

At first glance, such remarks might seem to herald an important shift: for decades, even as the Party has embraced legal reform, it has shied away from the creation of institutional mechanisms that would both restrain its free hand in the exercise of political power, and also better protect citizens' rights against state intrusion.

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[91] *Xi Jinping Pledges to Implement Rule of Law*, CHINA DAILY (Dec. 5, 2012), http://www.chinadaily.com.cn/china/2012-12/05/content_15985873.htm (quoting Xi Jinping, "To fully implement the Constitution needs to be the sole task and the basic work in building a socialist nation ruled by law").

[92] Xi Jinping (习近平), *Zai Shoudu Gejie Jinian Xianxing Xianfa Gongbu Shishi 30 Zhounian Dahui Shang de Jianghua* (在首都各界纪念现行宪法公布施行 3 0 周年大会上的讲话) [*Speech in the Capital Commemorating the 30th Anniversary of the Promulgation and Implementation of the 1982 Constitution* (Dec. 4, 2012), http://news.xinhuanet.com/politics/2012-12/04/c_113907206.htm, *translation at* http://lcbackerblog.blogspot.com/2013/05/xi-jingpings-constitutional-vision.html.

[93] *Id.*

And yet, given the Party's history of appropriating the language of law, constitutionalism, and rights for its own purposes, many observers did not take Xi's December 4 speech at face value. In fact, Xi's predecessor, Hu Jintao, made a similar speech soon after he took office, celebrating the 20th anniversary of the 1982 Constitution. In that speech, Hu praised the constitution as the "fundamental guideline" for using state power and, like Xi, called attention to the constitution's protection of basic rights. Hu also made reference to the still-imperfect implementation of the Constitution, and also hinted at the need for an improved "[c]onstitutional supervision mechanism."[94] Hu's pro-reform rhetoric had little effect on his substantive agenda. When he stepped down in 2012, Hu had undertaken no meaningful constitutional reforms. In general, Hu's ten-year tenure was criticized by many for the lack of progress on legal reform.[95]

Despite this history, many observers within China took advantage of the opportunity afforded both by Xi's remarks to put forward pro-constitutional reform arguments. Many reformers also wanted to take advantage of the fact that, less than a year into Xi's tenure as China's supreme leader, his views on reform were at that time largely unknown, and the political direction for the coming year was still uncertain.[96] Though Xi inherited a temporal challenge created by thirty years of Party inaction on constitutional

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[94] Hu Jintao (胡锦涛), *Hu Jintao Zai Shoudu Gejie Jinian Zhonghua Renmin Gongheguo Xianfa Gongbu Shishi Ershi Zhounian Dahui Shang de Jianghua* (胡锦涛在首都各界纪念中华人民共和国宪法公布施行二十周年大会上的讲话) [*Hu Jintao's Speech in the Capital in the Great Hall of the People on the 20th Anniversary of the Promulgation and Implementation of the 1982 Constitution*], XINHUA (Dec. 4, 2002), http://news.xinhuanet.com/newscenter/2002-12/04/content_649591.htm, *translated at* http://www.humanrights.cn/zt/magazine/200402004823153254.htm.

[95] Ian Johnson & Keith Bradsher, *On Way Out, China's Leader Offers Praise for the Status Quo*, N.Y. TIMES (Nov. 8, 2012), http://www.nytimes.com/2012/11/09/world/asia/hu-jintao-exiting-communist-leader-cautions-china.html. *See also* Shi Jiangtao, *President Hu Jintao's Legacy Seen as One of Stability but Stagnation*, S. CHINA MORNING POST (Sept. 7, 2012), http://www.scmp.com/news/china/article/1031120/president-hu-jintaos-legacy-seen-one-stability-stagnation.

[96] Chen Hongguo (谌洪果), *Zhongguo Dangxia de Xianzheng Sichao: Mubiao Ji Lujing Zhizheng* (中国当下的宪政思潮：目标及路径之争) [*Recent National Trends in Constitutionalist Thought: Debate over Goals and Paths*,] CHEN HONGGUO DE GONGSHI WANG: SIXIANGZHE DE BOKE (谌洪果的共识网：思想者博客) [CHEN HONGGUO'S CONSENSUS NET: A THINKER'S BLOG] (June 20, 2013), http://chenhongguo.blog.21ccom.net/?p=87.

development, the legitimacy gap was narrowed by the newness of Xi's administration.

Xi's strong anti-corruption rhetoric, which stems from his first days as Party Secretary,[97] also gave liberals hope that Xi was in fact serious about political reform. On at least one occasion, Xi publicly linked his own anti-corruption efforts to institutional reforms, stating that "power must be restricted by the cage of regulations."[98] As with the pro-constitutional rhetoric of his December 4 speech, this comment would also be repeatedly echoed by would-be constitutional reformists as evidence that Xi himself—and, by extension, the Party—was on their side.[99]

Xi's December 4 speech was a classic—and, by this point, almost ritualized—example of the Party's efforts to use the Constitution to enhance its legitimacy. With his suggestion that China "must establish mechanisms to restrain and supervise power,"[100] Xi suggested that he was contemplating institutional reforms that would fundamentally change the political system in China. In so doing, he was using the Constitution as a false blueprint, signaling—falsely, if the time that has passed since the speech is any guide—that he planned to move forward with institutional reforms that would operationalize the Chinese Constitution and turn it into a formal legal document.

One of the first responses to Xi's speech came from one of China's leading media outlets, Caixin. In an unsigned editorial

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[97] Andrew Hall Wedeman, *Xi Jinping's Anti-Corruption Campaign and the Third Plenum*, UNIVERSITY OF NOTTINGHAM CHINA POLICY INSTITUTE BLOG (Nov. 15, 2013), http://blogs.nottingham.ac.uk/chinapolicyinstitute/2013/11/15/xi-jinpings-anti-corruption-campaign-and-the-third-plenum/ (noting that, Xi's rhetoric to the contrary, his first year in office did not yield a significant increase in charges being filed against allegedly corrupt officials).

[98] *Xi Jinping Vows "Power Within Cage of Regulations*," XINHUA (Jan. 22, 2013), http://news.xinhuanet.com/english/china/2013-01/22/c_132120363.htm. Xi was addressing the Party's Central Commission for Discipline Inspection (CCDI), the Party's leading anti-corruption unit. In that same speech, Xi went on to say, "Party cadres at various levels should keep in mind that no one can enjoy absolute power outside the law." To date, however, no institutional reforms have been implemented as part of Xi's anti-corruption drive.

[99] Among many examples, *see* Weng Yicai (翁一采), *Cai Xia: Quanli Ru Long Guanche Zai Zhizheng Dang Wancheng Lishi Zhuanxing* (蔡霞：权力入笼关键在执政党完成历史转型) [*Cai Xia: The Key to Putting Power in a Cage is the Completion of the Historic Transition of the Governing Party]*, SHIDAI ZHOUBAO (时代周报) [TIMES WEEKLY] (Jan. 31, 2013), http://time-weekly.com/story/2013-01-31/128867.html.

[100] Xi, *supra* note 92.

published roughly a week after Xi's remarks, Caixin praised Xi's calls for greater attention to constitutional implementation. Caixin particularly emphasized institutional reforms, including longstanding proposals for a new Constitutional Court or a constitutional review committee under the NPC, noting that "[t]he constitution gains its authority in practice."[101]

Foreshadowing controversies to come, Caixin made reference to Xi's "Chinese Dream" rhetoric of earlier in 2012, saying that constitutional development was "also part of the dream."[102]

Later that month, another pro-constitutional reform salvo was fired, one which also made reference to Xi's December 4 speech. On December 26, a group of seventy-two prominent scholars, most of them in the Liberal camp, published a Reform Consensus Proposal (*gaige gongshi changyishu*). Signed by leading scholars, including Beijing University professors Zhang Qianfan and He Weifang, Chinese Academy of Social Sciences (CASS) scholar Xu Youyu, and former President of Chinese University of Political Science and Law Jiang Ping, the Proposal grew out of a meeting held jointly by the Beijing University Law School Constitutional and Administrative Law Research Center and the reformist magazine *Yanhuang Chunqiu* in late November.[103] The document advocated a six point reform agenda, including constitutional governance, implementation of electoral democracy, respect for free expression, deepening of market reforms, realization of judicial independence, and safeguarding of constitutional effectiveness, including through the creation and implementation of an effective constitutional review mechanism.

The Proposal was representative of much of the constitutional reform debate that would follow in 2013 in four key ways. First, it linked the need for constitutional reform to serious shortcomings in

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[101] *For China to Rise, so Must Status of Its Constitution*, CAIXIN ONLINE (Dec. 12, 2012), http://english.caixin.com/2012-12-12/100471777.html.

[102] *See also* Interview with Zhiwei Tong, constitutional scholar. Xu Wei (徐伟), *Tong Zhiwei: "Yixian Zhizheng" Jiu Yao Quanmian Luoshi Xianfa* (童之伟："依宪执政"就要全面落实宪法) [Tong Zhiwei: "Constitutional Governance" Requires Full Implementation of the Constitution], SHIDAI ZHOUBAO (时代周报) [TIMES WEEKLY] (Dec. 13, 2012), http://time-weekly.com/story/2012-12-13/128260.html. Tong suggests that, in essence, Xi's remarks show that the new CCP leadership favors constitutional reform.

[103] Lin Lan（林兰), *Zhongguo 70 Duo Zhiming Xuezhe Lianming Tuichu Gaige Gongshi Changyi Shu* (中国 70 多位知名学者联名推出《改革共识倡议书》) [*More Than Seventy Noted Chinese Scholars Jointly Release "Reform Consensus Proposal"*], RADIO FRANCE INTERNATIONALE (Dec. 26, 2012). The RFI report includes the full text of the Reform Proposal, which was subsequently blocked on websites inside China.

China's current governance structure, and painted a picture of abuse of power, corruption, and lack of transparency that could only be addressed through far-reaching and fundamental institutional reforms.[104] The Proposal eschewed academic jargon and theoretical abstractions to focus on a vision for China's future reform path that could be appreciated by both scholars and by a broader general audience.

Second, the Proposal pointed to the urgency of reform, suggesting that time was in fact not on the new leadership's side. "If the systemic reform that Chinese society so urgently needs is again thwarted, then stagnation, official corruption, and social discontent will lead China to the verge of crisis," the Proposal warns. "China will once again lose an opportunity for peaceful reform, and sink into the turbulence and chaos of violent revolution."[105]

Third, the Proposal, though aimed at the new leadership under Xi Jinping, highlighted the importance of broad public consensus, and the role of the Chinese people in pushing for bottom-up reform. "Without reformist pressure from outside the system, those inside the system will lack a motive drive for reform," the Proposal argues.

The fourth way in which the Proposal was representative of the reformist proposals that would follow in 2013 was that it indicated a high degree of consensus among academics and intellectuals in favor of reform. Though the debate between the Socialist Constitutionalists and the Liberals, described in more detail below, highlighted a number of areas of disagreement, nonetheless, there was broad agreement on the need for truly meaningful constitutional reform.

Other pro-Constitutional reform statements followed, many of which also made use of both Xi's December 4 speech and his "Chinese dream" rhetoric. In early January 2013, the pro-reform magazine *Yanhuang Chunqiu* issued a New Year's Greeting entitled "The Constitution is a Consensus for Political System Reform."[106] In

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[104] *Id.* (stating that the Proposal notes that the failure to make progress on political reform has meant that "official corruption, the misuse of public power, and the growing gap between rich and poor, and other such phenomenon have grown more critical with each passing day, leading to intense public dissatisfaction").

[105] *Id*.

[106] *Xianfa Shi Zhengzhi Tizhi Gaige de Gongshi* (宪法是政治体制改革的共识), [*The Constitution is a Consensus for Political System Reform*], YANHUANG CHUNQIU (炎黄春秋) [ANNALS OF THE YELLOW EMPEROR] (Jan. 2, 2013), *translated at* http://cmp.hku.hk/2013/01/02/30203/.

it, the magazine's editors gave various examples of how some of China's most pressing political, legal, and social challenges could be addressed by full implementation of specific constitutional provisions. Following in the footsteps of the Consensus Reform Proposal, *Yanhuang Chunqiu* called for institutional reforms, citing prior reform proposals calling for the creation of a constitutional review system or a constitutional court. Within days of the op-ed's publication, *Yanhuang Chunqiu's* website was shut down, though it would later be allowed to reopen.[107]

The drafters of the Reform Consensus Proposal and of the media pieces that followed were determined to make immediate use Xi's December 4 speech to push for constitutional reform. In particular, the Proposal was a paradigmatic example of the ways in which the regime's own constitutionalist rhetoric can be used to push a liberal, reformist, anti-authoritarian line. With its warning of impending crisis and calls for a bottom-up push for constitutionalism, the Proposal avoided the trap of reinforcing the Party's constitutionalist credentials, and instead kept its focus on the need for action. Such a push-and-pull between the Party and reformist intellectuals, with constitutionalism as the key vehicle, would become a key element of domestic political debate in 2013.

A. The Southern Weekend Controversy

The difficulties that *Yanhuang Chunqiu* faced over its New Year's editorial paled in comparison to the travails of the longtime liberal stalwart newspaper *Southern Weekend*. Its editors also penned a New Year's greeting highlighting the need for constitutional reform. In fact, the piece was originally titled "Chinese Dream, Dream of Constitutional Governance." That piece was essentially rewritten by provincial Party censors, leading to a standoff between *Southern Weekend* staff and provincial authorities, as well as carnival-like protests by members of the public in front of Southern Weekend's Guangzhou offices.[108]

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[107] Verna Yu, *Yanhuang Chunqiu Website Closed down After Editorial on Constitution*, S. CHINA MORNING POST (Jan. 5, 2013), http://www.scmp.com/news/china/article/1120153/yanhuang-chunqiu-website-closed-down-after-editorial-constitution.

[108] Edward Wong, *Protest Grows over Censoring of China Paper*, N.Y. TIMES (Jan. 7, 2013), http://m.cn.nytimes.com/china/20130108/c08southern-updated/en-us.

The incident began with an extensive back-and-forth between rank-and-file *Southern Weekend* editors and the editor-in-chief Huang Can over the content of the paper's annual New Year's message to readers.[109] In years past, the New Year's message had focused on the need for liberal reforms, and the original draft of the 2013 New Year's message, penned by editorial writer Dai Zhiyong, was no exception. Working in consultation with provincial propaganda officials, editor-in-chief Huang extensively watered down Dai's draft, altering the meaning of the piece considerably, while nonetheless keeping a few kernels of liberal reformist sentiment.

Had the watered-down version been published without additional changes, the episode would likely have passed unnoticed as just another example of routine censorship in the Chinese media. But the piece was reworked further. These further edits were attributed to provincial propaganda chief Tuo Zhen, a former journalist and longtime propaganda official known for his conservative views.[110] This final round of edits fundamentally altered the meaning of the piece, scrubbing it entirely of its original liberal tone. In essence, the last round of edits turned the editorial into a propaganda piece that praised the Party for its successful pursuit of the "Chinese dream" of national greatness.[111] This direct intervention by propaganda officials was seen by many as a new level of censorship, a form of heavy-handedness that crossed the line.

A side-by-side comparison of the two editorials highlights in very dramatic fashion the very different ways in which external and internal actors use constitutional concepts to craft very different messages, and to pursue very different goals.

Dai Zhiyong's original draft, "China's Dream, the Dream of the Constitution," made an eloquent and relatively moderate plea for

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[109] For an extensive account of the editorial process from an authoritative source, see Qian Gang, "*Why Southern Weekly Said 'No,'*" CHINA MEDIA PROJECT (Jan. 11, 2013), http://cmp.hku.hk/2013/01/11/30623/.

[110] *Id.* (suggesting that the final changes were made not by Tuo Zhen, but by his deputy Yang Jian. Moreover, propaganda officials ordered other changes—to pictures, to headlines, and to other pieces—in addition to the changes made to the New Year's editorial).

[111] A number of journalists—some of them ex-*Southern Weekend* staffers—noticed immediately that some lines in the New Year's Day editorial were borrowed directly from official propaganda pieces in outlets like the *People's Daily*. David Bandurski, *A New Year's Greeting Gets the Axe in China*, CHINA MEDIA PROJECT (Jan. 3, 2013), http://cmp.hku.hk/2013/01/03/30247/.

constitutionalism.[112] Dai makes four key points. First, he appropriates Xi Jinping's "dream" rhetoric, calling on his readers to realize the Chinese "dream of freedom, the dream of constitutionalism." Second, Dai reframes modern Chinese history as a series of—at times catastrophic—failures to realize this dream. Third, he places the CCP itself within this historical context, implicitly linking the Party to other pre-1949 ruling elites who also failed to realize the constitutionalist dream. In so doing, he suggests that contemporary problems are linked to the absence of constitutionalism, and can only be solved through constitutional development.

Dai's final point is perhaps his most subtle one and also among the most important. By framing his piece as written from the perspective of, and directly to the Chinese people themselves, Dai suggests that responsibility for achieving the "Chinese dream" of constitutionalism lies not with the Party, but with the people themselves. The people must "act right now with our own hands" in order to achieve it.

The revised editorial turns Dai's piece on its head. Rather than refashioning official Chinese dream rhetoric to serve a genuine liberal constitutionalist agenda, the revised piece instead embraces and trumpets the Party line, quoting Xi Jinping's call to realize the Chinese dream of "the rejuvenation of the Chinese nation." Rather than drawing historical parallels with the Qing Dynasty and the Republican era, the revised editorial places contemporary China—and, by extension, the ruling CCP—in the privileged position of having come "closer to this dream than we ever were." The single mention of constitutionalism suggests progress and effectuation, rather than any sense of falling short.

Half as long and, at times, platitudinous and dull, the revised editorial fails to engage or inspire. It reads as tired filler, as propaganda, and the basic errors that were written into the speech added insult to injury to those *Southern Weekend* journalists who were upset by its appearance in the pages of what once was China's most progressive news media outlet. The low quality of the piece,

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[112] *The Southern Weekly Affair: No Closer to the Chinese Dream?*, FREE SPEECH DEBATE (Feb. 20, 2013), http://freespeechdebate.com/en/discuss/the-southern-weekly-affair-no-closer-to-the-chinese-dream/. Both the original piece and the final published version were translated and published online by the Free Speech Debate project at Oxford University. Unless otherwise noted, all of the quotes from the editorial are taken from this translation.

and the intense negative reaction it generated, speaks to the very real challenge that the Party faces in creating constitutional messages that can resonate with the public.

When the revised editorial hit the newsstands on January 3, 2013, the reaction was immediate and intensely negative: top reporters and editors were shocked over the wholesale reworking of the piece, which took place outside of normal editorial channels, and deeply dismayed by its propagandistic tone. When *Southern Weekend* editor Huang Can took steps to have the paper publicly—and, of course, falsely—assert that the editorial was in fact written by *Southern Weekend* staff, editors and reporters rebelled, and called for an investigation of what they saw as unprecedented and unacceptable interference. Some reporters published an open letter calling for Tuo Zhen's resignation.[113] Others went on a short-lived strike.

If the response to the doctored editorial had been limited to the paper's staff, there is no doubt the Party would have considered it a regrettable but largely minor incident. However, news of the incident spread quickly across China on the Internet and made waves across Chinese society. Within days of the incident, protestors began to congregate outside of *Southern Weekend's* Guangzhou office, many of them toting signs calling for press freedom and other basic rights.[114] Interestingly, many of the protestors carried signs calling for the implementation of China's constitution. For many, the street protests were an extremely rare example of a public protest in defense of a basic constitutional ideal.

For millions of average Chinese, the incident played out online. Despite the best efforts of Chinese censors to keep the incident out of the mainstream press and off of the Chinese internet, an uncountable number of individual Chinese followed the standoff closely, avidly reading extensive Chinese-language and English-

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[113] Teddy Ng, *Former Southern Weekly Journalists Want Propaganda Chief Tuo Zhen to Go*, S. CHINA MORNING POST (Jan. 5, 2013), http://www.scmp.com/news/china/article/1120199/former-southern-weekly-journalists-want-propaganda-chief-tuo-zhen-go. The open letter strongly and publicly criticized Tuo Zhen by name, an extremely rare occurrence in China. The journalists referred to Tuo's actions as "ignorant and excessive," and also called for his resignation. "In this era where we see growing open-mindedness, his actions are muddle-headed and careless," the journalists wrote. "Tuo is unable to hold his current position, and should be forced to resign and make an open apology."

[114] Edward Wong, *Protest Grows over Censoring of China Paper*, N.Y. TIMES (Jan. 7, 2013), http://m.cn.nytimes.com/china/20130108/c08southern-updated/en-us. One banner carried by protesters read, "Get rid of censorship. The Chinese people want freedom."

language international media reports on the incident. Chinese actress Li Bingbing mentioned the incident to her 19 million followers on *Weibo*, the Chinese version of Twitter. Actress Yao Chen also sent an indirect message of support to *Southern Weekend* to her 31 million followers.[115]

On January 6, a constellation of more than two dozen of China's top intellectuals, academics, journalists, and lawyers, many of whom had written for *Southern Weekend* during its heyday as China's top intellectual journal, issued an open letter praising *Southern Weekend* for its contributions to reform in China. They echoed the call for Tuo Zhen's dismissal.[116] Several hundred intellectuals signed a second open letter calling for stronger legal protection of free expression. Others, including the journalism faculty at Nanjing University[117] and students at Guangzhou's Sun Yat-sen University,[118] also spoke out in support of *Southern Weekend's* rank-and-file journalists and editors. Overall, public interest in the controversy was very strong.

With cultural figures, prominent public intellectuals, journalists, and even some more mainstream academics all lining up on the side of *Southern Weekend*—and, at least in some way, in favor of constitutionalism—it seemed clear that the Party propaganda apparatus was losing the war of words, and that its loss was damaging the Party's credibility. Provincial officials moved quickly to negotiate an end to the standoff, which, in essence, guaranteed a return to "normal" standards of oversight and censorship. Public

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[115] *Id*.

[116] For a partial translation of the open letter, *see* David Bandurski, *Inside the Southern Weekly Incident*, CHINA MEDIA PROJECT (Jan. 7, 2013), http://cmp.hku.hk/2013/01/07/30402/.

[117] Teddy Ng, *Former Southern Weekly Journalists Want Propaganda Chief Tuo Zhen to Go*, S. CHINA MORNING POST (Jan. 5, 2013), http://www.scmp.com/news/china/article/1120199/former-southern-weekly-journalists-want-propaganda-chief-tuo-zhen-go.

[118] Ian Johnson, *Test for New Leaders as Chinese Paper Takes on Censors*, N.Y. TIMES (Jan. 6, 2013), http://www.nytimes.com/2013/01/07/world/asia/chinese-newspaper-challenges-the-censors.html. In their open letter, the students linked the struggle at *Southern Weekend* to the lack of legal status of the Chinese Constitution:

> It is because we have yielded that power has become unbridled and wanton; it is because we have been silent that the Constitution has become a rubber stamp. Our yielding and our silence has not brought a return of our freedom and our radiance. Quite the opposite, it has brought the untempered intrusion and infiltration of rights by power.

David Bandurski, *Students Speak out Against Censorship*, CHINA MEDIA PROJECT (Jan. 6, 2013), http://cmp.hku.hk/2013/01/06/30375/.

protests in front of the *Southern Weekend* office died down, and the public moved on to other issues.

To be sure, a key element of the *Southern Weekend* controversy was the way in which it demonstrated to Party leaders the growing tension between rank-and-file journalists and the massive Party-run censorship system.[119] Tensions between journalists and their managers had been growing for years, as Party propaganda officials moved to plug loopholes in the media management apparatus.[120] In particular, officials looked to strengthen pre-publication censorship and ensure that journalists could not beat the system and run stories that ran counter to Party interests. This in turn further alienated journalists, who resented having more and more stories altered or even killed.[121] The tensions were especially high at *Southern Weekend*, as the Party moved conservative officials into key Party posts both at *Southern Weekend's* parent, the Nanfang Daily Group, and at the Guangdong Province propaganda department, which oversees the paper.[122]

From a constitutionalist perspective, the incident demonstrated how evocative constitutional rhetoric can be and how quickly it can spread from elite circles to the general public. Public attention can, in turn, lead to public protests, long an anathema for the Party. The controversy illustrated the importance of Party control over the debate on constitutionalism: failure to maintain control could subvert Party efforts to publicly position itself as a pro-constitutionalist, reformist actor. In essence, the effect of the *Southern Weekend* incident was the exact opposite of what the Party usually attempts to achieve through constitutional-themed public messages: instead of bolstering the Party's legitimacy through the trumpeting of the constitution as a false blueprint, the *Southern Weekend* episode damaged the Party's reputation by exposing its

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[119] Qian Gang, *Why Southern Weekly?*, CHINA MEDIA PROJECT (Feb. 18, 2013), http://cmp.hku.hk/2013/02/18/31257/.

[120] For an excellent account of the long-term trends that led to the *Southern Weekend* controversy, see David Bandurski, *How the Southern Weekly Protests Moved the Bar on Press Control*, 13 JAMESTOWN CHINA BRIEF, no. 3, at 6, 2013, https://jamestown.org/program/how-the-southern-weekly-protests-moved-the-bar-on-press-control/.

[121] *Id*.

[122] Interestingly, Guangdong's new propaganda chief, Tuo Zhen, was himself once a respected up-and-coming journalist. *See* Teddy Ng, *Tuo Zhen, Crusading Journalist Turned Guangdong Propagandist*, S. CHINA MORNING POST (Jan. 5, 2013), http://www.scmp.com/news/china/article/1120156/tuo-zhen-crusading-journalist-turned-guangdong-propagandist.

censorship apparatus to public view and ridicule. The incident also placed the Party in the position of publicly subverting, rather than upholding, constitutional values.

The controversy convinced the newly-installed Party leadership that it needed to take a firmer line on public debate, and reassert greater Party oversight and control over the "ideological sphere."[123]

A central element of this reassertion of control was the issuance by the Party's Central Committee General Office of the so-called Document No. 9, in April 2013.[124] That directive, officially titled "Communique on the Current State of the Ideological Sphere," called on Party cadres to guard against seven "false ideological trends, positions, and activities," including "promotion of Western constitutional democracy" and "promoting 'universal values' in an attempt to weaken the theoretical foundations of the Party's leadership." Document No. 9 made clear that the Party viewed calls for constitutional reform as potentially subversive attempts to "use Western constitutional democracy to undermine the Party's leadership [and] abolish the People's Democracy."[125]

Just a month later, the first of many Leftist anti-constitutional pieces was published in the Party publication *Red Flag Manuscripts*. Official efforts to tamp down the liberal pro-constitutionalist debate through the use of Leftist rhetoric had begun.

B. Beyond Southern Weekend: The Intellectual Debate

Even from the debate's first moments, it was clear that there was a fair amount of common ground between the Socialists and the Liberals. Most fundamentally, both sides agreed that pro-reform

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[123] Author interviews (on file with author). *See also* Chris Buckley, *China Takes Aim at Western Ideas*, N.Y. TIMES (Aug. 19, 2013), http://www.nytimes.com/2013/08/20/world/asia/chinas-new-leadership-takes-hard-line-in-secret-memo.html. The *Times* reports that, after Document No. 9 was issued, provincial-level officials made speeches directly linking the *Southern Weekend* Incident to the issuance of Document No. 9 and the subsequent crackdown on bloggers, journalists, lawyers, and others.

[124] The document began circulating online in Chinese several weeks after its promulgation. *See Document 9: A ChinaFile Translation*, CHINAFILE (Nov. 8, 2013), http://www.chinafile.com/document-9-chinafile-translation.

[125] Although it did not refer to *Southern Weekend* by name, Document No. 9's reference to "some people [who] still use the phrase 'constitutional dream' to distort the Chinese dream of the great rejuvenation of the Chinese nation" would seem to be a clear-enough reference to the Guangzhou paper and the spiked pro-constitution editorial. *Id*.

voices were growing stronger.[126] In late January, Chinese Academy of Social Sciences economics researcher and prominent public intellectual Zhang Shuguang noted that "the voices calling for political system reform are quite strong."[127] At around the same time, activist and intellectual Wang Debang argued that "today, almost no one doubts that China must move toward democracy!"[128] Other more mainstream scholars made similar points in more measured tones.[129]

Another recurring theme was the "urgency" of reform, and the "anxiety" of many intellectuals over what might happen if political reform continued to take a back seat to economic reform.[130] As one scholar noted, the urgency of reform had itself become a point of consensus.[131] The urgency and the anxiety stemmed from concerns over China's current situation, and the perception that certain problems, including corruption, abuse of power, and the protection of "vested interests" at the cost of the public good, had become all too common. Public outrage over official abuse of power was being kept at bay only through ever-growing investments in an unchecked state stability apparatus dedicated to "stability maintenance" at all costs.[132]

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[126] In early January, journalist and commentator Ye Tan noted that China's New Year's message for 2013 seemed to be "appeals for constitutionalism from all sides." Ye Tan (叶檀), *Shichang Jingji Yu Fazhi Shuishou Shi Xianzheng Guojia Jichu* (市场经济与法治税收是宪政国家基础) [*A Market Economy and a Rule of Law Tax Collection System Are the Basis for a Constitutional Nation*], FT CHINESE (Jan. 28, 2013), http://www.ftchinese.com/story/001048350/?print=y.

[127] Zhang Shuguang (张曙光), *Zhongguo Zhengzhi Tizhi Gaige de Tupokou* (中国政治体制改革的突破口) [The Breakthrough Point for Political System Reform in China], UNIRULE INST. ECON. (Jan. 30, 2013), http://www.unirule.org.cn/index.php?c=article&id=988 (article deleted by censors, but now available at this source).

[128] Wang Debang (王德邦), *Minjian Qiubian Yu Guanfu Yingbian Xuanxiang Xia de Zhongguo Zhuanxing Lujing* (民间求变与官府应变选项下的中国转型路径) [*Choosing Between Public Calls for Change and the Official Need for Change on China's Transitional Path*], BOXUN WANG (博讯网) [BOXUN NET] (Jan. 31, 2013), http://www.boxun.com/news/gb/pubvp/2015/02/201502171154.shtml#.V_nFCsnJKT8.

[129] Wang Xiao (王霄), *Shi Gan Xing Bang, Shou Zai Xing Xian* (实干兴邦，首在行宪) [*For solid work and a rising nation, the first step is constitutional expertise*], AI SIXIANG (爱思想) [LOVE THOUGHT] (Jan. 16, 2013), http://www.aisixiang.com/data/60727.html.

[130] Yuan Xunhui (袁训会), *Zheng Yongnian Haiwai Kan Shibada: Kaiqi Zhongguo Xiandai Zhengzhi Yuannian* (郑永年海外看十八大:开启中国现代政治元年) [*Zheng Yongnian Looks at the 18th Party Congress from Overseas: Opening the New Era in Modern Chinese Politics*], GUANCHAZHE (观察着) [THE OBSERVER] (Feb. 2, 2013), http://www.guancha.cn/ZhengYongNian/2013_02_02_124768.shtml.

[131] Hua, *supra* note 11.

[132] Weng, *supra* note 99. Prof. Cai noted that, since the 1990s, government policy had created the "three rapids": rapid economic growth, rapid spread of corruption, and the rapid

Finally, many pieces suggested significant potential costs for the Party if it did not take advantage of the current window of opportunity and push forward with reforms sooner rather than later. "If the Party does not resolutely push forward with political system reform, the intensification of social conflict might cause the ruling party to miss the opportunity for reform," Central Party School scholar Cai Xia told an interviewer in early February. [133] Constitutional scholar Jiang Ping estimated that the Party had a five-year window in which to pursue reform; if it failed to take action during that five year "golden period," then China's future will be "difficult to predict."[134] Constitutional scholar Hua Bingxiao gave the Party a bit more time, suggesting that the Party had a decade-long window of opportunity, after which, if no action was taken, it might "lose its ruling status," and the nation would see "social division, economic decline, political upheaval, and national disintegration."[135]

1. Socialist Constitutionalism

The Socialist Constitutionalists represent the mainstream of academic constitutional thinking in China. At least within the halls of the academy, Socialist Constitutionalists vastly outnumber Liberals, who in turn outnumber the small handful of Leftist Anti-Constitutionalists.

Perhaps the core belief of Socialist Constitutionalists is that the existing 1982 Constitution can in fact be implemented, and that genuine constitutional reform can peacefully—even productively—coexist side by side with the one-party system. Socialists will fully acknowledge the CCP's leadership position, and have even urged other scholars to do the same, as a key element of building support

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divergence of social interests. These "three rapids" led to the creation of vested interests, who are now among the chief barriers to political reform.

[133] *Id*.

[134] Jiang Ping (江平) et al., *Li Xian, Xing Xian, Xianzhi—Weilai Shinian Xianzheng Poju* (立宪，行宪，宪治——未来十年宪政破局) [*Establish Constitutionalism, Implement Constitutionalism, Constitutional Governance: The Constitutional Collapse of the Next Decade*], XIANGGANG SHANG BAO (香港商报) [HONG KONG COMMERCIAL DAILY] (Feb. 25, 2013), http://www.21ccom.net/articles/zgyj/xzmj/article_2013030178048.html.

[135] *Id*.

within the Party for constitutional reforms that would, in essence, institutionalize and put limits on its use of political power.[136]

Whereas others might see contradiction, the Socialist Constitutionalists see a textual reality that must be harmonized, and also, perhaps more importantly, a political reality that cannot be wished away. They acknowledge that modern constitutional practice frowns upon the idea of naming and empowering a specific political party within the text of the constitutional document itself. Nonetheless, they would accept the reality that the 1982 Constitution enshrines the leadership position of the Chinese Communist Party, while at the same time putting forward a governmental structure in which state power is exercised through institutions, and in which all citizens are equal before the law.

Socialist Constitutionalists are also more deeply enmeshed in theory than the Liberals: they have spent much time and effort attempting to reshape traditional understandings of socialist legal theory, which generally does not acknowledge the possibility of violations of individual rights by the Socialist state, thus obviating the need for judicial review.[137] The emphasis on theory often involves a heavy reliance on key quotations from early Socialist thinkers, including Marx and Engels, as well as from leading Chinese revolutionaries, including, most commonly, Mao and Deng.[138]

This emphasis on theory partially explains the Socialists' particularly vociferous response to the Leftists: the Leftists launched a frontal attack on the theoretical framework that the Socialists had so painstakingly constructed over many years. Furthermore, the Leftists fundamentally challenged the relevance of the Socialists' intellectual project of packaging constitutional norms and values in ways that would make them acceptable—both intellectually and

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[136] Tong Zhiwei, *Talking Constitutionalism No. 3: A Supplemental Exposition of the Socialist Constitutionalist Concept*, GONGSHI WANG (共识网) [CONSENSUS NET] (June 4, 2013) ("in a word, I urge the Chinese intellectual community not to challenge the CCP's long-term constitutional governing position, and support the CCP's leadership").

[137] Kellogg, *supra* note 62.

[138] One method of reconciling the contradictions is to present the evolution of the legal system as a series of theoretical innovations, led by different generations of Chinese leaders. *See, e.g.*, Wang Zhenmin (王振民), *Xianfa Zhengzhi: Kai Wanshi Taiping Zhilu* (宪法政治:开万世太平之路) [*Constitutional Politics: Starting on the Generational Road of Peace*], GONGSHI WANG BOKE [共识网博客] [CONSENSUS BLOG] (Aug. 22, 2013), http://blog.ifeng.com/article/29793109.html.

politically—to the CCP. In some ways, the Liberals were off to one side of this conversation.

Another key characteristic of Socialist Constitutionalists is their view of constitutional change as a state-directed, top-down process. One Socialist scholar referred to constitutional reform as the Party's "unshirkable historic mission,"[139] another called it the Party's "mission."[140] Despite the lack of progress on constitutional reform since the adoption of the 1982 Constitution, Socialists, for the most part, continue to maintain public support for, and publicly profess their belief in, a Party-led reform process.[141]

It is unclear whether this professed faith in the Party's willingness to eventually undertake constitutional reform is genuine, or whether it is more pragmatic in nature. As leading Socialist Constitutionalist scholar Tong Zhiwei pointed out, the leading position of the CCP is an "objective fact," one that cannot be changed as the result of anyone's expression of opinion to the contrary. Furthermore, Tong argues, the Party's accumulation of "economic resources, political resources, and state coercive force," as well as

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[139] Hua Bingxiao (华炳啸), *Lun Fanxianzheng de Wuchi yu Qienuo: Huiying Fanxianzheng Guandian Xilie Zhi Er* (论反宪政的无耻与怯懦:回应反宪政观点系列之二) [*On the Shamelessness and Gutlessness of the Anti-Constitutionalist Faction: Responding to the Anti-Constitutionalist Views, Part Two in a Series]*, HUA BINGXIAO DE BOKE (华炳啸的博客) [HUA BINGXIAO BLOG] (July 8, 2013), http://huabingxiao.blog.caixin.com/archives/58851.

[140] Cai Xia (蔡霞), *Tuijin Xianzheng Minzhu Yinggai Shi Zhongguo Gongchandang de Zhizheng Shiming* (推进宪政民主应该是中国共产党的执政使命) [*Pushing forward Democratic Constitutionalism Should be the Chinese Communist Party's Governing Mission*], GONGSHI WANG (共识网) [CONSENSUS NET] (May 30, 2013), http://www.21ccom.net/articles/zgyj/xzmj/article_2011110648239.html. *See also* Li Liangdong (李良栋), *Zhizhengdang Yinggai Shanyu Lingdao Zhengzhi Tizhi Gaige* (执政党应该善于领导政治体制改革) [*The Governing Party Should Adeptly Lead the Reform of the Political System*], XUEXI SHIBAO (学习时报) [STUDY TIMES] (Aug. 5, 2013), http://www.21ccom.net/articles/zgyj/xzmj/article_2013080589108.html. Prof. Li, a political scientist at the Central Party School, argued that the reform process in China has entered into an "exceedingly complex" period, and that further reform was "both urgent and formidably difficult." Li called on the Party to lead the reform process, and play the role of "designers and organizers of reform," despite the fact that such reforms would face "unprecedented resistance" from "vested interests unwilling to see their interests harmed." Perhaps because of Professor Li's strong Party credentials, the piece was widely circulated within China.

[141] Other scholars have pointed out that the Socialists also view their own role as central. As Xi'an-based scholar Chen Hongguo put it, the Socialist Constitutionalists "are full of self-confidence, they believe that only the Socialist Constitutionalists can provide a workable path for constitutional implementation, and so therefore carry with them a martyr's spirt of sparing no efforts to reach comprehensive and effective constitutional implementation." Chen, *supra* note 96.

support from key social and interest groups, means that its position is incontestable.[142] This logic would seem to suggest mere acceptance of the status quo, rather than firm intellectual agreement and support.[143]

Perhaps because the Socialists view the Party's senior leadership as a key audience, they are more interested than the Liberals in political positioning. Many Socialist Constitutionalists will go to great pains to distance themselves from "Western-style" constitutionalism, instead insisting that they are offering something distinctly Chinese, or at least something distinctive to the People's Republic of China.[144] They also draw repeated parallels between their theories and the so-called "socialist market economy," the process of market-based reforms that began in China in the early 1980s.[145]

For many Socialist Constitutionalists, then, the key to constitutional reform is a signal from the Party that it is ready to move forward. That is why many Socialist Constitutionalists latched onto Xi Jinping's December 2012 comments on constitutional implementation: they hoped that those comments were in fact just the signal that they had been waiting for.[146] In an interview less than two weeks after Xi's December 4 speech, for example, Tong Zhiwei praised Xi's comments on constitutional implementation, calling them a "positive sign."[147]

In terms of their substantive agenda, the Socialists support a program that is paradoxically both conservative and a potentially far-reaching radical departure from the status quo. In an attempt to put

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[142] Tong, *supra* note 136.

[143] In that same piece, Tong expresses a certain "understanding" for his Liberal colleagues who have reservations about fixing the leadership position of the CCP within the Constitution itself. The arrangement does, at times, lend itself to a certain "moodiness," Tong acknowledges, as it fails to satisfy "man's inherent instinct to pursue freshness." *Id*.

[144] Wang, *supra* note 138.

[145] Hua, *supra* note 139.

[146] Wang Xiao (王霄), *Shi Gan Xing Bang, Shou Zai Xing Xian* (实干兴邦，首在行宪) [*For solid work and a rising nation, the first step is constitutional expertise*], Speech at the Second meeting of the Constitutionalism and Socialism Forum, AI SIXIANG (爱思想) [LOVE THOUGHT] (Jan. 16, 2013), http://www.aisixiang.com/data/60727.html.

[147] Tong Zhiwei (童之伟), *Yixian Zhizheng Yaoqiu Quanmian Shishi Xianfa* ("依宪执政"要求全面实施宪法) [*Tong Zhiwei: For "Public Administration According to the Constitution," We Must Fully Implement the Constitution*], TIME WEEKLY (时代周报) [SHIDAI ZHOUBAO] (Dec. 14, 2012), http://www.21ccom.net/articles/zgyj/xzmj/article_2012121873161.html.

forward a plan that is at least at the outer edge of feasibility, Socialists have come up with a more minimalist definition of constitutionalism. This definition jettisons elements—like direct elections for national-level leaders and multi-party democracy more generally[148]—that the CCP has made clear it cannot accept. The CCP often criticizes more liberal scholars for adding too many elements to the list, thereby making the question of constitutional implementation more complicated than it otherwise might be.[149]

For Shanghai-based scholar Tong Zhiwei, constitutionalism consists of three basic elements: a written constitution; limits on state power and protections for basic rights; and constitutional implementation, with a special emphasis on implementation of basic rights protections.[150] By this logic, because China has a written constitution, because this Constitution enumerates basic rights, and because it delineates the specific powers of different branches of government, China is close to full constitutionalism. Tong and other Socialists would argue it has the *structure*; it merely lacks for *implementation* of that existing constitutional structure. In other words, by the Socialists' reading, China is only one step away from constitutional governance: if a constitutional review mechanism is created, then China's transition to constitutionalism will be complete.

For many Socialist Constitutionalist scholars, identification of potential areas of reform that are both meaningful and politically acceptable to the CCP leadership is a key intellectual task. Whenever the Party has experimented with different reforms, such as local-level elections, open budget processes, and the development of OGI regulations, Socialists have trumpeted their constitutional implications, and have pushed – largely unsuccessfully, it must be said – for their broader adoption.

Tong Zhiwei himself has put forward a four-pronged reform plan, one that combines longstanding reformist elements with some new ideas. He proposes that the Party adopt legislative measures to protect basic citizen rights, with a special focus on the rights of citizens to "criticize and supervise" official behavior; establish a plan

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[148] Wang, *supra* note 138. *See also* Cai, *supra* note 3.

[149] Xu Qianchuan (徐潜川), *Tong Zhiwei, Wang Tingyou, He Weifang: Liu Wen Xianzheng Sanfang* (童之伟 汪亭友 贺卫方:六问 "宪政三方") [*Tong Zhiwei, Wang Tingyou, He Weifang: Six Questions for the Three Parties of Constitutionalism*], CAIJING (July 15, 2013), http://www.aisixiang.com/data/65769.html.

[150] Tong, *supra* note 136.

for expansion of direct elections for People's Congresses at higher levels than currently countenanced; strengthen judicial independence; and adopt institutionalized measures for strengthened external oversight of the police and for "strictly constraining the activities of the state security apparatus so as to practically improve protection citizens' freedom of person and freedom of communications."[151]

This four-pronged agenda illustrates the conservative and progressive elements of the Socialist Constitutionalist reform agenda. At least the first three of these proposals have been put forward repeatedly by intellectuals and, at times over the past twenty years, by the Party itself, which means that they are within the realm of political possibility. At the same time, if actually implemented, these reforms would constitute a significant step forward in terms of reform of China's political system, and would dwarf the minimal progress on political system reform over the past two decades.

Some more liberal scholars have suggested that one key flaw of the Socialist Constitutionalists' approach is that they do not engage directly with the human rights situation in China: they are too theoretical and not sufficiently engaged with the actual situation in China. They emphasize theoretical concerns and debate the merits of various reform models, while leaving aside—at least in their public writings—any detailed analysis of the political barriers to constitutional reform.

2. The Liberals

Before the Leftists joined the debate in May 2013, the reform conversation was primarily between the Socialist Constitutionalists and the Liberal Constitutionalists. Often referred to as the Pan-Constitutionalists or Enlightenment Liberals, the Liberals include in their camp a number of prominent public intellectuals, including Beijing University professors He Weifang and Zhang Qianfan; Shanghai-based legal scholar and lawyer Zhang Xueyou; political scientist Fang Shaowei; and regional security expert Zhao Chu. In general, the Liberals favor more far-reaching constitutional reforms, and more openly embrace Western models of state organization. They question the appetite of the Party for meaningful structural reform of the political system, and therefore are skeptical of the

[151] *Id.*

prospects for further progress under the existing constitutional framework. Often, Liberals are more likely to look at debates over constitutional development as more strategic than substantive. Lurking behind many of their public commentaries are questions about how to address political barriers to constitutional reform.

The Liberals also display a deeper commitment to core constitutional norms and values,[152] and as a result, are less likely than the Socialists to suggest compromise, for example on the need for direct elections as part of multi-party constitutional democracy, or on the need to end the CCP's constitutionally-enshrined leadership position as a key prerequisite of constitutional reform.

Indeed, just as the Socialists seek to harmonize seeming textual contradictions, the Liberals often call attention to them, arguing that they demonstrate the very real difficulties of meaningful reform under the existing structure.[153] They also note that the Constitution enshrines various doctrines, such as NPCSC oversight of the court system, which cut against fundamental constitutional norms, such as separation of powers.[154] Liberals also point to the raft of laws and regulations that would seem to violate basic rights protections, including rights to free speech, free association, and freedom of religion, as further evidence of the legal contradictions that would have to be resolved if constitutional development were to proceed.[155]

These textual contradictions, combined with the lack of progress on political reform in recent years, have led many Liberals to openly express doubts over the strategic wisdom of the Socialists' approach of, in essence, trying to convince the Party that constitutional reform can move forward without putting the core of the one-party system at risk. Many Liberals fear that that the Party

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[152] Chen, *supra* note 96.

[153] While the most significant contradiction has to do with the enshrining of the CCP's leadership position within the Preamble of the Constitution itself, there are other concerns. Beijing University scholar He Weifang points to the various provisions of the Chinese Constitution (specifically Articles 8, 12, and 13) that cover state and private ownership of land. He points out that different forms of property in China are, in practice, often accorded very different levels of protection by the state. Such Constitutional provisions, He argues, "are not in accordance with the spirit of constitutionalism." Xu, *supra* note 149.

[154] *Id*. Article 67 of the Chinese Constitution gives the NPCSC the power to "supervise" the work of the SPC. Article 104 grants similar powers to provincial and local People's Congress Standing Committees. Article 128 states that the SPC shall be "responsible to" the NPCSC.

[155] *Id*.

has lost interest in meaningful political reform,[156] not least because such reform would limit their own power.[157] Instead of focusing on Party-led, top-down reform strategies, the Liberals argue, would-be reformers should focus on bottom-up approaches to reform, engaging the broader public and helping to build a social consensus in favor of constitutional development.[158]

In contrast to the Socialists, the Liberals are more likely to define constitutionalism more broadly, and to see the component parts as mutually-reinforcing, and therefore all equally vital. The key components most often mentioned include separation of powers, judicial independence, protection of basic rights, and civilian control of the military.[159] Prominent Liberal Zhang Qianfan put forward a six-point "consensus" agenda for structural reform, which included democratization of the CCP; elections for key Party and government posts; protection of free speech; market liberalization reforms; professionalization of the court system; and substantive implementation of the constitution.[160]

Finally, Liberals are more likely to link the need for constitutional reform more directly to the overall country context, and to openly embrace the political, rather than purely academic, aspects of reform.[161] In an August 2013 speech at the pro-reform think tank Tianze Economic Research Institute, Liberal scholar Zhang Qianfan argued that the reformist approach of the past two decades, one which

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[156] Zhao Chu (赵楚), *Shexian Lun de Da Shenhua* (社宪论的大神话) [*The Great Mythologies of the Socialist Constitutionalists*], ZHAO CHU DU JIA PINGLUN (赵楚独家评论) [ZHAO CHU EXCLUSIVE COMMENTARIES] (June 6, 2013), http://zhaochuboke.blog.163.com/blog/static/207319147201356335985 3/. Zhao points out that the Leftist attacks on Socialist Constitutionalism have "once again clearly pointed out that the dictatorial system does not tolerate constitutionalism."

[157] Du Daozheng (杜导正), *Zhengzhi Tizhi Gaige Yinggai Zhongbu Qianjinle* (政治体制改革应该中步前进了) [*Political System Reform Should be Striding Forward*], YANHUANG CHUNQIU (炎黄春秋) [ANNALS OF THE YELLOW EMPEROR] (Sept. 12, 2012), http://www.21ccom.net/articles/zgyj/xzmj/article_2012091967982.html.

[158] Zhao, *supra* note 156. In Zhao's view, constitutional transition in China needs the input of scholars, but "really it is a political movement," one that, in accordance with modern constitutionalism, should be rest on a broad-based social contract in favor of constitutional reform. *See also* Du, *supra* note 157.

[159] Chen, *supra* note 96.

[160] Zhang Qianfan (张千帆), *Zhongguo Dangqian Zuida Weixian Shi Quezhi Tizhi Gongshi* (中国当前最大危险是缺乏体制共识) [*Contemporary China's Greatest Danger is that it Lacks Systemic Consensus*], MENGSHAN YEYI DE BOKE (蒙山野逸的博客) [Mengshan Yeyi Blog] (Mar. 19, 2013), http://blog.sina.com.cn/s/blog_9c28f2160101gwt5.html.

[161] Zhao, *supra* note 156.

emphasized economic reforms while paying little if any attention to political reform, was deeply flawed.[162] That approach, Zhang argued, had generated huge external costs, doing deep damage to China's environment, its natural resources, its social institutions, and even to public morale. Under such circumstances, Zhang argued, official corruption would inevitably skyrocket, creating an additional barrier to eventual political reform.

In Zhang's view, China's current path, of maintaining a narrow focus on economic reform without addressing very real shortcomings in China's political system, is unsustainable. "If we continue with this approach to reform," Zhang stated flatly, "the costs of corruption will go higher and higher." Without a shift in direction, Zhang argued, China's future prospects would be grim:

> My conclusion is this: without a larger environment of constitutional governance, without at least some basic improvements in the political and legal environment, our economic reforms will continue to follow a distorted path, and in the end will lead to outcomes that none of us want to see.[163]

The only solution, Zhang argued, was constitutionalism. In essence, Zhang argued, "without constitutional governance, reform is nonsense."

For Zhang and other Liberals, constitutional reform is the best—perhaps the only—means to avoid future calamities. In a March 2013 essay, Zhang argued that, in the absence of wide-ranging reforms, China was facing a potential "crisis." This word was used by a number of scholars throughout the 2013 debate.[164]

Because they view constitutional development as an inherently political, rather than academic, process, the Liberals often call for broader social consensus on political reform. They more directly address key strategic questions of top-down versus bottom-up change, and are more likely to see a need for broad-based social mobilization to push for reform. Accordingly, many prominent

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[162] Zhang Qianfan (张千帆), *Meiyou Xianzheng, Gaige Jiu Shi Chedan* (没有宪政，改革就是扯淡) [*Without Constitutional Governance, Reform is Nonsense*], XINWEN LAOBING DE BOKE (新闻老兵的博客) [VETERAN JOURNALIST BLOG] (Aug. 2, 2013), http://blog.sina.com.cn/s/blog_5974c0620102e7nl.html.

[163] *Id.*

[164] Zhang, *supra* note 160.

Liberals seek to engage a broader public audience beyond the halls of the academy.

IV. STAGE TWO OF THE DEBATE: THE ANTI-CONSTITUTIONALIST WAVE

Leftist anti-constitutional statements are not totally unknown —there are some precedents, including a 2004 piece by an obscure scholar named Chen Hongtai,[165] for example. But by and large, Leftist views have been largely absent from mainstream legal-constitutional debate in China over the last three decades.[166] The return of Leftist constitutional argument in some of the most prominent theoretical journals in the country took many scholars by surprise.

The arguments put forward by the Leftists were often taken directly from classic Socialist legal theory, and thus cannot be said to be particularly innovative or insightful. In many ways, their arguments reflect Chinese constitutional scholarship of the pre-reform era. Not surprisingly, then, the response from more mainstream scholars, many of whom view themselves as offering the very innovations to Socialist legal theory that would allow China to move forward with Constitutional development, were dismissive of the first wave of Leftist writings that began to appear in late May and June 2013.

That dismissiveness, however, represented a missed opportunity: though it is true that the main arguments of the Leftist scholars are of limited intellectual value, nonetheless, various pieces do contain some content that may indirectly shed some light on the views of some in the Party leadership on the dangers of liberal constitutional values to the Party's continuing hold on political power.

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[165] Qian Gang, *The Uncertain Death of 'Constitutionalism,'* CHINA MEDIA PROJECT (Sept. 2, 2013), http://cmp.hku.hk/2013/09/02/33944/. Chen's piece appeared in the November 2004 issue of the obscure theoretical journal TRENDS IN THEORETICAL RESEARCH, and was titled, "Views and Reasons Why the Term 'Constitutionalism' Cannot Be Used." In November 2005, the journal PARTY HISTORY ran an anti-constitutional piece by Xin Yan, entitled "'Constitutionalism' Cannot Be Taken as a Basic Political Concept for Our Country." Both pieces mirrored arguments put forward by Yang Xiaoqing and other anti-constitutionalists in 2013.

[166] That said, elements of Leftist arguments have remained a key component of Communist Party discourse, even as other, more modern strains of thought have also made their way into Party debates.

The first the anti-constitutionalist piece was penned by legal scholar Yang Xiaoqing, whose article, "Comparative Research on Constitutionalism and the People's Democratic System,"[167] was published in the Party journal *Red Flag Manuscripts* on May 22.

Yang's "Comparative Research on Constitutionalism and the People's Democratic System" is in some ways a walk backwards in time, to the pre-reform era, when China's legal academy was still dominated by Socialist legal theory, which held that Western-style constitutionalism was in fact a tool of suppression, used by economic elites—the capitalist class—to oppress society as a whole, and maintain control of the political system. Quoting liberally from Marx, Engels, and Lenin, as well as Chinese leaders like Mao, Deng, and Jiang Zemin, Yang argues that "the key systemic elements and principles of constitutionalism only belong to capitalist dictatorship, and are not part of the Socialist People's Democratic System."

Though Yang was repeatedly excoriated for engaging in Cultural Revolution-style political invective, in fact her piece merely regurgitated the basic tenets of Socialist legal theory, and applied them, one by one, to the supposed advantages of the key components of Western constitutional systems including parliamentary democracy, separation of powers, judicial independence, and state control of the military. Her review of these elements led her to conclude that China's Socialist legal system is in fact superior, and that such elements are "not suitable" for China.

Interestingly, save for passing references to the *Southern Weekend* controversy and liberal scholars who advocate for more wholesale reforms, Yang's main target in the piece was the Socialist Constitutionalist camp. She argued that this camp was "pandering to the political might and rhetorical hegemony" of Western constitutionalism.

And yet, Yang did not fully reject Western constitutional theory and practice as completely irrelevant to the Chinese context. Instead, she noted that many Socialist systems have adopted secondary elements of the liberal democratic constitutional system, including market economics, protection of human rights, freedom of

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[167] Yang Xiaoqing (杨晓青), *Xianzheng Yu Renmin Minzhu Zhidu Zhi Bijiao Yanjiu* (宪政与人民民主制度之比较研究) [*Comparative Research on Constitutionalism and People's Democratic System*], HONGQI WENGAO (红旗文稿) [RED FLAG MANUSCRIPTS] (May 22, 2013), http://www.qstheory.cn/hqwg/2013/201310/201305/t20130521_232618.htm.

religion, and legislative oversight of government budgets.[168] But, she argued, the adoption of these elements by China had led some Socialist Constitutionalist scholars to argue that China has already become a Socialist Constitutional state. Yang warned that this argument is very dangerous; it could "handcuff" China and lead it down the path of the Soviet Union, toward inevitable state collapse.

Over the next few weeks, Yang's piece was followed by others in a similar vein. On May 29, for example, the Party theoretical journal *Party Constructs* ran a piece by one Zheng Zhixue—a pen name[169]—entitled "Recognizing the Essential Nature of 'Constitutionalism.'"[170] That piece repeated many of the same basic arguments advanced by Yang Xiaoqing, including the core argument that constitutionalism is a "capitalist" political and economic system unsuitable for Socialist China.

At the same time, however, Zheng's piece was not an all-out attack on Socialist Constitutionalists. Zheng notes that "intentions (of the Socialist Constitutionalists) are good," even if their ideas are "vague," "specious," and "erroneous." To adopt constitutionalism as a core value, Zheng argues, would be to "fall into a rhetorical trap." Zheng decried what he saw as the faddishness of Chinese study of Western political and legal theories, and warned of the dangers of "being led around by the nose" by the "capitalist" theory of constitutionalism. Such actions, Zheng stated flatly, would be equivalent to "intellectual surrender."

Perhaps Zheng's most interesting point is his suggestion of a slippery slope associated with constitutional reforms. Zheng argued that, if China adopted constitutionalism or even socialist constitutionalism as a key guiding concept, then leading liberal constitutional theories will "spread unchecked," leading to "increased confusion" in the broader ideological sphere. "Foreign and domestic hostile forces" would use the additional space created to "gradually compel us to use liberal constitutionalist theory" and to implement

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[168] Interestingly, Yang cites media freedom as a secondary characteristic of democratic constitutionalist systems that have not been adopted by Socialist countries, an implicit commentary on the role of the media in China and its relationship to the Party's propaganda apparatus.

[169] The true identity of the author of the *Party Constructs* piece was the subject of some speculation among Chinese academics.

[170] Zheng Zhixue (郑志学), *Renqing Xianzheng de Benzhi* (认清宪政的本质) [*Recognizing the Essential Nature of 'Constitutionalism'*], DANGJIAN (党建) [PARTY CONSTRUCTS] (May 29, 2013), http://theory.people.com.cn/n/2013/0529/c83855-21652535.html.

"so-called Socialist constitutionalism," and would thus "interfere with the implementation and direction of our nation's political system reform." This suggestion of constitutional reform as an all-or-nothing proposition may in fact explain the reluctance of many in the Party to embrace even modest changes to the political system over the past twenty years.

The third key piece in the first wave of anti-constitutional writings was Wang Tingyou's essay, also published in *Red Flag Manuscripts*, entitled, "A Few Thoughts on the Problem of Constitutionalism."[171] Perhaps unsurprisingly given his post at the People's University Marxism Institute, Wang's essay focused heavily on Marxist theory and did not spend much time attacking pro-constitutional advocates. He did, however, note that Western nations hope to use constitutionalism as a "breakthrough point," one that can "progressively abolish the leadership of the Communist Party and the Socialist system."

In some ways, the particular thrust of the Leftists' arguments mattered less than the politics behind them. There were various hints that the Leftist attacks may have been orchestrated by senior Party officials, or at least been launched with their blessing. The timing of the attacks, roughly one month after the issuance of the so-called Document No. 9, led many to wonder whether there was in fact a connection between the Party's anti-constitutionalist rhetoric as articulated in Document No. 9, and the leftist wave started by Yang. Second, the use of key Party theoretical outlets, including *Red Flag*, *Red Flag Manuscripts*, and *Party Constructs*, strongly suggested the involvement of the Party ideological apparatus. Finally, the fact that these articles circulated widely online, while pro-constitutional voices were often censored, indicated that Party propaganda officials were playing an active role in managing the debate.[172]

It seems clear, then, that the May-June spate of Leftist articles bore the Party's fingerprints, even if the identity of the specific Party leaders pushing the Leftist line remained unknown. And yet, if the Leftist push had stopped there, it likely would have been brushed off

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[171] Wang Tingyou (汪亭友), *Dui Xianzheng Wenti de Yixie Kanfa* (对宪政问题的一些看法) [*A Few Thoughts on the Problem of Constitutionalism*], HONGQI WENZHAI (红旗文摘) [RED FLAG MANUSCRIPTS] (June 12, 2013), http://news.xinhuanet.com/politics/2013-06/09/c_124840106.htm.

[172] Qian Gang, *The Uncertain Death of 'Constitutionalism,'* CHINA MEDIA PROJECT (Sept. 2, 2013), http://cmp.hku.hk/2013/09/02/33944/.

by moderates as a temporary aberration, as nothing more than the frustrated musings of the Party's Leftist camp. The fact that the attacks were penned by a group of marginal scholars, often writing under assumed names, only reinforced the notion that the attacks in May and June were not a serious threat, and were probably not connected with the highest reaches of the Party leadership.[173]

After a lull in July, the Leftist attacks were renewed in early August. The second wave of attacks was much sharper, and much more political, than the first.

The renewed push began with three pieces in the *People's Daily* overseas edition by one Ma Zhongcheng, an alias.[174] The first piece, published on August 5, was entitled, "Constitutionalism is essentially a weapon in the war of public opinion." That piece focused less on abstruse theoretical arguments over the relationship between Marxism and constitutionalism. Instead, the article focused much more heavily on politics, and in particular, on political attack. Ma made clear that scholars advocating for constitutionalism in fact were looking to "overthrow" the socialist system, and therefore needed to be watched.

Ma's first opinion piece also differed from the earlier academic Leftist pieces in its increased emphasis on the role of the United States in helping to support constitutionalist, and even socialist constitutionalist, discourse, and in his drawing of comparisons between the 2013 Constitutional debate and the collapse of the Soviet Union. According to Ma, concepts like "democratic socialism" and "socialist constitutionalism" are viewed by the CIA as the "most effective weapons" in the war against socialism.[175]

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[173] *Id*.

[174] Ma Zhongcheng (马钟成), *Meiguo Xianzheng de Mingbu Fushi* (美国宪政的名不副实) [*American Constitutionalism in Name Only*], RENMIN RIBAO HAIWAI BAO (人民日报海外报) [PEOPLE'S DAILY OVERSEAS EDITION] (Aug. 6, 2013), http://paper.people.com.cn/rmrbhwb/html/2013-08/06/content_1278768.htm. Ma Zhongcheng may be a homonym for "loyalty to socialism," and the anonymous author may have ties to Leftist scholars who supported Bo Xilai before his downfall. Ping Chang, *What Propaganda Against Constitutionalism Tells Us About China's 'New' Government*," S. CHINA MORNING POST (Aug. 20, 2013), http://www.scmp.com/comment/insight-opinion/article/1297833/what-propaganda-against-constitutionalism-tells-us-about.

[175] Ma also argues that Western NGOs and foundations are part of the CIA's efforts to win the ideological war, and to spread "American liberal economics and legal studies" around the world. Ma mentions in particular a 1987 Ford Foundation project on global comparative constitutionalism. *Id.*

Ma also draws an implicit parallel between Socialist Constitutionalist advocates and the reformist leaders of the Soviet Union in the 1980s, suggesting that seemingly moderate systemic reforms can lead quite quickly to state collapse. Once again, a Leftist article reflects very real debates and concerns within the Party elite, that Constitutionalism is one of a number of Liberal reforms that represent the first step in a slippery slope toward the end of one-Party rule.

Ma's second piece, "American Constitutionalism in Name Only," focused more closely on what Ma referred to as the "myths" of American constitutional governance.[176] In particular, Ma argued that the US constitution, rather than being an instrument for the protection of individual rights, instead acts as a tool for capitalist domination of the working classes; it therefore compares unfavorably, Ma points out, with China's constitution, which enshrines the dictatorship of the proletariat.

The third piece in Ma's series, "In China, Pushing So-Called Constitutional Governance Can Only Be Like Climbing a Tree to Catch Fish," also put forward the argument that socialist constitutionalism was even more "misleading" than Liberal constitutionalism.[177] Further, the piece linked Socialist Constitutionalist theory to reform theories that led to the collapse of the Soviet Union. The piece concluded by reiterating the leadership position of the Chinese Communist Party, as enshrined in the Constitution's preamble.

This initial spate of articles significantly upped the rhetorical ante, and also signaled a higher degree of Party involvement: unlike the series of May articles, written largely by academics in Party-affiliated theoretical journals, the early August pieces were shorter, and used more pugnacious, and overtly political, language. They were also published in more prominent outlets, including the *People's Daily* overseas edition. These pieces were one step closer to a formal Party statement on constitutionalism.[178]

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[176] *Id*.

[177] Ma Zhongcheng (马钟成), *Zai Zhongguo Gao Suowei Xianzheng Zhineng Shi Yuanmu Qiuyu* (在中国搞所谓宪政只能是缘木求鱼) [*In China, Pushing So-Called Constitutional Governance Can Only Be Like Climbing a Tree to Catch Fish*], RENMIN RIBAO HAIWAI BAO (人民日报海外版) PEOPLE'S DAILY OVERSEAS EDITION (Aug. 7, 2013), http://paper.people.com.cn/rmrbhwb/html/2013-08/07/content_1279445.htm.

[178] Banyan, *Climbing Trees to Catch Fish: a Curious To-and-Fro About China's Constitution Bodes Ill for Political Reform*, ECONOMIST (Aug. 17, 2013), http://www.

The Ma Zhongcheng series of articles was followed by two pieces of somewhat obscure origin: "'Constitutionalist' Theory Interferes With and Misleads China's Reform," by Zheng Li, and "The Constitutionalist Wave is Challenge to the Spirit of the 18th Party Congress," by Gao Xiang.[179] Those pieces, published on September 20th and 21st, continued the attacks on both Liberal Constitutionalist and Socialist Constitutionalist camps, often using even harder-edged language than Ma Zhongcheng.

And yet, some observers held out hope that the May-June academic articles and the August spate of opinion pieces were not in fact a formal intervention from the top Party leadership, but rather an unsanctioned attempt by a no doubt well-connected and influential group within the Party to stir the ideological pot. Hong Kong University-based scholar and media analyst Qian Gang, for example, pointed to the fact that all of the anti-constitutionalist pieces appeared in outlets just below the highest, most authoritative level.[180] If the Party leadership wanted to send a clear message, Qian argued, why not issue a clear and authoritative statement in the Party's flagship *People's Daily*?[181] Further, Qian argued, the rather crude rhetorical style of some of the pieces suggested that the Party's most senior ideologues were in fact not the authors of the August attacks.

Those hopes were dashed only a month later with the release of a series of strongly-worded attack pieces by provincial Party secretaries and provincial propaganda chiefs, many of them published in the most authoritative Party outlets, including *People's Daily* itself.

This wave of articles, which included pieces by thirty-one senior provincial-level officials, stemmed from an August 19 speech by Xi Jinping at a National Propaganda Work Conference on the

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economist.com/news/china/21583697-curious-and-fro-about-chinas-constitution-bodes-ill-political-reform-climbing-trees. *See also* Benjamin Carlson, *What's China Got Against the US Constitution?*, GLOBAL POST (Aug. 12, 2013), http://www.globalpost.com/dispatch/news/regions/asia-pacific/china/130811/china-democracy-political-reform.

[179] Both pseudonymous authors were identified as researchers at the Oceanic Security and Cooperation Research Institute; both saw their pieces published first on the far-left nationalist website *Hanjiang Online* before being reposted to the website of the Party doctrinal magazine *Seeking Truth*.

[180] Qian Gang, *The Uncertain Death of 'Constitutionalism'*, CHINA MEDIA PROJECT (Sept. 2, 2013), http://cmp.hku.hk/2013/09/02/33944/.

[181] *Id*. As Qian pointed out, the *People's Daily* overseas edition is not the same as the mainland edition of the *People's Daily*.

importance of the "public opinion struggle."[182] Though initial reporting on the speech, which has not been made public, used a more moderate tone in summarizing Xi's remarks, later reports characterized the speech as having a harder edge, and many linked the phrase "public opinion struggle" directly to Xi's remarks.[183]

It seems clear, then, that the Leftist push that began in May was orchestrated by the CCP from the very beginning as a coordinated effort to manage the public conversation on political reform. The fact that the Leftist push was undertaken with the approval of senior Party leaders, most likely including Xi himself, speaks to the need of the Party to maintain control over the Constitution. The Party cannot allow it to be subverted by others for what it sees as anti-Party purposes. In essence, it cannot maintain the Constitution as a legitimacy-enhancing false blueprint if others are able to either successfully push for it to become a legally-binding document, or successfully expose the Constitution as a legally meaningless sham constitution.

Many of the provincial-level responses, which must have been coordinated by central authorities, made specific mention of constitutionalism as a "Western" tool to infiltrate China and subvert the rule of the CCP. One representative piece, written by Hubei Province propaganda Minister Yin Hanning, referred to constitutionalism and universal values as "beautiful lies," and urged close attention to the "rhetorical traps" set by Western states.[184]

Though Minister Yin's piece—along with the pieces by other provincial-level ministers—used strong language to condemn constitutionalism, nonetheless these pieces, and those that followed, marked a subtle shift in Party-sanctioned rhetoric on constitutionalism. Unlike, say, the Ma Zhongcheng series of articles, which attacked both Socialist Constitutionalism and Liberal constitutionalism as very real anti-Party threats, Minister Yin remained silent on mainstream socialist constitutionalist thought. His

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[182] Qian Gang, *Parsing the Public Opinion Struggle*, CHINA MEDIA PROJECT (Sept. 24, 2013), http://cmp.hku.hk/2013/09/24/34085/. *See also* Willy Lam, *Ideological Crackdown Reaches the Strongholds of Reform*, 13 JAMESTOWN CHINA BRIEF, no. 19 (2013), https://jamestown.org/program/ideological-crackdown-reaches-the-strongholds-of-reform/.

[183] *Id*.

[184] Yin Hanning (尹汉宁), *Shenke Renshi Yishixingtai Gongzuo de Jiduan Zhongyaoxing* (深刻认识意识形态工作的极端重要性) [*Deeply Recognize the Extreme Importance of Ideological Work*], QIU SHI (求是) [SEEKING TRUTH] (Sept. 16, 2013), http://theory.people.com.cn/n/2013/0916/c40531-22935925.html.

piece, and those written by his colleagues, may have represented a turning point in the Party's approach to the Socialist debate, the first step toward a return to a status quo ante in which the Party largely tolerated academic discussion of Socialist Constitutionalism theories, even as it held the line on refusing to implement meaningful constitutional reforms of the sort advocated by Socialists and Liberals alike.

This small but significant shift was carried into the pages of the *People's Daily* itself in late September.[185] The first *People's Daily* piece on the 2013 Constitutionalism debate, written by Shanxi province Party Secretary Yuan Chunqing and entitled "Leading Cadres Must Strengthen Their Political Convictions," criticized both universal values and Western-style constitutionalism, but did not mention Socialist Constitutionalism as one of several "false ideologies" that Party cadres must resolutely guard against.[186] The omission of Socialist Constitutionalism from the authoritative *People's Daily* piece was telling.

A mid-October article in *Seeking Truth* by Autumn Stone—an alias—entitled "Consolidate the Common Intellectual Foundation of the United Struggle of the Party and the People" took the process of winding down the anti-constitutionalist push one step further.[187] In it, the author emphasizes the "extreme importance" of a common intellectual foundation, one that can unite the Party and the people under the leadership of the CCP.

Like Yuan Chunqing before him, Autumn Stone cast aspersions on the "international anti-China forces" who "push a strategy of Westernizing and splitting China." Yet the subtle differences between the Autumn Stone piece and Yuan Chunqing's piece are in some ways more important than their commonalities. Interestingly, Autumn Stone does not excoriate "universal values" such as freedom, democracy, and human rights; instead, he reverts to

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[185] David Bandurski, "*Struggling" Against Constitutionalism*, CHINA MEDIA PROJECT (Sept. 25, 2013), http://cmp.hku.hk/2013/09/25/34196/.

[186] Yuan Chunqing (袁纯清), *Lingdao Ganbu Bixu Zengqiang Zhengzhi Dingli* (领导干部必须增强政治定力) [*Leading Cadres Must Strengthen Their Political Convictions*], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY] (Sept. 24, 2013), http://politics.people.com.cn/n/2013/0924/c1001-23009079.html.

[187] Qiu Shi (秋石) [Autumn Stone], *Gonggu Dang He Renmin Tuanjie Fendou de Gongtong Sixiang Jichu* (巩固党和人民团结奋斗的共同思想基础) [*Consolidate the Common Intellectual Foundation of the United Struggle of the Party and the People*], QIU SHI (求是) [SEEKING TRUTH] (Oct. 16, 2013), http://www.qstheory.cn/zxdk/2013/201320/201310/t20131012_278250.htm.

established Party practice of using such terms for the Party's own ends.

Perhaps most importantly, Autumn Stone offered some qualified support for constitutionalism, arguing that the Party has historically supported "ruling the country according to the Constitution." He launched a much more calibrated attack on supporters of constitutional reform, singling out for criticism only those who believe that "'constitutional democracy' is almost the only topic of discussion on political reform." Explicitly excluding supporters of Socialist Constitutionalism, Autumn Stone attacked unnamed Liberals who would have China adopt Western-style constitutionalism, and in so doing "cancel the leadership of the CCP, and change our nation's socialist system."

Harsh though this language may sound, it is still vastly different from the line adopted just two months earlier by Ma Zhongcheng and others. In signaling that Socialist Constitutionalism would once again return to the realm of acceptable discourse, those behind the Autumn Stone piece were bringing an end the rhetorical battle against mainstream academic constitutionalist discourse.

Why would the Party wind down its anti-Constitutionalist campaign just a few months after it began? There are at least four key reasons that explain the Party's retrenchment: first, the anti-constitutionalist campaign had achieved its goal of pushing back against growing calls in the first months of 2013 for constitutional reform. Second, the new Party leadership led by Xi Jinping had inoculated itself against charges that it was soft on Rightist would-be reformers, thus making it easier to move forward with right-leaning economic reforms. Third, bringing the debate to a close helped to clear the ideological air in advance of the Third Plenum, which was held in November.

Finally, bringing the debate to a close would return the conversation to the status quo ante, and would allow the Party to revert to its position of touting constitutional reform, falsely, as part of its own political reform agenda. Less than a year after the end of the debate, Party Secretary Xi Jinping himself returned to constitutionalist rhetoric, closing the circle that he had opened with his December 4, 2012 constitutionalist speech. In a September 2014 speech marking the 60th anniversary of the founding of the National People's Congress, Xi declared that "(t)he Constitution is the most basic law of our country. Rule of the nation by law means, first and foremost, ruling the nation in accord with the constitution; governing

by laws is, first and foremost, governing in accord with the constitution." [188] Other references to constitutional governance would follow over the course of the fall, signaling Xi's intent to return to constitutionalist rhetoric—if not action—as a key element of the Party's search for political legitimacy.

The end of the debate as signaled by Yin and Autumn Stone also allowed mainstream academic voices to return to their prior practice of making pro-constitutionalist statements that would, by and large, reinforce the Party's constitutional reformist credentials. Perhaps unsurprisingly, the responses of many intellectuals to the Leftist push ignored the clear and abundant evidence of senior Party involvement in the short-lived anti-constitutionalist campaign. For many moderate intellectuals, a return to the status quo, in which constitutional reform is always on the horizon, was a welcome return to normalcy that they quickly embraced.

V. SOCIALIST (AND OTHER) RESPONSES: A RETURN TO THE STATUS QUO

Given that Leftist voices like Yang Xiaoqing's have been marginalized for decades, many mainstream academics were taken by surprise by the high-profile spate of Leftist attacks on mainstream Socialist constitutionalist thought.

Many public intellectuals—including those from disciplines other than law, politics, and philosophy—simply lamented the return of such extreme Leftist rhetoric.[189] For many Chinese of a certain age, such arcane and hard-edged terminology is redolent of the highly charged – and highly dangerous—political discourse of the Cultural Revolution, whose excesses are part of the lived experience of many older Chinese intellectuals.

For those who were direct participants in the constitutionalism debate, however, the Leftist push was a direct attack on their own painstaking intellectual contributions to China's political development. A response—hopefully a vigorous one—was needed.

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[188] Qian Gang, *Xi's Missing Terms Emerge Again*, CHINA MEDIA PROJECT (Sept. 8, 2014), http://cmp.hku.hk/2014/09/08/35953/.

[189] Li Yinhe (李银河), *Xianzheng Lun Zhi Wo Jian* (宪政论争之我见) [*My View on the Constitutionalism Debate*], LI YINHE DE BOKE (李银河的博客) [LI YINHE BLOG] (May 30, 2013), http://blog.sina.com.cn/s/blog_473d53360102f0as.html.

Initial responses from Socialist constitutionalists to Yang Xiaoqing and her colleagues were often dismissive: one prominent Socialist academic referred to the writings of Yang Xiaoqing and her cohort as "laughable" and "preposterous,"[190] mocking her as someone who "does not understand Marxism."[191] Others used similarly dismissive language.

But what was most notable about many of the mainstream Socialist responses was the lack of analysis of the broader political import of the anti-constitutionalist push. Instead of asking the most basic question of why such pieces were appearing in prominent Party outlets, most Socialists instead busied themselves with substantive legal and theoretical responses, refuting Yang and others point by point. It could be argued that such responses missed the point: if Party elders were using the anti-constitutionalists to throw cold water on the constitutionalist debate, then legal arguments would have little impact on the CCP leadership's political calculus.

Take, for example, the response of prominent Socialist constitutionalist Hua Bingxiao. In a series of heavily-footnoted papers published in the months following Yang's piece, Hua argued that Yang had fundamentally misconstrued Socialist legal theory, in part by ignoring the contributions to that theory by Hua himself and other key Socialist constitutionalist scholars.[192] In Hua's view, Yang "perfected the art of distortion." By pretending that other schools of Chinese socialist thought did not exist, Yang created a universe in which the only two options available were her (in Hua's view, simplistic and retrograde) take on Socialist constitutionalism, and "Western, capitalist" constitutionalism.[193] Only through such "deceitful methods" could Yang attain even a minimal level of legitimacy for her "absurd theories," Hua argued.[194] Using a clutch of references from Marx, Lenin, the German political theorist Herbert Marcuse, Bukharin, Mao, and others, Hua then went on to elaborate a complex and highly theoretical argument as to why, in the end, Socialist legal theory and constitutionalism complement, rather than

[190] Hua, *supra* note 139.
[191] Hua, *supra* note 11.
[192] Hua, *supra* note 139.
[193] *Id*.
[194] *Id*.

contradict, each other. He condemned Yang and her colleagues as Stalinists for their failure to recognize this fact.[195]

Instead of asking difficult questions about the political import of the series of Leftist attack pieces, Hua went so far as to suggest that the tail might be wagging the dog: he accused Leftists like Yang of attempting to "trick Party and state senior leading cadres," and of trying to "drive a wedge between the Party, intellectuals, and the great masses."[196] To be fair, Hua was writing before the publication of similar anti-constitutionalist pieces published by several dozen Party officials in September 2013. Those pieces make clear the connection between the Party leadership and the anti-constitutionalist rhetoric that appeared from May to November 2013.

Yet many scholars writing after September 2013 continued to describe anti-constitutionalists as extreme Leftists who were fighting against Xi Jinping's reformist agenda. Tsinghua University physicist and political commentator Ge Weikun, for example, cast anti-constitutionalists as fighting against "Chairman Xi's vision" on behalf of vested interests, who seek to "defend [their] illegal occupation of economic wealth and state power, and continue their suppression of calls for democracy."[197] Such responses, though erroneous, benefit the Party, by casting the CCP senior leadership as fighting against vested interests and also fighting for constitutional reform. Some commentators even went so far as to map the purge of Chongqing Party chief Bo Xilai and his apparent ally Zhou Yongkang by Xi Jinping and others in the Party leadership onto the debate between Yang Xiaoqing and her fellow Leftists and the Socialist Constitutionalists, with Yang and her colleagues cast in the roles of the evil duo, Bo and Zhou.[198]

Other responses focused less on theoretical questions and more on political positioning as well as the practical difficulties of reform. Wuhan University law professor Qin Qianhong, for example, argued in an October 2013 piece that Socialist constitutionalism should be seen as avoiding the excesses of both the Left (anti-constitutionalists) and the Right (the Liberals); as such, it was ideally

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[195] *Id*.
[196] *Id*.
[197] Ge, *supra* note 18.
[198] Hua, *supra* note 139.

suited to offer a feasible path to constitutional reform.[199] Echoing previous arguments made by other Socialist scholars, Qin asserted that, unlike other camps, the views of the Socialist constitutionalists could serve as the basis for a wide-ranging consensus which would include both the vast majority of constitutional scholars and the Party itself.

Interestingly, Qin spent more time arguing against the theories of the Liberals than he did the anti-constitutionalists, despite the fact that it was the Left that had launched what he called a "fierce bombardment" against establishment scholars like himself. His decision to do so might indicate that he viewed the Leftist moment as having past, and thus not worthy of detailed scholarly refutation. Just as Party propagandists had turned away from the moderates to train their rhetorical fire on the liberal Right, so too did Qin turn away from the hard Left, a spent force, to concentrate his energies on Rightist liberals.

Qin also seemed to define constitutionalism downward, listing various reforms that the Party had already embraced—including inner-Party democracy, judicial reform, and new open government information regulations—as key elements of constitutional development. Qin seemed less interested in laying out specific institutional reforms that the Party might embrace to bring it closer to full constitutional enforcement.

Qin closed with a famous quote from the prominent early 20th century scholar Hu Shi: "more study of problems, less talk of isms." "If the Socialist Constitutionalist conceptual debate returns to an inquiry into problems," Qin averred, "I guess Hu Shi would not disagree."

In referencing Hu Shi in this way, Qin seemed to be speaking to his fellow Socialist constitutionalists, nudging them to focus on specific reforms that meshed with the Party's own already-articulated agenda, and to avoid larger political debates over China's future reform path. For Qin and other Socialists, it seemed time to bring the 2013 Constitutionalist Debate to a close.

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[199] Qin Qianhong (秦前红), *Shehui Zhuyi Xianzheng: Gainian Zhizheng Haishi Wenti Zhizheng* (社会主义宪政：概念之争还是问题之争) [*Socialist Constitutionalism: an Argument over Concepts or over Problems?*], CAIJING (财经) (Oct. 14, 2013). The fact that Qin was writing in the prominent business and finance news weekly *Caijing* may also have signaled a relaxation on public commentary by moderates by the propaganda apparatus, which would serve as a further signal that the 2013 constitutionalist debate was coming to a close, and that the pre-2013 status quo was being reinstated.

Just as Autumn Stone's *Seeking Truth* article could be seen as the Party-state's signal that the anti-constitutionalist campaign was coming to an end, a piece by prominent constitutional scholar and People's University Law School Dean Han Dayuan can be taken as a strong signal of the academic community's return to the pre-2013 status quo. That piece, entitled "Crossing the River by Feeling the Constitution," argued that the Party needed to shift its strategy away from an experimentalist approach that heavily emphasized pro-market economic reforms, and instead prioritize the construction of a rule-based political system.[200]

Perhaps more that Qin, Han emphasized the serious problems—including corruption and resistance to legal and constitutional rules among local officials—that the Chinese leadership currently faces. Indeed, the title of Han's piece referred to Deng Xiaoping's famous maxim from the early reform period that China should "cross the river"—of market reforms—by "feeling the stones."[201] Han makes clear that constitutional and rule of law reforms would are in line with the Party's own goals, including maintaining the "leadership of the Chinese Communist Party."

In essence, Han was directing his argument toward the CCP leadership, arguing that it should adopt a new reform slogan, one which emphasized constitutional values. In so doing, Han was playing the classic moderate role of advising the state, rather than—as Liberals would do—seeking to harness the reformist energies of the Chinese people to push bottom-up reforms. Indeed, for Han, a key step toward constitutional implementation is "cultivating the constitutional awareness of civil servants, especially leading cadres."[202] Han's articulation of a more traditional top-down approach was yet another signal of a return to the pre-2013 status quo.

Finally, Han's piece was notable as much for what it did not say as for what it did. Han did not mention Yang Xiaoqing by name, nor did he extensively engage with Leftist arguments at any point, making his piece perhaps one of the first that did not take Yang's attack—or, for that matter, the 2013 constitutionalism debate as a

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[200] Han Dayuan (韩大元), *Mozhe Xianfa Guohe* (摸着宪法过河) [*Crossing the River by Feeling the Constitution*], CAIJING (财经) (Oct. 24, 2014), http://magazine.caijing.com.cn/2013-10-14/113413681.html.

[201] Though the phrase is now associated with Deng, Han makes clear that the phrase was first used as early as 1950 by CCP economic czar Chen Yun. *Id*.

[202] *Id*.

whole—as its jumping-off point for a broader discussion.[203] Indeed, Han's piece almost entirely ignores the 2013 debate, which likely signals that, for Han, that debate is over, and it is time to return to the concerns that animated academic constitutionalist discourse before the debate began, including, first and foremost, the need to educate officials on constitutional values.

Virtually all of the responses by the Socialists reaffirmed support for the Party-led constitutional development path. From the Party's perspective, these various responses also—most likely by design—switched the terms of the debate away from key questions of implementation, like how to construct a workable mechanism for enforcement of constitutional rights, and toward the (to the Party) much more amenable ground of the true compatibility of Socialism and constitutionalism.

At bottom, however, such interventions—which, in essence, are trying to win an academic and somewhat esoteric argument over the compatibility of Socialism and constitutionalism – may miss the point. The barriers to constitutional development in contemporary China are not theoretical, but rather political—at present, the Party has chosen not to move forward with a constitutional reform agenda, one that would, for the first time in the history of the People's Republic, put institutional constraints on the Party's exercise of political power. And here, all too real limits on academic freedom in China may come into play: many Chinese constitutional law scholars may well feel, not without basis, that they would encounter very serious professional and even personal risks were they to try to analyze these difficult political dynamics in print.

Constitutional law scholarship that seeks to contribute to constitutional development in China must address this very difficult political question of the Party's reluctance to embrace a true constitutional reform agenda, rather than focusing exclusively on more narrow theoretical concerns.

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[203] Han does mention, at least in passing, those on the left who "refuse to let go of their vested interests," and who "seem to persist in 'Marxisim,' [but who] essentially deviate from fundamental concepts of Marxism, and cling tenaciously to conservative, backward concepts and behavioral styles." *Id*. As with Ge Weikun and others, Han, too, links Leftists to vested interests who oppose Xi Jinping's reform agenda.

VI. CONCLUSION: PARTY CONSTITUTIONALIST PROPAGANDA RETURNS

Throughout most of 2014, constitutionalism remained largely absent from official discourse. It was not until September that constitutional terminology made a limited return: in a speech marking the 60th anniversary of the founding of the National People's Congress, Communist Party Chairman Xi Jinping declared that "[t]he Constitution is the most basic law of our country. Rule of the nation by law means, first and foremost, ruling the nation in accord with the constitution; governing by laws is first and foremost, governing in accord with the constitution."[204] Though Xi's speech was published in full in official media, both print and electronic media reports on the speech neglected to mention Xi's use of pro-constitutionalist rhetoric.[205]

Pro-constitutionalist rhetoric was given an even more prominent platform in October, when two key phrases—ruling the

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[204] Qian Gang, *Xi's Missing Terms Emerge Again*, CHINA MEDIA PROJECT (Sept. 8, 2014), http://cmp.hku.hk/2014/09/08/35953/. It should be noted, however, that, on the whole, Xi's speech hewed largely to more conventional themes, including the leadership position of the Communist Party and the need to advance "Socialism with Chinese characteristics." Various liberal reforms—including legal reform, judicial reform, and reform of the People's Congress system—were counter-balanced by clear qualifiers, such as the need for Party oversight of state political and legal institutions. Xi Jinping (习近平), *Zai Qingzhu Quanguo Renmin Daibiao Dahui Chengli Liushi Zhounian Dahui Shang de Jianghua* (在庆祝全国人民代表大会成立 60 周年大会上的讲话) [*Speech at the Conference to Celebrate the 60th Anniversary of the Establishment of the National People's Congress*], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY] (Sept. 5, 2014), http://cpc.people.com.cn/n/2014/0906/c64093-25615123.html.

[205] Qian Gang, *Xi's Missing Terms Emerge Again*, CHINA MEDIA PROJECT (Sept. 8, 2014), http://cmp.hku.hk/2014/09/08/35953/. For the Xinhua report on Xi's speech, see Xi Jinping (习近平), *Zai Qingzhu Quanguo Renmin Daibiao Dahui Chengli Liushi Zhounian Dahui Shang Fabiao Zhongyao Jianghua* (习近平在庆祝全国人民代表大会成立 60 周年大会上发表重要讲话) [*Xi Jinping Gives an Important Speech at the Conference to Celebrate the 60th Anniversary of the Establishment of the National People's Congress*], XINHUA (Sept. 5, 2014), http://news.xinhuanet.com/2014-09/05/c_1112382569.htm. For an English-language report on the speech, see *Xi Stresses Adherence to China's Political Path Ahead of Legislature Anniversary*, GLOBAL TIMES (Sept. 6, 2014), http://news.xinhuanet.com/english/china/2014-09/05/c_133624166.htm. A full twelve-minute CCTV news report on the speech also omitted any reference to Xi's constitutionalist commentary, despite giving extensive coverage to other aspects of the speech. *Xi Jinping Zai Qingzhu Quanguo Renmin Daibiao Dahui Chengli 60 Zhou Nian Dahui Shang Fabiao Zhongyao Jianghua* (习近平在庆祝全国人民代表大会成立 60 周年大会上发表重要讲话) [Xi Jinping Gives Important Speech at 60th Anniversary Celebration of the NPC], SOHU (搜狐), http://tv.sohu.com/20140905/n404115242.shtml (last visited Oct. 11, 2016).

country according to the Constitution and governing according to the Constitution – found their way into the final text of the final document of the 4th Plenum of the 18th Party Congress. That document, the CCP Central Committee Decision Concerning Some Major Questions on Comprehensively Moving Forward on Governing the Country According to Law (the "Decision"), was viewed as a step forward in that it focused heavily on rule of law and legal reform.[206] The Decision also made reference to constitutional development, echoing the language that Xi Jinping used in his September speech on "ruling the country in accordance with the constitution" and "governing in accordance with the constitution."

Though the Decision's heavy focus on legal reform and its references to constitutional governance were welcome, nonetheless, taken as a whole, the Decision was by no means a historic, trailblazing document. It affirmed the leadership position of the Communist Party, and maintained the Party's position above the legal system and above the law. For example, the Decision called for "strengthening Party leadership over legislation work."

That said, many observers pointed to language in the Decision which, if acted upon, would strengthen the judiciary and the People's Congress system.[207] The Decision also called for progress on "complet[ing] procedures and mechanisms for constitutional interpretation," raising the hope, as Xi's December 2012 speech had, that the Party would finally move forward on the construction of institutions which could interpret and enforce constitutional norms, including constitutional rights provisions. Once again, the Party was using the Chinese Constitution as a false blueprint, one that would, at an undefined point in the future, lead China toward a full embrace of constitutional governance.

Yet without any specific actions to be taken to move forward on creating such "procedures and mechanisms," it seemed likely that the Decision's constitutional reform rhetoric would remain just

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[206] *CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward*, CHINA COPYRIGHT AND MEDIA (Oct. 28, 2014), https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/ (translation).

[207] *See* Don Clarke, *The Fourth Plenum's "Decision": My Take*, LAW PROFESSORS BLOGS NETWORK (Oct. 29, 2014), http://lawprofessors.typepad.com/china_law_prof_blog/2014/10/the-fourth-plenums-decision-my-take.html.

that—rhetoric.[208] Indeed, the only specific action that the Decision called for on constitutionalism was the proposal to declare December 4 National Constitution Day. The Standing Committee of the National People's Congress duly took action on this suggestion, and December 4, 2014 marked the first-ever observance of National Constitution Day across China.[209]

Perhaps mindful of the 2013 constitutionalism debate, the Party propaganda apparatus made sure to publish concurrently with the Decision a warning about what was meant—or, more precisely, what was *not* meant—by the constitutionalist references of the Decision. That same day, October 24, the *People's Daily* published an editorial by one Guo Ping—a pseudonym—entitled, "Governing According to the Constitution Must Not Be Confused with Western 'Constitutionalism.'"[210] As the title suggests, Guo's piece argued that "in a word, governing according to the constitution is not Western 'constitutionalism.' In fact, the two are completely different, and we cannot allow the fundamental differences between the two to be obscured." Though much more mild in tone than the anti-constitutionalist attacks of 2013, nonetheless Guo's piece signaled that any attempts to appropriate the Decision's rhetoric for purposes beyond the CCP's own limited and largely political agenda would not be welcome.

Some have argued that the months-long official silence on constitutionalism, followed by sporadic references, suggests a split within the Party on the benefits of pro-constitutionalist rhetoric.[211] And, indeed, there is some limited evidence to suggest that some key elements within the Party wanted to keep any references to

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[208] Jerome Cohen, *China's New Constitution Day: Is It Worth Celebrating?* 14 JAMESTOWN CHINA BRIEF, no. 22 (2014), https://jamestown.org/program/chinas-new-national-constitution-day-is-it-worth-celebrating.

[209] Shannon Tiezzi, *For China, Constitution Day Comes Without Constitutionalism*, DIPLOMAT (Dec. 4, 2014), http://thediplomat.com/2014/12/for-china-constitution-day-comes-without-constitutionalism/.

[210] Guo Ping (国平), *Yixian Zhizheng yu Xifang Xianzheng Burong Hunxiao* (依宪执政与西方"宪政"不容混淆) [*Governing According to the Constitution Must Not Be Confused with Western 'Constitutionalism,'*], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY] (Oct. 24, 2014), http://politics.people.com.cn/n/2014/1024/c70731-25904899.html.

[211] Qian Gang, *Xi's Missing Terms Emerge Again*, CHINA MEDIA PROJECT (Sept. 8, 2014), http://cmp.hku.hk/2014/09/08/35953/ ("One thing we can be quite sure of . . . is that there are people within the Party who are unsettled by Xi Jinping's decision to use these [constitutionalist] terms"). *See also* Qian Gang, *The Missing Speech*, CHINA MEDIA PROJECT (Sept. 4, 2014), http://cmp.hku.hk/2014/09/04/35905/.

Constitutionalism out of the Fourth Plenum Decision, and, most likely, out of official Party discourse altogether.[212] If true, then this disagreement within the Party would mark a small but significant setback for Xi Jinping, who is otherwise regarded as having moved quickly to consolidate power and to solidify his own political position.

At the same time, the pattern of official discourse on constitutionalism in 2014 is also consistent with prior efforts by the Party to use constitutionalist rhetoric as a source of political legitimacy. It is possible that, after the events of 2013, the Party decided to wait for a period of months before returning to pro-constitutionalist propaganda. In so doing, it allowed any lingering memories of the Leftist push to recede, thus ensuring that its renewed constitutionalist rhetoric in September and October would not be tainted by association with those far-from-mainstream views.

The fact that it published the pro-constitutionalist Decision and the more cautious warning by the pseudonymous Guo Ping on the same day speaks to the authoritarian constitutional dilemma that the Party continues to face: it wants to make use of pro-constitutionalist rhetoric, but it cannot hit such notes too hard, for fear that some listeners might take its rhetoric at face value, and seek to use that rhetoric to force the Party to act on a full-fledged constitutional agenda, something that it believes that it cannot do.

The need to proceed with caution in the face of such a dilemma also explains the lack of prominent coverage given to the constitutionalist sentiments in Xi Jinping's September 5, 2014 speech. The authoritarian constitutionalist dilemma also likely explains why Party-controlled media outlets devoted much more attention to the rule of law elements of the Fourth Plenum Decision, and gave relative short shrift to the constitutionalist content.[213]

Overall, the use of pro-constitutionalist rhetoric is a minor part of Xi Jinping's political strategy. Roughly four years into his tenure as China's supreme leader, the outlines of Xi's agenda are now clearer: his administration remains heavily focused on the anti-corruption campaign and on solidifying Party control over virtually all important aspects of Chinese life. Over the past four years, there has been a heavy emphasis on tightening up on civil society, and on exerting greater control over the vehicles of public discourse,

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[212] Qian Gang, *A Backstage Glimpse at the Plenum 'Decision,'* CHINA MEDIA PROJECT (Nov. 10, 2014), http://cmp.hku.hk/2014/11/10/37015/.

[213] Qian Gang, *China's Constitution Roller-Coaster*, CHINA MEDIA PROJECT (Nov. 6, 2014), http://cmp.hku.hk/2014/11/06/36962/.

including the internet and the media. At the same time, a limited set of legal reforms, along the lines of those put forward in the Decision, are a smaller but still significant part of Xi's reform plans. At least as of this writing, it seems that any meaningful political system reform, including constitutional reform, is not on part of Xi Jinping's agenda.

It may well be the case that the mix of a hard-hitting anti-corruption campaign and tighter political cointrols will be enough to preserve the Party's political legitimacy, such that it is able to maintain public support even in the face of slowing economic growth and limited progress on political-legal reform.

Yet, the 2013 Constitutionalism Debate demonstrated the deep-seated desire among many Chinese intellectuals, as well as an uncountable number of Chinese citizens, for genuine constitutional reform, including the development of institutions that would limit the Party's arbitrary authority, and would, for the first time, put political power in China in an institutional cage. Time and time again, the Party responds to this desire with pro-constitutional promises that are never quite fulfilled. While this formula has worked well enough over the past three decades, it is showing signs of age. It may be time for the Party to acknowledge this, and move from a false constitutional blueprint to a real one.