

3-2-2023

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Bui, Ngoc Son (2023) "Discursive Constitutionalism," *Chicago Journal of International Law*. Vol. 23: No. 2, Article 2.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol23/iss2/2>

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Discursive Constitutionalism

Ngoc Son Bui*

Abstract

“Constitutionalism” has been contentiously debated at national and international levels. This Article develops the concept of discursive constitutionalism, defined as the construction of constitutionalism through public discourse. It theorizes about four elements (ideas, actors, actions, and spaces) and the constructive logic of discursive constitutionalism. Public constitutionalist discourse can be shaped by the existing relations of political power. At the same time, it can constrain the political monopoly of constitutional thinking, shape the design of institutions to limit political power, and prevent the arbitrary use of political power in practice. This study provides an explanatory account of three models of discursive constitutionalism in East Asia. The protectionist model in Japan refers to the discursive defense of national constitutional commitments to international peace and renouncing war. The reformist model in China denotes the discursive promotion of institutional reforms in line with normative values of constitutionalism. The diffusionist model in Vietnam features the discursive spread of constitutionalist ideas from external international and comparative sources into internal intellectual communities. Discursive constitutionalism can be a useful conceptual tool to understand the quest for constitutionalism through public discourse.

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I. INTRODUCTION

On September 22, 2020, the Civil Alliance for Peace and Constitutionalism in Japan issued a written request to opposition parties, demanding, inter alia, restoration of “constitutionalism” in the country.¹ To regain constitutionalism, the Civil Alliance called for abolition of allegedly unconstitutional laws, such as the war-related laws, the state secrets protection law, and the anti-conspiracy law; and “all-out efforts be made” to thwart the ruling Liberal Democratic Party’s attempt to amend Article 9 of Japan’s 1946 post-war constitution that renounces war.²

The discursive contestation of constitutionalism is not unique to Japan. The concept of constitutionalism—often understood as constitutional constraints on government power—has attracted great attention in national public law discourse in countries like China,³ the U.K.,⁴ and the U.S.⁵ National debate on constitutionalism is not merely national but sometimes international. The Japanese story indicates that the domestic discourse on constitutionalism is relevant to various aspects of international law, such as wars and international peace.

Beyond national public law discourse, the language of constitutionalism has been used in the discourse of international organizations, such as the United Nations (U.N.), the European Union (EU), and the World Trade Organization (WTO).⁶ In public international law, the debate is whether the U.N. Charter can

¹ *Civil Alliance Issues Written Request to Opposition Parties to Work Together for Regime Change*, JAPAN PRESS WKLY. (Sept. 22, 2020), <https://perma.cc/QGCT-NBNS>.

² *Id.*

³ See WANG JIANXUN, FUNDAMENTAL PRINCIPLES OF CONSTITUTIONALISM: A GENERAL THEORY OF LIMITED GOVERNMENT (憲政要義: 有限政府的一般理論) (2017); TIAN FEILONG, POLITICAL CONSTITUTIONALISM IN CHINA (政治憲法的中國之道) (2017); QIN QIANHONG & YE HAIBO, THE STUDY OF SOCIALIST CONSTITUTIONALISM (社會主義憲政研究) (2017); YAO ZHONGQIU, ON CONFUCIAN CONSTITUTIONALISM (儒家憲政) (2017).

⁴ Jo Eric Khushal Murkens, *The Quest for Constitutionalism in U.K. Public Law Discourse*, 29 OXFORD J. OF LEGAL STUD. 427 (2009) (explaining how and why the idea of constitutionalism enters U.K. public law discourse).

⁵ See generally THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM (Steven Kautz et al. eds., 2011) (discussing the idea of constitutionalism in the U.S. Supreme Court’s constitutional jurisprudence).

⁶ Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT’L L. & BUS. 398 (1997); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT’L L. & BUS. 354 (1997); Signe Reihling Larsen, *Varieties of Constitutionalism in the European Union*, 84 MOD. L. REV. 477 (2021); Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 32 (Grainne de Burca & Joanne Scott eds., 2001).

be understood in terms of “international constitutionalism.”⁷ The EU has also been discussed as a system of “transnational constitutionalism.”⁸ In international economic law, some have contested whether the WTO can be considered constitutionalist.⁹

This Article introduces the concept of discursive constitutionalism, defined as *the ideational, institutional, and functional construction of constitutionalism through public discourse*. Constitutionalism is not merely achieved through aggressive and confrontational mechanisms, such as litigation and social protest, respectively. Constitutionalism can also be achieved through discursive mechanisms. Citizens may challenge governments’ arbitrary use of power at constitutional courts. They may demonstrate on the streets to demand the use of public power within constitutional constraints. But citizens may also use constitutional discourse to protect an existing constitutionalist polity, to demand institutional reforms in line with constitutionalist ideas, or simply to disseminate constitutional ideas in the public to limit ideological domination. When constitutionalist discourse becomes an influential public discourse, it can channel constitutional thoughts, constitutional design, and constitutional practices toward the direction of a limited government.

The concept of discursive constitutionalism is illustrated by constitutional experiences in Asia. Asia is a region of varied constitutional dynamics that have drawn academic attention.¹⁰ This Article identifies and explores three discursive models of constitutionalism in Asia: the protectionist model in Japan, the reformist model in China, and the diffusionist model in Vietnam. The

⁷ Jan Klabbbers, *International Constitutionalism*, in *THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW* 498–520 (Roger Masterman & Robert Schutze eds., 2019); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 *COLUM. J. TRANSNAT’L L.* 529 (1998).

⁸ See generally *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS* (Nicholas Tsagourias ed., 2007); Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 *PENN STATE INT’L L. REV.* 89 (2008).

⁹ See, e.g., Jessica C. Lawrence, *Contesting Constitutionalism: Constitutional Discourse at the WTO*, 2 *GLOB. CONSTITUTIONALISM* 63 (2013); John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 *HARV. L. REV.* 511 (2000).

¹⁰ See, e.g., Li-ann Thio, *Varieties of Constitutionalism in Asia*, 16 *ASIAN J. OF COMP. L.* 285 (2021); *THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW* (Philipp Dann et al. eds., 2020); YVONNE TEW, *CONSTITUTIONAL STATECRAFT IN ASIAN COURTS* (2020); PO JEN YAP, *COURTS AND DEMOCRACIES IN ASIA* (2017); Pranoto Iskandar, *Indigenizing Constitutionalism: A Critical Reading of “Asian Constitutionalism”*, 5 *OXFORD U. COMP. L. FORUM* 3 (2018); *UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA* (Mark Tushnet & Madhav Khosla eds., 2015); WEN-CHEN CHANG ET AL., *CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS* (2014); *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* (Rosalind Dixon & Tom Ginsburg eds., 2014); *CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY* (Albert H. Y. Chen ed., 2014); *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* (Sunil Khilnani et al. eds., 2013).

protectionist model refers to the discursive defense of national constitutional commitments to international peace and the renunciation of war. The reformist model denotes the discursive promotion of institutional reforms in line with normative values of constitutionalism. The diffusionist model features the discursive spread of constitutionalist ideas from external international and comparative sources into internal intellectual communities.

Discursive constitutionalism can be a useful conceptual tool to understand the quest for constitutionalism through discourse. Following the Introduction, Part II develops a theoretical framework of discursive constitutionalism. Part III explores three discursive models of constitutionalism in Japan, China, and Vietnam. Part IV concludes.

II. THEORIZING DISCURSIVE CONSTITUTIONALISM

This Part defines the concept of discursive constitutionalism, articulates its elements, and explains its constructive logic.

A. Concept

Constitutionalism is a controversial concept. C. H. McIlwain famously argued that “constitutionalism has one essential quality: it is a legal limitation on government.”¹¹ However, many scholars contest the equation of constitutionalism to limited government, arguing that constitutionalism also involves enabling government’s positive functions.¹² The elements of constitutionalism have also been hotly debated. Scholars discuss whether constitutionalism entails liberal components (such as separation of powers and protection of liberal rights) or whether it encompasses non-liberal qualities (such as centralization of power and the promotion of communal values).¹³ I contend that the creation of state institutions is essentially the enterprise to establish constitutional boundaries within which the effective use of state power is possible. Limits make things possible. Human society is replete with limits (for example, speed, age, word, weight, and time) set up to enable humans to act for the common good. Speed limits do not stop, but rather enable, a driver to drive

¹¹ CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 24 (2005).

¹² *See, e.g.*, N.W. BARBER, *THE PRINCIPLES OF CONSTITUTIONALISM* 3 (2018); JEREMY WALDRON, *POLITICAL THEORY ESSAYS ON INSTITUTIONS* 23 (2016); SOTIRIOS A. BARBER, *WELFARE & THE CONSTITUTION* 51 (2003).

¹³ *See, e.g.*, *CONSTITUTIONALISM BEYOND LIBERALISM*, (Michael W. Dowdle & Michael A. Wilkinson eds., 2017); Li-Ann Thio, *Constitutionalism in Illiberal Polities*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* (Michel Rosenfeld & Andras Sajó eds., 2012); Graham Walker, *The Idea of Nonliberal Constitutionalism*, in *ETHNICITY AND GROUP RIGHTS* 164 (Ian Shapiro & Will Kymlicka eds., 1997).

safely and protect public safety at the same time. In the same vein, constitutional limitations make governing possible for the public good.

Because the concept of constitutionalism is amorphous, it is attractive. The fact that constitutionalism lacks a fixed meaning generates an ample space for contentious debate in which discursive actors attribute different connotations to the concept.¹⁴ In addition, constitutionalism is an appealing concept due to an omnipresent apprehension of arbitrary power. Walker states that “the appeal of constitutionalism, now and in previous eras, seems precisely to lie in its capacity to ward off tyranny by structuring public life and institutions in a way that keeps them accountable to general public standards.”¹⁵ Understandably, constitutionalism is appealing in public discourse in countries where constitutional democracy has been under tension (like Japan) and where authoritarianism has been consolidated (like China and Vietnam). The common dread of arbitrary power drives the discursive turn to constitutionalism as an antidote to such power.

To understand the struggle for constitutionalism through discourse, I develop the concept of discursive constitutionalism. This concept derives from two intellectual sources. One is discursive institutionalism, “an umbrella concept for the vast range of works in political science that take account of the substantive content of ideas and the interactive processes by which ideas are conveyed and exchanged through discourse.”¹⁶ Studies of discursive institutionalism underline the importance of ideas and discourse in institutional change.¹⁷

To further understand the contextual, political factors that shape the ideational and discursive dynamics, I draw on Michel Foucault’s discourse

¹⁴ Lawrence, *supra* note 9, at 67.

¹⁵ Walker, *supra* note 13, at 164.

¹⁶ Vivien A. Schmidt, *Taking Ideas and Discourse Seriously: Explaining Change Through Discursive Institutionalism as the Fourth ‘New Institutionalism’*, 2 EUR. POL. SCI. REV. 1, 3 (2010); *see also* Vivien A. Schmidt, *Discursive Institutionalism: The Explanatory Power of Ideas and Discourse*, 11 ANN. REV. OF POL. SCI. 303 (2008); Vivien A. Schmidt, *Discursive Institutionalism: Scope, Dynamics, and Philosophical Underpinnings*, in *THE ARGUMENTATIVE TURN REVISITED: PUBLIC POLICY AS COMMUNICATIVE PRACTICE* 85 (Frank Fischer & Herbert Gottweis eds., 2012).

¹⁷ Discursive institutionalists have explored a range of institutional issues, such as education reform, think tanks’ power, and financial crisis. *See, e.g.*, Ninni Wahlstrom & Daniel Sundberg, *Discursive Institutionalism: Towards a Framework for Analysing the Relation Between Policy and Curriculum*, 33 J. OF EDUC. POL’Y 163 (2018); Erin Zimmerman, *Discursive Institutionalism and Institutional Change*, in *THINK TANKS AND NON-TRADITIONAL SECURITY: CRITICAL STUDIES OF THE ASIA-PACIFIC* 16 (2016); Dimitris Papadimitriou et al., *European Elites and the Narrative of the Greek Crisis: A Discursive Institutional Analysis*, 58 EUR. J. OF POL. RSCH. 534 (2019).

theory.¹⁸ Foucault defines discourses as “practices that systematically form the objects of which they speak.”¹⁹ In Foucauldian theory, discourse is embodied in social power relations while simultaneously generating knowledge and meaning of the social world.²⁰ Constitutional law, a body of fundamental legal rules and principles on political powers and rights, is undoubtedly a prominent field in which public discourse embodies the relations of public power.²¹

With those conceptual foundations, I define discursive constitutionalism as *the ideational, institutional, and functional construction of constitutionalism through public discourse*. Discursive constitutionalism is a set of discursive practices involving the production of constitutional knowledge and meaning through written and vocal exchange and communication. The constitutional relations of political powers are embedded in constitutionalism discourse. At the same time, constitutionalism discourse constructs constitutional knowledge that can shape constitutional recognition, the constitutional framework that regulates power relations, and the actual practice of state power.

Discursive constitutionalism is not merely about constitutionalism discourse. Its discursive nature lies in the fact that the ideas of constitutionalism function as an epistemic field for constitutional communication and exchange. In addition, discursive constitutionalism is a material thing. It is essentially a discursive practice of constitutionalism. When constitutionalism discourse becomes an influential public discourse, it can constrain the domination of a single ideology and the hegemony of political leaders’ official constitutional discourse and channel constitutional design and constitutional practices toward the direction of constitutionalism. Consequently, constitutionalism is achieved through the discursive power. In other words, influential public constitutionalist discourse can check political power ideationally, institutionally, and functionally. Such public discourse can constrain political actors’ monopoly on public constitutional thinking, shape the formal design of institutions to constrain state power, and prevent the arbitrary use of state power in practice.

¹⁸ MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* (1982); Michel Foucault, *The Order of Discourse*, in *UNTYING THE TEXT: A POST-STRUCTURALIST READER* 51–77 (Robert Young ed., 1981).

¹⁹ FOUCAULT, *supra* note 18, at 54.

²⁰ Tauhid Hossain Khan & Ellen MacEachen, *Foucauldian Discourse Analysis: Moving Beyond a Social Constructionist Analytic*, 20 *INT’L J. OF QUALITATIVE METHODS* 5 (2021).

²¹ Unsurprisingly, Foucault’s theory has been used to discuss constitutional questions. *See, e.g.*, LAWRENCE, *supra* note 9; MARIA TZANAKOPOULOU, *RECLAIMING CONSTITUTIONALISM: DEMOCRACY, POWER AND THE STATE* 125–38 (2018); Jiai Paiban, *Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism*, 45 *J. OF L. & SOC’Y* 30–51 (2018); John Morison, *Democracy, Governance and Governmentality: Civic Public Space and Constitutional Renewal in Northern Ireland*, 21 *OXFORD J. OF LEGAL STUD.* 287 (2001).

B. Elements

Discursive constitutionalism consists of four elements: ideas, actors, actions, and spaces.

1. Ideas

The substantive contents of discursive constitutionalism are the ideas of constitutionalism. *Constitutionalist ideas* are the contents of constitutional recognition and debate. Discursive institutionalists indicate that ideas exist at three different levels of generality: philosophies, programs, and policies.²² In the same vein, discursive constitutionalism involves the debate on the ideas of constitutionalism at three levels, characterized here as jurisprudence, principles, and rules.

At the jurisprudential level, discursive constitutionalism concerns the discursive contestation of the abstract nature of constitutionalism. Discursive constitutionalism involves the debate on jurisprudential questions such as: What is constitutionalism? Does constitutionalism imply limited government? If it does, what do these limits mean? The jurisprudential level of discursive constitutionalism also involves contestation over the constitutionalist nature of a political system. In this regard, actors of discursive constitutionalism may contest, for example, whether a country's governmental system can be perceived as constitutionalist.

Discursive constitutionalism also involves a debate on principles of constitutionalism. The jurisprudential idea of constitutionalism underpins ideas about the principles of constitutionalism.²³ These include constitutionalist ideas such as popular sovereignty, separation of powers, other forms of checks and balances, judicial review, and protection of fundamental rights.²⁴ Discursive actors may contest questions such as: What should be necessary principles of constitutionalism? What are principles of constitutionalism that a particular polity should adopt?

Philosophical and paradigmatic constitutionalist ideas direct other ideas about concrete constitutionalist rules. Constitutionalist rules dictate specific political actions to ensure the use of the public power within constitutional limits. Discursive constitutionalism may involve the debate on questions such as: Should presidential terms be limited? How should the government use force in the context of national security?

²² Schmidt, *Discursive Institutionalism*, *supra* note 16, at 306.

²³ N.W. BARBER, *supra* note 12, at 11–18 (arguing that constitutionalism includes a set of principles); *see also* Tarunabh Khaitan, *Constitutional Directives: Morally-Committed Political Constitutionalism*, 82 MOD. L. REV. 603 (2019).

²⁴ Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. 533, 535–36 (1992).

Apart from these three levels, discursive institutionalists distinguish two types of ideas: interest-and-necessity-justified cognitive ideas and value-justified normative ideas.²⁵ The cognitive ideas of constitutionalism are justified on instrumental bases. Scholars, for example, have discussed the instrumental relationship between elements of constitutionalism (particularly democracy, separation of power, and freedom of the press) and economic development.²⁶ The normative ideas of constitutionalism are legitimized through adherence to values such as individual freedom²⁷ or the state's moral duty to work for the wellbeing of the community.²⁸

2. Actors

Actors of discursive constitutionalism refers to individual and institutional agents that engage in the debate on constitutionalism. The institutional actors of discursive constitutionalism may be governmental institutions including parliaments, executives, or courts. They may also be social institutions like civil society organizations or social movement organizations. Discursive constitutionalism may involve individual actors such as politicians, public intellectuals, lawyers, activists, or ordinary citizens. Actors of discursive constitutionalism are more extensive than those of judicial constitutionalism, because they do not merely involve courts and judges; they also include a wide range of social and political actors.

3. Actions

Discursive constitutionalism does not involve judicial adjudication, but rather the actions of discourse. The *actions of discourse* are the written and vocal communications and conveyances of the ideas of constitutionalism. Discursive constitutionalism is, therefore, a *dynamic* process by which the ideas of constitutionalism are presented, disseminated, and contested through discourse.²⁹ In this process, the ideas of constitutionalism are more than the law of mind, only existing as mental feelings, aspiration, and awareness. Rather, the constitutionalist ideas spread in the public and are vibrantly debated.

Discursive actions include the coordinative and communicative discourse on constitutionalism.³⁰ Coordinative discourse refers to the exchange of the

²⁵ Schmidt, *Taking Ideas and Discourse Seriously*, *supra* note 16, at 3.

²⁶ Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895, 905–12 (2008).

²⁷ DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE 8 (2016).

²⁸ N.W. BARBER, *supra* note 12, at 10.

²⁹ Schmidt, *Discursive Institutionalism*, *supra* note 16, at 309 (“Discourse is a more versatile and overarching concept than ideas.”).

³⁰ For coordinative and communicative discourse, see *id.* at 310.

ideas on constitutionalism within groups and organizations. Coordinative constitutional discourse may involve individuals loosely connected in intellectual communities or closely connected individuals.³¹ In the former context, constitutional intellectuals form intellectual communities on the basis of their sharing the cognitive and normative attraction to constitutionalist ideas. In the latter context, they exchange constitutionalist ideas in more institutionalized communities such as groups, societies, and organizational coalitions advocating for constitutionalism.

Discursive constitutionalism concerns a broader communicative discourse on the ideas of constitutionalism among public constitutional intellectuals, other citizens, and the organizations and holders of public power. The functions of coordinative and communicative conversations on constitutionalism are different. Coordinative discourse seeks to formulate a shared understanding on the ideas of constitutionalism among a community of constitutionalists. Communicative discourse presents and circulates the ideas of constitutionalism in the broader public for general discussion and support of the idea.

4. Spaces

Spaces of discursive constitutionalism refers to the sphere in which the debate on constitutionalism takes place. Constitutionalist ideas are expressed and debated in a variety of venues, such as academic publications, government addresses, petition letters, newspapers, and online social media. Coordinative discourse on constitutionalism may be presented in academic publications. Communicative discourse on constitutionalism may occur in what Habermas calls the “public sphere” or the “realm of our social life in which something approaching public opinion can be formed.”³² The communicative discourse may present the idea of constitutionalism in popular platforms, such as newspapers or social media, which makes the idea accessible to the broader public audience.

C. Constructive Logic

Combining two constructive aspects, discursive constitutionalism is not merely about discourse; it is also about generating some practices of constitutionalism. On one hand, the domestic constitutional system shapes constitutionalism discourse. On the other hand, the constitutionalism discourse generates knowledge that shapes the real construction of constitutionalism.

³¹ *Id.*

³² Jürgen Habermas, *The Public Sphere: An Encyclopedia Article (1964)*, 3 *NEW GER. CRITIQUE* 49, 49 (1974).

1. The Construction of Constitutionalism Discourse

Principles and rules in the existing constitutional system shape the opportunities, ideas, actors, actions, and spaces of discursive constitutionalism.

Discursive constitutionalism is conditioned by structural and specific constitutional *opportunities*. The structural opportunity emerges from what Gary J. Jacobsohn calls “constitutional disharmony.”³³ A national constitution may include competing constitutional commitments and ambiguous language, which provides the structural opportunity for discursive constitutionalist contestations. Some constitutional events generate specific opportunities for discourse on constitutionalism. These can be a government’s constitutional amendment initiative (as in the case of Japan), a presidential speech on constitutional implementation (as in the case of China), or a constitution-making process (as in the case of Vietnam). Such events are often significant as they involve constitutional issues that are foundational to the nature of the polity, which draws public attention to and triggers public debate on constitutionalism.

The existing constitutional framework also shapes the specific *ideas* of constitutionalist discourse. For instance, Japanese discursive constitutionalism is mainly concerned with protecting constitutional pacifism from a strong executive power. In China, however, the constitutionalism debate focuses on the limitation of the power of the Communist Party. By contrast, Vietnamese discourse on constitutionalism deals with various forms of limiting the state’s power, which is animated by the new constitution’s incorporation of the principle of mutual control among the legislative, executive, and judicial branches.

Domestic constitutional frameworks shape the *actors* of discursive constitutionalism. A liberal constitutional system that recognizes a fundamental right to association may facilitate the engagement of institutional social actors, including organized social movements, in discursive constitutionalism. An authoritarian constitutional system that limits organizational rights would limit the participation of social organized subjects in discursive constitutionalism.

Local constitutional contexts shape the *actions* of discursive constitutionalism. A liberal constitutional setting may facilitate broader communicative discourse on constitutionalism, whereas such communicative discourse may be limited under an authoritarian setting. To avoid political resistance, actors of discursive constitutionalism under authoritarianism may carry out more coordinative discourse, although they may reach out to the broader audience when possible.

Domestic constitutional contexts also determine the *spaces* in which the ideas of constitutionalism are circulated and contested. Such spaces are

³³ GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 4 (2010).

embodied in the constitutional relations of powers. Liberal democratic constitutional systems—like Japan’s—would enable discursive constitutionalism to be expressed in various public venues thanks to the constitutional protection of freedom of expression. In authoritarian constitutional systems—like those of China and Vietnam—where there is an imbalance of constitutional powers as the government controls the public sphere, the venues for constitutionalist discourse would be limited.

2. The Construction of Constitutionalism Through Discourse

Constitutionalism discourse is not merely constructed by the existing constitutional framework; it also has a constructive power. *Constructive power* refers to the capacity of constitutionalism discourse in generating constitutional knowledge and meaning that influences the construction of constitutionalism. The construction of constitutionalism through public discourse is manifested in three aspects: ideational, institutional, and functional.

Regarding the ideational aspect, public discourse constructs constitutionalism due to its capacity for public articulation. Walker argues that:

[T]he defining quality of constitutionalism is not having definite texts; it is the public articulation of (at least some of) a polity’s normative architecture, that is, of those conventions and practices, principles and understandings that, when not simply taken for granted, are invoked to control more particular disputes. These things can be articulated via all forms of influential public discourse. Articulating a constitution has certain logical, possibly psychological, and certainly political, consequences. Most importantly, to articulate a polity’s normative architecture is to objectify it. It is to confer upon it a kind of separate existence—separate, especially, from the immediate holders of power, even if those holders of power are the ones doing the articulating. Public articulation means that the shape and purposes of the polity are no longer hostage to the vagaries of their subjectivity.³⁴

Public discourse articulates normative values of a constitutionalist polity and hence objectifies them. When constitutionalism discourse is influential among the public, it prevents the powerholders from monopolizing construction of constitutional meaning for their own interests. In addition, powerful constitutionalist discourse can channel constitutional thought and awareness of political actors and citizens in the direction of limited government.

The second aspect of discursive construction of constitutionalism is institutional. Influential public constitutional discourse does not merely shape constitutional thinking; it also generates knowledge that informs the formal design of institutions to constrain political power.

³⁴ Walker, *supra* note 13, at 165.

The third dimension of discursive construction of constitutionalism is functional. Influential public constitutional discourse can prevent political leaders from using their power for personal purposes.

The constructive power of discursive constitutionalism derives from ideational power and discursive power. The ideational power stems from the practical and normative appeal of the ideas of constitutionalism. When intellectuals, other individuals, and politicians are convinced by the necessity and values of constitutionalism, they may change their constitutional thoughts and actions. However, their being convinced depends not only on the inherent necessity and values of constitutionalism, but also on the discursive power: the capacity of presentation, circulation, and legitimation of the ideas of constitutionalism among the public through discourse to influence constitutional thinking and behavior.

To be sure, the discursive power can be immaterial. When the ideational and discursive powers are weak (for example, when the ideas are not appealing to the public and are not widely circulated), the discursive power may only lead to some partial achievement of discursive constitutionalism. To illustrate, the discursive power may not lead to meaningful constitutionalist design and practices, but it may cause constitutionalism to become an influential concept in public constitutional discourse, which restrains ideological domination.

III. THE ASIAN MODELS OF DISCURSIVE CONSTITUTIONALISM

Discursive constitutionalism is illustrated by three Asian cases. The case selection model integrates the most different and the most similar cases.³⁵ Japan is the most different case. Unlike the socialist regimes in China and Vietnam, postwar Japan is “a success story of the transplant of Western liberal constitutional democracy to Asian soil.”³⁶ Japan’s postwar Constitution of 1946 entrenched fundamental values of liberal constitutionalism, including the separation of powers, basic rights, and constitutional review by the Supreme Court.³⁷ The Constitution remains unchanged, although there were occasional calls for formal amendments.³⁸ Despite the differences between liberal-democratic and authoritarian settings, Japan, like China and Vietnam, has recently witnessed a controversial debate on constitutionalism. Constitutionalism has arguably been under crisis in Japan recently, which has triggered the

³⁵ For a combination of similar and different cases, see David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 949–52 (2015).

³⁶ Albert H. Y. Chen, *Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations*, 8 INT’L J. CONST. L. 849, 855 (2010).

³⁷ Nobuhisa Ishizuka, *Constitutional Reform in Japan*, 33 COLUM. J. ASIAN L. 5, 12 (2019).

³⁸ See LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN: 1970 THROUGH 1990* 12–18 (1996).

contentious debate.³⁹ The attraction to the idea of constitutionalism in Japanese discourse makes the inclusion of this case sensible for a comparative study of constitutionalism.

China and Vietnam are the most similar cases. They are both socialist states, they have both rejected transition into a liberal constitutional democracy, and they have both retained constitutional systems under the domination of a communist party.⁴⁰ China enacted four constitutions (in 1955, 1975, 1978, and 1982) under the rule of the Chinese Communist Party.⁴¹ Vietnam promulgated five constitutions (in 1946, 1959, 1980, 1992, and 2013) under the leadership of the Communist Party of Vietnam.⁴² The socialist constitutional systems in China and Vietnam share common features: the constitutional mandate of the communist parties' leadership, the principle of democratic centralism (meaning that powers are centralized in the legislature while the executive and judicial institutions are subordinate to it), and the state's regulatory control of individual rights and the national economy.⁴³ Despite such similarities, constitutionalist discourse in China and Vietnam presents considerable divergence in terms of its window of opportunity, substantive arguments, forms, and consequences. The differences render the comparative enterprise meaningful.

It is possible to develop different models to understand different discourses on constitutionalism in the three Asian states. The term "model" is used here in the same way it is normally used in social science, where

a model is a simplified picture of the real world. It has some of the characteristics of the real world, but not all of them. It is a set of interrelated guesses about the world. Like all pictures, a model is simpler than the phenomena it is supposed to represent or explain.⁴⁴

On that basis, a discursive model of constitutionalism is a simplified set of features of the discourse on the ideas of constitutionalism.

Based on its function, I identify three discursive models of constitutionalism in Asia: the protectionist model in Japan, the reformist model in China, and the diffusionist model in Vietnam. The protectionist model is defined by the discursive defense of existing constitutionalism. The reformist model is characterized by discursive advocacy for institutional reform in line

³⁹ See Part III.A *infra*.

⁴⁰ See generally WHY COMMUNISM DID NOT COLLAPSE: UNDERSTANDING AUTHORITARIAN REGIME RESILIENCE IN ASIA AND EUROPE (Martin K. Dimitrov ed., 2013).

⁴¹ See generally QIANFAN ZHANG, THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS (2012).

⁴² See generally MARK SIDEL, THE CONSTITUTION OF VIETNAM: A CONTEXTUAL ANALYSIS (2010).

⁴³ For more details, see BUI NGOC SON, CONSTITUTIONAL CHANGE IN THE CONTEMPORARY SOCIALIST WORLD 77–83 (2020).

⁴⁴ CHARLES A. LAVE & JAMES G. MARCH, AN INTRODUCTION TO MODELS IN THE SOCIAL SCIENCES 3 (1993).

with the ideals of constitutionalism. The diffusionist model refers to the discursive spread of external constitutionalist ideas into internal intellectual communities.

The above distinction among the three discursive models of constitutionalism in the three Asian states is designed to identify particular models, rather than to be exclusive. The identity of each model is defined by a dominant function of discursive constitutionalism, while other peripheral functions may be present. Protectionist discourse may help diffuse the external idea of constitutionalism among the society, but diffusionism does not play a leading role in the discourse. Diffusionist discourse may touch on how constitutionalism should be implemented through institutional reform, but reformism only plays a marginal role. Reformist discourse may be instrumental to spreading the idea of constitutionalism, but diffusionism is not ascendant in the discourse.

The below table summarizes the main features of the three discursive models of constitutionalism, while the next sections will examine the three models in greater detail.

Table 1. Three Models of Discursive Constitutionalism in Asia

Features	Protectionist Model (Japan)	Reformist Model (China)	Diffusionist Model (Vietnam)
<i>Function</i>	Defending constitutional pacifism	Promoting institutional reform	Spreading constitutionalist ideas
<i>Opportunity</i>	Amendment initiatives	Presidential speech	Constitution-making
<i>Ideas</i>	Limiting executive power	Limiting party power	Limiting state power
<i>Actors</i>	Political leader, intellectuals, ordinary citizens, social movement organizations	Intellectuals, ordinary citizens	Intellectuals
<i>Space</i>	Popular and academic venues	Unofficial popular venues	Official academic and semi-academic venues
<i>Power</i>	Limiting formal amendment power; increasing intellectual and social awareness of constitutionalism	Echoing the 2018 amendments; limiting ideological domination; increasing intellectual and social awareness of constitutionalism	Limiting ideological domination; increasing intellectual awareness of constitutionalism

A. Japan: The Protectionist Model

The most widely read constitutional law textbook in Japan defines “constitutionalism” as “the limitation of arbitrary power and broad guarantee of citizens’ rights.”⁴⁵ Japanese intellectual discourse deals with several aspects of constitutionalism, such as its historical development in a comparative and national context, global constitutionalism, and the relationship between international law and constitutionalism.⁴⁶ Beyond academic circles, the discourse on constitutionalism has extended to the broader public because of the government’s attempt to amend the constitution in 2012. This section focuses on the popular discourse on constitutionalism in Japan.

1. Background

Hajime Yamamoto demonstrates that Japan has taken an authoritarian turn since 2012 when Shinzo Abe was selected as Prime Minister for a second term.⁴⁷ Koichi Nakano also argues that

with the demise of the DPJ [Democratic Party of Japan] government in December 2012, which in turn brought about the collapse of the political opposition in the face of an almighty LDP [Liberal Democratic Party of Japan] government of the right-wing Abe Shinzo, Japan entered a new era of corporatist authoritarian legality. The ongoing crisis of constitutionalism and the rule of law in Japan need to be understood in the context of the shifting modes of authoritarian legality.⁴⁸

The “crisis of constitutionalism” in Japan involved controversies surrounding Article 9 of the Constitution. As the product of the Allied occupation of Japan at the end of World War II, Article 9 was adopted “to ensure that Japan would never again pose a threat to peace and security.”⁴⁹ It

⁴⁵ Noboru Yanase, *Debates Over Constitutionalism in Recent Japanese Constitutional Scholarship*, 19 SOC. SCI. JAPAN J. 193, 193 (2016) (citing NOBUYOSHI ASHIBE, KENPO [CONSTITUTIONAL LAW] 5 (6th ed. 2015)).

⁴⁶ See FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY (Yoichi Higuchi ed., 2000); Akihiko Kimijima, *Global Constitutionalism and Japan’s Constitutional Pacifism*, 23 立命館国際研究 [RITSUMEIKAN INT’L STUD.] 43 (2011); Kaoru Obata, *The Emerging Principle of Functional Complementarity for Coordination Among National and International Jurisdictions: Intellectual Hegemony and Heterogeneous World*, in GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES 451–69 (Takao Suami et al. eds., 2018).

⁴⁷ Hajime Yamamoto, *An Authoritization of Japanese Constitutionalism?*, in AUTHORITARIAN CONSTITUTIONALISM: COMPARATIVE ANALYSIS AND CRITIQUE 341 (Helena Alviar Garcia & Gunter Frankenberg eds., 2019).

⁴⁸ Koichi Nakano, *Neoliberal Turn of State Conservatism in Japan: From Bureaucratic to Corporatist Authoritarian Legality*, in AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION 337, 363 (Weitseng Chen & Hualing Fu eds., 2020).

⁴⁹ Mark A. Chinen, *Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus*, 27 MICH. J. INT’L L. 55, 58 (2005).

includes two sections.⁵⁰ The first section renounces war: “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.”⁵¹ The second section bans the maintenance of armed forces: “In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.”⁵²

The first section has been read as not renouncing the right to *individual* self-defense: Japan’s right to defend itself from direct attack.⁵³ Abe has long pursued a formal amendment to Article 9 to allow Japan to exercise the right of *collective* self-defense.⁵⁴ This amendment attempt was due to Japan’s rising engagement in multilateral missions and regional security challenges, such as China’s assertiveness in territorial disputes with East Asian countries (including Japan in the Senkaku Islands dispute), and North Korean missile tests threatening Japan’s security.⁵⁵

However, the constitutional amendment rule presents an impediment: Article 96 of the Constitution requires two-thirds support in both Houses of the Diet—the national legislature—followed by a national referendum, to approve a constitutional amendment.⁵⁶ Therefore, in December 2012, Abe proposed a revision to Article 96 to relax the amendment rules.⁵⁷ Abe wanted to change the amendment rules to require a simple majority in both houses plus national referendum.⁵⁸ He contended that “it was unfair that constitutional amendment could be blocked by a mere one-third of the members of the Diet, when opposition from a majority of Diet members is necessary to block other

⁵⁰ NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 9 (Japan). For more discussion, see SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS* 237 (2011).

⁵¹ KENPO art. 9.

⁵² *Id.*

⁵³ Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 67 AM. J. COMP. L. 145, 153 (2019).

⁵⁴ Jeremy A. Yellen, *Shinzo Abe’s Constitutional Ambitions*, THE DIPLOMAT (Jun. 12, 2014), <https://perma.cc/C2QM-3SFV>.

⁵⁵ Dixon & Baldwin, *supra* note 53, at 155.

⁵⁶ KENPO art. 96. For discussion on this article, see Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT’L J. CONST. L., 655, 659–61 (2015); Adam N. Sterling, *Implicit Limits on Amending the Japanese Constitution*, 28 WASH. INT’L L.J. 243, 25–55 (2019).

⁵⁷ Okano Yayo, *Prime Minister Abe’s Constitutional Campaign and the Assault on Individual Rights*, 16 THE ASIA-PACIFIC JOURNAL: JAPAN FOCUS 1, 3 (2018).

⁵⁸ Yellen, *supra* note 54.

legislative proposals.”⁵⁹ Abe’s amendment proposal failed due to criticism from opposition parties and the public.⁶⁰

After the abortive attempt at formal amendment, the Abe government issued a cabinet decision in 2014 to reinterpret Article 9 to allow Japan’s military, the Japanese Self-Defense Forces, “to engage in ‘collective self-defense,’ meaning the defense of allies rather than only of Japan itself.”⁶¹ The cabinet decision sets down the conditions for the application of measures for collective self-defense, allowing the “use of force to the minimum extent necessary” when (1) “an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan’s survival and poses a clear danger to fundamentally overturn people’s right to life, liberty and pursuit of happiness” and (2) “there is no other appropriate means available to repel the attack and ensure Japan’s survival and protect its people.”⁶²

Based on the above constitutional interpretation, in 2015, the Abe government proposed related security bills, which triggered public opposition.⁶³ A package of security legislation was adopted on September 30, 2015, including: (a) the Law for Partial Amendments to the Self-Defense Forces Law and other Existing Laws for Ensuring Peace and Security of Japan and the International Community, and (b) the Law Concerning Japan’s Cooperation and Support Activities for Foreign Military Forces and other Personnel in Situations that the International Community is Collectively Addressing for Peace and Security.⁶⁴

2. Defending Constitutionalism

The constitutionalism debate emerged in Japan surrounding the Article 96 and Article 9 contestations.⁶⁵ Criticizing Abe’s attempt to change the amendment rules in Article 96, constitutional law expert Yoichi Higuchi, together with other scholars, created the *Association for Article 96* on May 23,

⁵⁹ Yayo, *supra* note 57, at 2.

⁶⁰ Yamamoto, *supra* note 47, at 354.

⁶¹ Dixon & Baldwin, *supra* note 53, at 146. For discussion on this decision, see Hajime Yamamoto, *Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law?*, 26 WASH. L. INT’L. REV. 99 (2017); Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the “Reinterpretation” of Japan’s War Powers*, 40 FORDHAM INT’L L.J. 427 (2017); Naoko Kumada, *Theocracy vs. Constitutionalism in Japan: Constitutional Amendment and the Return of Pre-War Shinto Nationalism* (S. Rajaratnam Sch. of Int’l Stud., Working Paper No. 310, 2018).

⁶² MINISTRY OF FOREIGN AFFAIRS OF JAPAN, CABINET DECISION ON DEVELOPMENT OF SEAMLESS SECURITY LEGISLATION TO ENSURE JAPAN’S SURVIVAL AND PROTECT ITS PEOPLE (2014), <https://perma.cc/CM3M-EFSZ>.

⁶³ Kiyoshi Takenaka, *Huge Protest in Tokyo Rails Against PM Abe’s Security Bills*, REUTERS (Aug. 30, 2015), <https://perma.cc/WQM9-Z2B2>.

⁶⁴ Hitoshi Nasu, *Japan’s 2015 Security Legislation: Challenges to its Implementation Under International Law*, 92 INT’L L. STUD. 249, 253 (2016).

⁶⁵ Yanase, *supra* note 45, at 198.

2013.⁶⁶ The association sought to defend the Article from the perspective of constitutionalism as expressed in its manifesto:

Whether we can protect Article 96 is not simply a procedural issue but a substantive one, *because it is fundamental to constitutionalism, that is, the constitution's role in constraining state power. [...] To aim to loosen restrictions on constitutional amendment by using Article 96, which indeed specifies these very restrictions, signals a threat to the raison d'être of the constitution.*⁶⁷

To justify the government's reinterpretation of Article 9, Abe asserted that "the view of constitutions as a restriction upon state power is outdated," and suggested that "a constitution should be something that talks about the direction, ideals, and future of Japan."⁶⁸ This view shocked many Japanese constitutional scholars, who believe that modern constitutionalism's emphasis on restricting state power is unquestionable.⁶⁹ The Japanese government believed that the interpretation to allow for the use of self-defense is rational and "does not run contrary to constitutionalism," but all mainstream constitutional scholars denounced the government's decision and the follow-up legislation "as a subversion of constitutionalism."⁷⁰

For example, constitutional law scholar Kazuyuki Takahashi argues that:

If the essence of constitutionalism lies in the constitutional restriction of the exercise of political power in order to protect the human rights of the people, the idea that the government itself is able to alter the interpretation of what the constitution commands it to do surely amounts to a hollowing-out of constitutionalism. Accordingly, like many other constitutional scholars, I believe that the government's reinterpretation to permit the exercise of the right to collective self-defense that was previously disallowed runs contrary to constitutionalism.⁷¹

The Japan Federation of Bar Associations also criticized the government's security bills from the perspective of constitutionalism:

The Bills are in clear violation of the preamble and Article 9 of the Japanese Constitution that stipulates the principle of thorough and lasting peace, and guarantees the right to live peacefully. Thus, the Bills have the effect of fundamentally overturning Japan's status as a nation of peace. Additionally, changing these principles of the Japanese Constitution by way of laws which

⁶⁶ Yayo, *supra* note 57, at 3.

⁶⁷ *Id.*

⁶⁸ Yanase, *supra* note 45, at 199.

⁶⁹ *Id.*

⁷⁰ *Id.* at 200–01.

⁷¹ *Id.* at 200 n.2 (citing Kazuyuki Takahashi, *Rikken Shugi wa Scifu ni yoru Kenpo Kaishaku Henko o Kinshi Suru* [Constitutionalism Prohibits Reinterpretation of the Constitution by the Government], in SHUDANTEKI JIEIKEN NO NANI GA MONDAI KA [WHAT IS THE PROBLEM WITH THE RIGHT TO COLLECTIVE SELF-DEFENSE?] 99–124 (Yasuhiro Oukudaira et al. eds., 2014)).

are inferior to the Constitution goes directly against the principles of Constitutionalism.⁷²

In the same vein, former Chief Justice of Japan's Supreme Court, Shigeru Yamaguchi, castigated the security bills as “unconstitutional” and expressed his concern that the government's reinterpretation of the pacifist Constitution would “undermine constitutionalism and make it impossible to control the use of power or protect citizens from arbitrary politics.”⁷³

Discursive constitutionalism in Japan even evolved into a social movement.⁷⁴ Students, mothers, scholars, and other citizens created organizational platforms to defend constitutional pacifism, including: the Saving Constitutional Democracy group in April 2014 (the successor of the Association for Article 96), the Students Emergency Action for Liberal Democracy in May 2015, the Association of Scholars Opposed to the Security-Related Law in June 2015, and the Association of Mothers Opposed to the Security-Related Law in July 2015.⁷⁵

In December 2015, the above groups came together to form one umbrella association called the Civil Alliance for Peace and Constitutionalism (*Anpo Hōsei no Haishi to Rikkenshugi no Kaifuku o Motomeru Shimin Rengo*).⁷⁶ As one Japanese scholar describes it, the work of the Civic Alliance “encouraged the formation of a new coalition among the opposition parties, especially the Democratic Party and the Communist Party, under the banner of constitutionalism,” resulting in the coalition of opposition parties winning eleven out of thirty-two seats in single-seat constituencies in the 2016 Upper House election.⁷⁷ Beyond the immediate concern of elections, the Civic Alliance has broader goals, including the “abolition of the national security legislation; restoration of constitutionalism (including the revocation of the Abe Cabinet decision to enable Japan to exercise the right to collective self-defense); and realization of politics to respect individual dignity.”⁷⁸

⁷² Susumu Murakoshi, *Statement Opposing the Bills to Revise National Security Policies*, JAPAN FED'N OF BAR ASS'NS (May 14, 2015), <https://perma.cc/6AVQ-TY8C>.

⁷³ *Japan's Appeals at Home Should Be Heeded for a Better Future*, CHINA DAILY (Sept. 7, 2015), <https://perma.cc/UUZ4-WL43>.

⁷⁴ Koichi Nakano, *Crisis of Constitutional Democracy and the New Civic Activism in Japan: From SEALDs to Civil Alliance*, in JAPANESE CONSTITUTIONAL REVISIONISM AND CIVIC ACTIVISM 39, 48–54 (Helen Hardacre et al. eds., 2021).

⁷⁵ Yayoi, *supra* note 57, at 4.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *'Civil Alliance' Formed to Repeal War Legislation*, JAPAN PRESS WKLY. (Dec. 21, 2015), <https://perma.cc/UG4A-YB3T>.

On September 22, 2020, the Civic Alliance issued a written request to opposition parties to work together to address fifteen items.⁷⁹ Restoration of constitutionalism is the Civic Alliance's first demand. This demand means stopping the initiative to amend Article 9 and abolishing the arguably unconstitutional laws, such as the war-related laws, the state secrets protection law, and the anti-conspiracy law.⁸⁰ Some demands on democracy and transparent government are relevant to the institutional principles of constitutionalism. Other social and economic demands (such as prioritizing people's lives and gender equality) are about the goals of constitutionalism. Other social and economic demands (shifting from a for-profit, efficiency-first economy and self-responsible society) involve the material foundations of constitutionalism.

The movement to criticize the government's security decision and related bills was instrumental to popularizing the concept of constitutionalism among ordinary Japanese citizens. Thanks to Japanese scholars, "a growing number of ordinary citizens gained greater knowledge of the concept of constitutionalism: that is, an understanding of the fact that the role of the constitution is to place limits on the exercise of political power within the framework of universal principles of respect for fundamental human rights."⁸¹ In particular, the rise of the Association for Article 96 and Association of Scholars Opposed to the Security-Related Laws "made ordinary citizens more aware of and interested in the very idea of constitutionalism."⁸² The popular attraction to the idea of constitutionalism is due in part to the fact that this idea is not merely presented as an abstract idea. Rather, constitutionalism operates as an epistemic framework for Japanese scholars and other citizens to debate practical issues, such as national security, peace, and war, which are closely relevant to citizens' quotidian lives and the lives of future generations. The social relevance of constitutionalism explains the attention and support from the public to this idea.

⁷⁹ *Civil Alliance Issues Written Request to Opposition Parties to Work Together for Regime Change*, *supra* note 1. The list of fifteen items includes: regain constitutionalism; restore democracy; establish a fair and transparent government; shift from for-profit efficiency-first economy (i.e., neoliberalism); shift from the self-responsible society to a mutually-supportive one under a responsible government; realize policies which place top priority on people's lives; achieve a society where everyone with a 40-hour work week leads a decent life; dramatically improve the national budget for children and education; realize a society where everyone is respected based on gender equality; create an industrial structure of decentralized network and diverse community; break away from nuclear energy and develop natural energy sources; support sustainable agriculture, forestry, and fisheries; proactively promote an international coordination system as a pacifist Japan and work to help build an effective world order; respect the dignity of Okinawans; and pursue symbiosis, peace, and denuclearization in East Asia.

⁸⁰ *Id.*

⁸¹ Yayo, *supra* note 57, at 2.

⁸² *Id.* at 4.

3. Analysis

Amendment initiatives opened a window of opportunity for Japanese discourse on constitutionalism. The constitutionalism discourse was triggered by the Abe government's formal constitutional amendment proposal and informal constitutional interpretations. The amendment proposal and interpretations prompted discursive constitutionalism as they signaled that constitutionalism is in tension, because the government attempted to lift constitutional limits on its power.

Consequently, the main function of Japanese discursive constitutionalism is to protect the existing constitutionalist government. As Japan has a functional constitutionalism (because the Constitution has imposed constraints on government power), the constitutional intellectuals and other citizens sought to employ discursive measures—along with social mobilization—to save constitutionalism from degeneration.

The general objects of Japanese constitutionalism discourse are informed by the jurisprudential idea of constitutionalism as limited power, the principle of individual rights, and amendment rules. The discursive demands for protecting individual rights and adhering to the rigid amendment rules are justified on the jurisprudential basis of limiting government power as the core of constitutionalism.

The specific objects of Japanese protectionist discourse on constitutionalism were shaped by Japan's unique commitment to pacifism as a teleological constitutional principle. Article 9's teleological commitments to pacifism are nebulous and aspirational, creating space for the dynamics of discursive constitutionalism. Japanese constitutionalists sought to defend a limited government conceived as instrumental to the fundamental right to live in peace. Japanese discursive constitutionalism largely analogizes the government's attempt to depart from constitutionalism with the violation of constitutional principles and rules constraining its power. This is consistent with Japanese jurists' conceptualization of constitutionalism as limited government.

Japanese jurists' constitutionalist arguments are both procedural and substantive. The procedural argument focuses on the government's violation of the amendment rules by its attempt to change the formal amendment rule and by its subsequent informal change of the Constitution through governmental interpretations. The substantive argument emphasizes that governmental interpretations contradict the teleological principle of constitutional pacifism and the concomitant fundamental right to live peacefully.

Japanese discursive constitutionalism involves coordinative and communicative discourse. Coordinative discourse occurred among Japanese scholars and other individuals closely connected with organizational platforms, such as the Association for Article 96, the Association of Scholars Opposed to

the Security-Related Laws, and the Civil Alliance for Peace and Constitutionalism. Japanese discursive constitutionalism also involves communicative discourse among constitutional intellectuals, the government, political parties, activists, social movement actors, and the public. The general protection of freedom of association and freedom of speech is the constitutional condition for such structured and popular discourse on constitutionalism in Japan.

The Japanese constitutionalists targeted the executive power. This is due to a turn toward strong executive power in Japan. This new turn is described by Koichi Nakano as “corporatist authoritarian legality”: a model of government structure similar to a corporation, in which the power and authority is concentrated on the prime minister as on a CEO, and where the dominant party (the LDP) faces no rival due to the collapse of the opposition party (the DPJ).⁸³ According to Nakano, this model is manifested in government constitutional interpretations to enable collective self-defense despite strong public contestation.⁸⁴

Japanese constitutionalism discourse aims to limit the corporatist authoritarian executive power to amend the Constitution. The idea that constitutionalism entails limiting the amendment power is familiar: holders of governmental power cannot freely change the entrenched rules limiting their power.⁸⁵ This idea resonates with Japanese discourse aimed at limiting the legislative power to formally amend Article 9. However, Japanese constitutionalism discourse went further. It also attempted to limit the *executive’s informal amendment power*—the power to change the Constitution through governmental interpretations. This discursive effort of constitutionalism was conditioned by Japan’s unique administrative model of constitutional interpretation and the corporatist authoritarian turn of the strong executive power in the country. The Japanese experience suggests that constitutionalism involves limitations of informal amendment power not only by judicial interpretations but also by executive interpretations.

Japanese discursive constitutionalism is expressed in various forms, including speeches on the internet, popular publications, and academic publications. The general protection of freedom of expression⁸⁶ in Japan enables

⁸³ Nakano, *supra* note 48, at 357.

⁸⁴ *Id.* at 360.

⁸⁵ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 658 (2013) (“It appears that the global trend is moving towards accepting the idea of limitations—explicit or implicit—on constitutional amendment power.”).

⁸⁶ Takashi Jitsuhara, *Guarantee of the Right to Freedom of Speech in Japan: A Comparison with Doctrines in Germany*, in CONTEMPORARY ISSUES IN HUMAN RIGHTS LAW: EUROPE AND ASIA 169 (Yumiko Nakanishi ed., 2017).

Japanese constitutionalists to express critical views on the government's departure from constitutionalism in different fora, such as in the meetings of civil society organizations.⁸⁷

Japanese constitutionalism has been achieved through influential public constitutionalist discourse. The achievement of Japanese protectionist discursive constitutionalism is evident in ideational and institutional aspects. On the ideational aspects, constitutionalism discourse objectifies the normative commitments to pacifism, which prevents the constitutional meaning of Article 9 from being subjectively construed by government leaders. Thanks to discursive power, the constitutional commitment to pacifism is discernable to the broader citizenry, which in turn helps define its meaning and struggles for its materialization.

Another ideational aspect of Japanese discursive constitutionalism concerns the popularization of the concept of constitutionalism itself. In the long term, the popularity of constitutionalism in the Japanese society may be instrumental to the construction of a *popular culture of constitutionalism*: social awareness and belief in constitutionalism. That culture may constitute the social foundation for a constitutional citizenship. With such a culture, the wider citizenry—beyond intellectuals—may engage in defending constitutionalism when it is in crisis.

Discursive constitutionalism in Japan is also manifested in institutional aspects, as discursive power limits the government's amendment power. In this way, it helps defend Article 96 and Article 9 from formal amendment. To be sure, the blocking of these formal amendments is due to several factors, such as the formal difficulty of amendment and contestation from social movements and opposition parties. However, public critical discourse provides constitutionalist arguments to consolidate political opposition to formal amendments.

However, Japanese constitutionalism discourse failed to block informal constitutional amendments. This is partially because the Japanese government recognizes the normative value of constitutionalism but may not be convinced by the instrumental necessity of constitutionalism in the context of national security, and therefore the government may prioritize national security over constitutionalism. On the other hand, discursive constitutionalism in Japan renders informal constitutional amendments complex. The complexity lies in the fact that different actors (state actors and social actors) that constitute the constitutionalist system in Japan construct different meanings of informal constitutional amendments. While the government may claim the legitimacy of

⁸⁷ See, e.g., The Foreign Correspondents' Club of Japan, Nakano, Nagao & Okuda: "Civil Alliance for Peace and Constitutionalism"/*Deformed Democracy by Abe*, YOUTUBE (June 17, 2016), <https://youtu.be/pODMbgTGH70>.

its constitutional interpretations on the basis of national security, public intellectuals and other citizens may question the interpretations as a departure from constitutionalism, which renders informal constitutional development unpredictable.

B. China: The Reformist Model

Chinese scholars have discussed different forms of constitutionalism. Peng Chengyi's recent book provides a comprehensive survey of the intellectual discourse on liberal, socialist, and Confucian constitutionalism in China.⁸⁸ Beyond academic discussions, in 2013, the constitutionalism (*xianzheng*) debate extended to the general public in China and lasted for months.⁸⁹ This section focuses on the popular debate on constitutionalism in 2013.

1. Background

Since President Xi Jinping came to power in 2012, the Chinese Communist Party “took a hardline stance against Western-style-constitutionalism.”⁹⁰ The term “constitutionalism” “is not generally welcomed within the official discourse of the Party-state,” and hence internet has become the main venue for constitutionalism debate in China.⁹¹ A scholar's Baidu (the largest search engine in China) search of “宪政” (“constitutionalism”) in 2017 yielded more than 7,000,000 hits.⁹²

The online debate on constitutionalism in China was triggered by President Xi Jinping's comment on the need to implement the Constitution in his speech at the 30th anniversary of China's 1982 Constitution on December 4, 2012.⁹³ In response to the Xi's speech and his rhetoric of “Chinese Dream,” editors of liberal newspaper Southern Weekend published a New Year's greeting, stating

⁸⁸ See PENG CHENGYI, *CHINESE CONSTITUTIONALISM IN A GLOBAL CONTEXT* (2014); see also Baogang He, *Socialist Constitutionalism in Contemporary China*, in *CONSTITUTIONALISM BEYOND LIBERALISM* 176 (Michael W. Dowdle & Michael A. Wilkinson eds., 2017); JIANG QING, *A CONFUCIAN CONSTITUTIONAL ORDER: HOW CHINA'S ANCIENT PAST CAN SHAPE ITS POLITICAL FUTURE* (Daniel A. Bell & Ruiping Fan trans., 2012); Su Bian, *Political but Incontestable: A Review of 'Political Constitutionalism' in China*, 10 *GLOB. CONSTITUTIONALISM* 10 (2021); Fu Hualing & Zhai Xiaobo, *What Makes the Chinese Constitution Socialist?*, 16 *INT'L J. OF CONST. L.* 655 (2018).

⁸⁹ Rogier Creemers, *China's Constitutionalism Debate: Content, Context and Implications*, 74 *THE CHINA J.* 91 (2015); Wu Changchang, *Debates on Constitutionalism and the Legacies of the Cultural Revolution*, 227 *THE CHINA Q.* 674 (2016).

⁹⁰ H. Li, *Chinese Discourse on Constitutionalism and Its Impact on Reforms*, 22 *J. OF CHINESE POL. SCI.* 407, 408 (2017).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Xi Jinping, *Speech at the Capital Conference Commemorating the 30th Anniversary of the Promulgation and Entry into Force of the Current Constitution*, CHINA COPYRIGHT & MEDIA (Dec. 4, 2012), <https://perma.cc/MJL9-TEGW>.

that the Dream of Constitutionalism is a part of Chinese Dream.⁹⁴ The piece argues that:

[W]e absolutely do not only dream about material wealth, we also hope for spiritual plenty; we absolutely not only dream that the country can become strong and wealthy, we hope even more that its citizens can find self-respect. A new people and a new country is [sic] saving the nation from extinction and enlightening it. No one can do without others, no one can overpower others. Constitutional governance [or constitutionalism] is the basis for all beautiful dream.⁹⁵

The piece explains the connection between constitutionalism and freedom:

Only by honouring the commitment of constitutional governance, limiting and dividing power, will citizens be able to loudly proclaim their criticism of public power; will it be possible for everyone to live freely according to their inner beliefs; and will we be able to build a free and strong country. Only by honoring the commitment of the great dream of constitutional governance, will everyone be able to dream individual dreams.⁹⁶

Thus, constitutionalism is conceptualized in liberal terms as limitations on the public power to protect individuals' liberty.

2. Realizing Constitutionalism

Beyond the Southern Weekend's piece, the debate further developed and involved three camps: liberal constitutionalism, socialist constitutionalism, and anti-constitutionalism.⁹⁷

The liberal and socialist constitutionalists in China shared the same understanding of constitutionalism as limiting political power.⁹⁸ In addition, they both agreed that constitutionalism can be achieved in China by implementing China's 1982 Constitution. However, they diverged on how to undertake institutional reform within the existing constitutional framework to realize constitutionalism.

Liberal constitutionalists called for broader engagement of society in constitutional reforms to embrace separation of powers, judicial independence, protection of basic rights, and civilian control of the military.⁹⁹ For example, Wang Jianxun contends that "since the legal reform and constitutional

⁹⁴ Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the "Urgency" of Political Reform*, 11 U. PA. ASIAN L. REV. 337, 370 (2017).

⁹⁵ *The Chinese Dream, the Dream of Constitutional Governance*, CHINA COPYRIGHT & MEDIA (Jan. 1, 2013), <https://perma.cc/YC3W-QP3N>.

⁹⁶ *Id.*

⁹⁷ Kellogg, *supra* note 94, at 379–97.

⁹⁸ Mateusz Stepień, *Conceptualizations of Constitutionalism in Recent China's Debates: Preliminary Typologies*, in CHINA: CENTRAL AND EASTERN EUROPE CROSS-CULTURAL DIALOGUE SOCIETY, BUSINESS AND EDUCATION IN TRANSITION 155, 158 (Joanna Wardega ed., 2016).

⁹⁹ Kellogg, *supra* note 94, at 383–85.

establishment of the Late Qing, apart from the years of totalitarianism, a march towards constitutionalism has basically been the baseline consensus of the Chinese people.”¹⁰⁰ Jianxun defines constitutionalism as “a sort of institutional arrangement and ideological idea of limiting government power and protecting individuals’ fundamental rights and liberties.”¹⁰¹ He considers the separation of legislative, executive, and judicial power, federalism, and checks and balances to be the institutional cores of constitutionalism.¹⁰² Turning to the case of China, Jianxun opines that “one of the objectives of reform and opening up was that ‘[t]he Party must act within the scope of the Constitution and the law,’ [and] this point is the basic proposition of constitutionalism.”¹⁰³ Wang Jianxun understood constitutionalism from a liberal perspective: limiting political power to protect individuals’ rights. Yet, this liberal conception is contextualized in China: Constitutionalism denotes limiting the ruling party that monopolizes public power, that is, limiting the power of the Communist Party rather than the power of the government in general.

Zhang Qianfan, another liberal constitutional law scholar, links constitutionalism to the implementation of provisions on fundamental rights and government powers in China’s 1982 Constitution.¹⁰⁴ He states:

What is called constitutionalism is nothing but implementing these provisions from the Constitution and constraining government power in this way. It is similar to the rule of law and ruling the country according to the law, constitutionalism is ruling the country according to the Constitution and governing according to the Constitution. In fact, constitutionalism is one part of the idea of rule of law, because the “law” in the rule of law evidently also includes the Constitution, and so ruling the country according to the Constitution and using the Constitution to impose standards on the use of political power, is the dictionary meaning of constitutionalism . . . [I]t can be seen that constitutionalism is a state of affairs in which the Constitution is implemented and effectively restrains political power.¹⁰⁵

Socialist constitutionalists, such as Tong Zhiwei and Cai Xia, presented mainstream constitutional thought—socialist, rather than liberal, constitutional thought—in China. They supported the Communist Party’s leadership but called for party-led constitutional reforms to put institutional limitations (including constitutional review) on its political power.¹⁰⁶ Their arguments run like this:

¹⁰⁰ Wang Jianxun, *My View on Constitutionalism*, CHINA COPYRIGHT & MEDIA (Aug 15, 2013), <https://perma.cc/S23W-78ZX>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Zhang Qianfan, *The Implementation of the Constitution and Long-Term Governance*, CHINA COPYRIGHT & MEDIA (Aug. 22, 2013), <https://perma.cc/PNZ9-XWTF>.

¹⁰⁵ *Id.*

¹⁰⁶ Kellogg, *supra* note 94, at 379–80.

China is close to full constitutionalism because it has a written constitution which provides for fundamental rights and government structure. China only needs one step to implement the constitution, which is the creation of an institution of constitutional review.¹⁰⁷

Anti-constitutionalists, mainly party ideologues and leftist intellectuals, attacked constitutionalism under pen names in a number of key Party publications.¹⁰⁸ They believed that constitutionalism “is a by-product of Western capitalism, incompatible with China’s own practice of socialism, and that China’s political system must reflect the country’s social and cultural conditions.”¹⁰⁹ Anti-constitutionalists also claimed that “socialist constitutionalism” is dangerous because it may eventually lead to state collapse like that of the Soviet Union in the 1980s.¹¹⁰ To illustrate, one anti-constitutionalist paper demonstrates that constitutional governance or constitutionalism involve “the implementation of bourgeois constitutions,” and include liberal institutions: tripartite separation of power and mutual checks and balances; judicial independence, constitutional review and constitutional courts; multi-party rotational governance; parliamentary budgets; limited government; free market economies; universal values, including freedom, democracy, rule of law, and human rights; nationalization of the military; and freedom of news media.¹¹¹ The paper indicates that these features of liberal constitutionalism are essentially opposed to the Chinese socialist political system.¹¹² It states that advocates of constitutionalism aimed to abolish the leadership of the Communist Party and overthrow the Socialist regime in China. Therefore, the paper concludes that constitutionalism cannot be made into a basic political concept for China.¹¹³

China’s 2013 *xianzheng* debate was closed with the victory of anti-constitutionalism. The Party considered the promotion of western constitutional democracy to be an attempt to undermine the Party’s leadership and “political system of Socialism with Chinese characteristics.”¹¹⁴ China’s 2018 constitutional amendments demonstrate the party-state’s resistance to constitutionalism, including the constitutional mandate of Party leadership as a definitive feature of

¹⁰⁷ *Id.* at 382.

¹⁰⁸ Kellogg, *supra* note 94, at 387; Samson Yuen, *Debating Constitutionalism in China: Dreaming of a Liberal Turn?*, 4 CHINA PERSPECTIVES 67, 67 (2013).

¹⁰⁹ Yuen, *supra* note 108, at 67.

¹¹⁰ Kellogg, *supra* note 94, at 392.

¹¹¹ Zhengzhi Xue, *Clearly Understanding the Essence of “Constitutional Governance”*, CHINA COPYRIGHT & MEDIA (May 29, 2013), <https://perma.cc/2CDQ-GDFS>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Communique on the Current State of the Ideological Sphere*, CPC CENT. COMM. GEN. OFF. (Apr. 22, 2013), <https://perma.cc/Y723-MEBM>.

Chinese socialism, and the abolition of presidential term limits.¹¹⁵ Following the amendments, President Xi stated in 2019 that “We must never follow the path of Western ‘constitutionalism,’ ‘separation of powers,’ or ‘judicial independence.’”¹¹⁶ The official denial of constitutionalism limited discursive constitutionalism in China.

However, a small number of Chinese scholars have recently discussed “global constitutionalism.”¹¹⁷ Bjorn Ahl observes that “although they contemplate the mutual connections between domestic constitutions and international law, these authors make no express attempts to derive principles from the Chinese constitution or socialist rule-of-law concept that could serve as guidance for the interpretation and further development of public international law.”¹¹⁸ Chinese discourse on global constitutionalism is yet to be developed.

3. Analysis

A presidential speech on constitutional implementation generated the *immediate opportunity* for the emergence of Chinese discourse on constitutionalism. Chinese intellectuals responded to official constitutional rhetoric by calling for institutional reforms to realize constitutionalism. Beyond the immediate opportunity, Chinese discourse on constitutionalism is animated by a broader *structural opportunity* rooted in China’s 1982 Constitution. For one thing, the fact that the Constitution includes nebulous language, such as “a socialist country under rule of law” and “human rights,”¹¹⁹ creates the conditions for reformists to fill in alternative meanings, including constitutionalist meanings. In addition, the gap between the constitutional aspirations, such as the socialist rule of law state and fundamental rights, and the reality, such as “official corruption, the misuse of public power, and the growing gap between rich and poor,”¹²⁰ provides the structural opportunity for reformist discourse on constitutionalism to materialize constitutional commitments.

The main function of Chinese constitutionalism discourse is to promote institutional reforms to realize constitutionalist ideals. Constitutionalism operates as a conceptual framework for discourse on institutional reforms without formal constitutional change or transformation. Chinese constitutionalism discourse, therefore, has two reformist features. First, it locates reformist programs (such

¹¹⁵ For more details, see BUI, *supra* note 43, at 306–12.

¹¹⁶ Charlotte Gao, *Xi: China Must Never Adopt Constitutionalism, Separation of Powers, or Judicial Independence*, THE DIPLOMAT (Feb. 19, 2019), <https://perma.cc/8A6C-55BL>.

¹¹⁷ Bjorn Ahl, *Chinese Positions on Global Constitutionalism, Community of Common Destiny for Mankind, and the Future of International Law*, 9 THE CHINESE J. OF COMP. L. 304, 314 (2021).

¹¹⁸ *Id.* at 16.

¹¹⁹ XIANFA arts. 5, 33 (1982).

¹²⁰ Kellogg, *supra* note 94, at 369.

as judicial independence, judicial review, and protection of fundamental rights) within the existing *formal constitution*. The reformists did not call for formal amendments to the 1982 Constitution or for a new constitution. They mainly demanded institutional change to realize the commitments in the formal constitution. Second, Chinese constitutionalism discourse (regardless of socialist or liberal camps) called for institutional reforms within the existing *functional constitution* (“living constitution” in the U.S.) or the socialist constitutional order.

Chinese constitutionalism discourse is informed by general ideas of constitutionalism. These include the jurisprudential idea of constitutionalism as limitations on political power and the ideas of constitutional principles, such as separation of powers, checks and balances, federalism, judicial review, and the protection of fundamental rights. These ideas are legitimated on cognitive bases (for example, a strong country) and normative bases (for example, individual freedom). The Chinese discourse did not focus on ideas of particular constitutional rules, because the discourse did not advocate for formal change to the Constitution.

The specific ideas of Chinese reformist discourse on constitutionalism focus on institutional limitations on the Communist Party’s political power. This is due to the dual constitution in China: the state constitution and the party constitution.¹²¹ As the Communist Party plays a leading role in China, its constitution serves as the political source for the state constitution.¹²² Chinese constitutionalists sought to reverse the situation, demanding that the party should be limited by the state constitution.¹²³ This explains why Chinese discursive constitutionalism concentrated on institutional reforms, such as judicial review, to ensure the party’s compliance with the state constitution.

Apart from abstract reasons pertaining to the dual constitution, the fact that Chinese constitutionalism discourse targeted the party’s power was animated by a political affair: the large-scale anti-mafia campaign by Bo Xilai, party leader of Chongqing, from 2009 to 2012.¹²⁴ Jurists revealed that the

¹²¹ Shucheng Wang, *Emergence of a Dual Constitution in Transitional China*, 45 H.K. L.J. 819, 827 (2015) (“China’s Constitution has been evolving under a dual structure consisting of the Party Constitution and the State Constitution, both of which are indispensable and cannot be underestimated.”).

¹²² Larry Cata Backer, *Party, People, Government and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 B.U. INT’L L.J. 331, 343 (2012). For example, “Xi Jinping Thought” was included in the Party Constitution in 2017 and then incorporated in the State Constitution in 2018 through amendments. Taisu Zhang & Tom Ginsburg, *China’s Turn Toward Law*, 59 VA. J. INT’L L. 306, 359 (2019).

¹²³ Wu Changchang, *supra* note 89, at 674 n.1 (“Constitutionalism, as proposed by the reformists and the constitutionalist alliance in China, refers to the reform of the 1982 Constitution in an attempt to limit the power of the Party and recover the primacy of the state constitution over the Party constitution, not vice versa.”).

¹²⁴ *Id.* at 678.

campaign “had resulted in miscarriages of justice, and finally had turned the anti-mafia (da hei, 打黑) campaign into an illegal crackdown (hei da, 黑打)” on the mafia.¹²⁵ The campaign was conceived by netizens as a “direct contravention of constitutionalism,” and therefore engendered the constitutionalism debate, which aimed to subject the party power to the state constitution.¹²⁶

Unlike the Japanese story, Chinese constitutionalism discourse did not involve structured constitutional dialogues to avoid political resistance. Chinese constitutionalists were loosely connected in various intellectual communities (liberal and socialist) on the base of their shared understanding and commitments to various forms of constitutionalism. Chinese constitutionalism discourse, however, involved popular dialogue among liberal and socialist constitutionalists, anti-constitutionalists, the party, and net-citizens.

The spaces of Chinese constitutionalism discourse in 2013 were mainly online platforms. Through Weibo and personal blogs, constitutionalists published a petition called Reform Consensus Petition, essays, and comments on constitutionalism.¹²⁷ The virtual space of Chinese discursive constitutionalism is shaped by censorship due to the sensitive content of Chinese constitutionalism debate, which focused on limiting the party power. The content is sensitive—calls for constitutionalism were denounced as an attempt to subvert the party.¹²⁸

Chinese constitutionalism discourse in 2013 provoked party resistance.¹²⁹ The 2018 constitutional amendments, which eliminated presidential term limits, exemplify this. Resistance is due to both ideational and discursive reasons. First, as expressed through arguments by anti-constitutionalists, the party was not convinced by the instrumental and normative values of constitutionalism. The party perceived constitutionalism as a dangerous instrument to the existing regime. In addition, from the party’s point of view, constitutionalism’s normative liberal values contradict the regime’s socialist commitments. Second, Chinese discourse on constitutionalism was soon quelled by the party, and then “‘constitutionalism’ joined the list of most-censored words.”¹³⁰ This limited its broader impact on institutional reforms and the public.

However, the constructive power of Chinese constitutionalism discourse should not be underestimated. One scholar argues that Chinese

¹²⁵ *Id.* at 679. In 2013, Bo Xilai was tried for corruption and abuse of power, and was sentenced to life in prison. Ben Self, *The Bo Xilai Trial and China’s Struggle with the Rule of Law*, 14 WASH. U. GLOB. STUD. L. REV. 155, 156–57 (2015).

¹²⁶ Wu Changchang, *supra* note 89, at 679.

¹²⁷ *Id.* at 686.

¹²⁸ *Id.* at 682.

¹²⁹ For a detailed explanation, see BUI, *supra* note 43, at 298–303.

¹³⁰ Bethany Allen-Ebrahimian, *On First Annual Constitution Day, China’s Most Censored Word Was ‘Constitution’*, FOREIGN POLICY (Dec. 5, 2014), <https://perma.cc/K9HV-DM6N>.

constitutionalism discourse is instrumental to increasing “public awareness of the rule of law and constitutionalism,” Chinese citizens’ better understanding of their constitutional rights, and the party-state’s cherry-picking “the most appropriate policy from the competing ideas.”¹³¹ The discursive power induces the achievements of discursive constitutionalism in China in ideational and institutional aspects.

First, Chinese constitutionalism discourse increases popular constitutionalist awareness to some extent, although not in the same way as in the Japanese story. This ideational development partially constrains the domination of the party-state’s official constitutional discourse. At least, the discursive power prevents socialist ideology from being the exclusive intellectual source to make sense of China’s Constitution and constitutionalism. When influential public discourse on constitutionalism limits the domination of a single way to construct the constitutional meanings, discursive constitutionalism is partially materialized in China.

Second, China’s constitutionalism discourse expresses the existing constitutional and social problems that are addressed in institutional design. The discourse brings up problems associated with the authoritarian nature of the existing socialist constitutional system and the social consequences of the constitutional problems. The expressed constitutional problems include, for example, the restriction of fundamental rights, the monopoly of the party’s power, and the abuse of state power. The public discourse reveals that constitutional problems generate social problems, such as corruption and human rights violations. Constitutional discourse also expresses the public’s concerns about constitutional and social problems.

Although the party-state rejects the concept of constitutionalism, China’s 2018 constitutional amendments address several institutional issues that echo the concerns of Chinese constitutionalists, especially socialist constitutionalists. The creation of Supervisory Commissions as anti-corruption agencies¹³² resonated with the constitutionalists’ concerns of constitutional checks on government corruption and other forms of arbitrary power. In addition, the creation of the Constitution and Law Committee in 2018, an institution of constitutional review within the National People’s Congress, reflects the demand in the constitutionalism discourse.¹³³ Although this institution is a legislative and advisory institution, not a judicial institution that is the normative demand of

¹³¹ Li, *supra* note 90, at 422–23.

¹³² Li Li & Peng Wang, *From Institutional Interaction to Institutional Integration: The National Supervisory Commission and China’s New Anti-Corruption Model*, 240 *THE CHINA Q.* 967, 967–89 (2019).

¹³³ Keith J. Hand, *Constitutional Supervision in China After the 2018 Amendment of the PRC Constitution: Refining the Narrative of Constitutional Supremacy in a Socialist Legal System*, 23 *ASIAN-PACIFIC L. & POL’Y J.* 137 (2022).

various Chinese constitutional intellectuals, its creation can demonstrate that the party-state has carried out some institutional reforms in response to the call for the creation of a constitutional review system, a part of both liberal and socialist constitutionalist discourses.

C. Vietnam: The Diffusionist Model

The discourse on “constitutionalism” (variously translated into Vietnamese as “chu nghĩa hop hien,” “chu nghĩa lap hien,” and “chu nghĩa hien phap”) emerged in Vietnam in the 2010s. Unlike the stories in Japan and China, Vietnamese discourse on constitutionalism is limited mainly within the intellectual circle, although there were some attempts to reach out to the general public. This section explores the intellectual discourse on constitutionalism and consequently the incipient practice of discursive constitutionalism in Vietnam.

1. Background

In the 2010s, grave corruption cases, especially the cases involving the Vietnam Shipbuilding Industry Group (Vinashin) and Vietnam National Shipping Lines (Vinalines) in 2012, challenged the legitimacy of the socialist state in Vietnam. This compelled the state to amend the 1992 Constitution to deal with institutional and human rights issues to regain legitimacy. Consequently, between 2010-2012, Vietnamese scholars and politicians debated a wide range of issues related to constitutional amendments, such as controlling state power, judicial review, a constitutional referendum, and direct democracy.¹³⁴ Discourse on constitutionalism also emerged in Vietnam around this time, as a response to the government’s efforts to make constitutional amendments.

While the initial plan was to amend the 1992 Constitution, Vietnam ended up enacting the new Constitution in 2013, which replaced the 1992 charter. The Constitution’s new features include the principle of controlling state power and additional protection for human rights (such as the rights to life and personal privacy), among others.¹³⁵ The implementation of the new Constitution further provides the basis for discourse on constitutionalism.

2. Spreading Constitutionalism

Vietnamese scholars sought to diffuse the very idea of constitutionalism and its formative ideas from outside Vietnamese schools of thought into the local intellectual community. In 2012, they published a collection entitled *On the Rule of Law and Constitutionalism: Some Essays by Foreign Scholars*, which includes the

¹³⁴ For more details, see Bui Ngoc Son, *Contextualizing the Global Constitution-Making Process: The Case of Vietnam*, 64 AM. J. COMP. L. 931 (2016).

¹³⁵ HIEN PHAP NUOC CONG HOA XA HOI CHU NGHIA VIET NAM [CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM] Nov. 28, 2013, art. 2, § 2.

Vietnamese translations of 22 essays on the themes written by American federalists Alexander Hamilton, James Madison, John Jay, and other foreign scholars.¹³⁶ Translation, therefore, is a mechanism to diffuse the idea of constitutionalism in Vietnam.

Three scholars from the Law School at Vietnam National University-Hanoi (VNU), Dao Tri Uc, Vu Cong Giao, and Nguyen Dang Dung, published their own writings on constitutionalism in the *Tap chi Nghien cuu Lap phap* (*Journal of Legislative Studies*), a journal of the Vietnamese legislature, the National Assembly.¹³⁷ The audience of this journal includes not only scholars but also legislators and government officials.¹³⁸ The publication of constitutionalism pieces in this journal may imply that the authors sought to disseminate the idea of constitutionalism to the broader audience beyond the academic community. In addition, as the National Assembly was preparing to amend the Constitution, the scholars published their pieces in this journal to inform the legislators' discussions on constitutional issues.

In an essay, Professor Dao Tri Uc discussed the achievements of and impediments to modern constitutionalism in Vietnam.¹³⁹ He believed that modern constitutionalism in Vietnam was manifested in the “democratization” of the Communist Party in its relationship with the people, control of state power by social organizations (such as the Fatherland Front and the Labor Union), legislative reform to facilitate the creation of a coherent legal system, administrative reform to combat government corruption, judicial reform to promote justice, the enactment of legislation protecting human rights, and the promotion of grassroots democracy. Dao Tri Uc, however, points out problems in Vietnamese constitutionalism, including the courts' failure to cite the Constitution in their decisions, the lack of a mechanism to review the constitutionality of legislation, and the impediments to judicial independence as

¹³⁶ VE PHAP QUYEN VA CHU NGHIA HOP HIEN: MOT SO TIEU LUAN CUA CAC HOC GIA NUOC NGOAI [ON THE RULE OF LAW AND CONSTITUTIONALISM: SOME ESSAYS BY FOREIGN SCHOLARS] (Nguyen Dang Dung et al. eds., 2012).

¹³⁷ Dao Tri Uc & Vu Cong Giao, *Bao Hien, Chu Nghia Lap Hien Va Nba Nuoc Phap Quyen* [*Constitutional Review, Constitutionalism, and the Rule of Law*], NGHIEN CUU LAP PHAP (2012), <https://perma.cc/J8PX-W3GB>; Nguyen Dang Dung, *Chu Nghia Hien Phap Va Nhung Yeu To Cau Thanh* [*Constitutionalism and Its Elements*], NGHIEN CUU LAP PHAP (2009), <https://perma.cc/4KT8-ZU7V>; Nguyen Dang Dung & Nguyen Dang Duy, *Chung Ta Can Hien Phap Hay Chu Nghia Hien Phap/Chu Nghia Hop Hien?* [*Do We Need the Constitution or Constitutionalism?*], NGHIEN CUU LAP PHAP (2013), <https://perma.cc/83CX-BKU9>.

¹³⁸ Uong Chu Luu, *Xay Dung Tap Chi Nghien Cuu Lap Phap Tro Thanh Co Quan Bao Chi Tien Phong Trong Du Bao Chinh Sach* [*Building the Journal of Legislative Studies to Become a Pioneer Press Agency in Policy Forecasting*], NGHIEN CUU LAP PHAP (Dec. 17, 2020), <https://perma.cc/A599-PPA2>.

¹³⁹ Dao Tri Uc, *Chu Nghia lap hien Hien dai o Viet Nam: Nhung Thanh Thuu va Cac Van De Dat Ra* [*Modern Constitutionalism in Vietnam: Achievements and Problems*], in HIEN PHAP: NHUNG VAN DE LY LUAN VA THUC TIEN [CONSTITUTION: THEORETICAL AND PRACTICAL ISSUES] 72 (Nguyen Dang Dung et al. eds., 2011).

the Constitution requires the Chief Justice to report and be accountable to the legislature.¹⁴⁰ In the above discussions, constitutionalism operates as a loose umbrella to discuss political and legal development and reformist issues in Vietnam. Particularly, the notion of constitutionalism was used lavishly to embrace even the developments in the villages (grassroots democracy).

After the new 2013 Constitution was adopted, Dao Tri Uc published an article in the *Journal of Legislative Studies* discussing this document from the perspective of constitutionalism.¹⁴¹ He defines constitutionalism as the existence and implementation of a written constitution.¹⁴² This definition is formalist and functional, without reference to the normative substance of constitutionalism. However, when he goes further to identify the substantive elements of constitutionalism, he turns to liberal normative values: human rights, limited power, and political liberty. He said:

Constitutionalism fosters the protection and promotion of human rights through the establishment of the ultimate principle that state power is given to the people and subject to the people's supervision Human rights, especially civil and political rights, contribute to ensuring the reality of constitutionalism. Through the exercise of civil and political rights, people participate in the supervision and control of state activities, which are to ensure the principle of absolute sovereignty of the people and the principle that state power must be limited and controlled.¹⁴³

Based on this conception, Dao Tri Uc believes that: "The 2013 Constitution shows that human beings and human rights are the most important guiding values of modern Vietnamese constitutionalism."¹⁴⁴ This view tends to collapse constitutionalism into a normative constitution.

Another advocate of constitutionalism in Vietnam is Professor Vu Cong Giao, a constitutional law and human rights scholar.¹⁴⁵ Drawing on writings by several foreign and Vietnamese scholars, he identifies a common view on constitutionalism as limitations on state power by a constitution.¹⁴⁶ He contends that constitutionalism seeks to resolve the relationship between the people's power and state power by establishing these principles: (1) absolute power belongs to the people; (2) state power derives from the people and is limited;

¹⁴⁰ *Id.* at 81–88.

¹⁴¹ Dao Tri Uc, *Hien phap nam 2013 va viec phat trien nhan thuc ve hien phap* [The 2013 Constitution and the Development of Constitutional Awareness], 268 *NGHIEN CUU LAP PHAP* 3, 7 (2014), <https://perma.cc/Q5GH-J94K>.

¹⁴² *Id.*

¹⁴³ *Id.* at 8.

¹⁴⁴ *Id.*

¹⁴⁵ Vu Cong Giao, *Tieu luan ve Constitutionalism* [An Essay on Constitutionalism], in *CONSTITUTION: THEORETICAL AND PRACTICAL ISSUES*, *supra* note 139, at 90.

¹⁴⁶ *Id.* at 91.

and (3) arbitrary action by the state must be prevented by law.¹⁴⁷ On that conceptual basis, he points out that various aspects of constitutionalism were embodied in Vietnam's four constitutions enacted in 1946, 1959, 1980, and 1992, including the principles of popular sovereignty, the rule of law, and the constitutional protection of fundamental rights.¹⁴⁸ Looking forward to the future development of constitutionalism, Vu Cong Giao argues that the 1992 Constitution should include a provision on people's referendum on the constitution.¹⁴⁹ In addition, he opines that under the single-party rule in Vietnam, to ensure the absolute power of the people according to the requirement of constitutionalism requires consideration of three complicated questions: the relationship between the Communist Party of Vietnam and the people; the relationship between the Party and the state; and distribution of the legislative, executive, and judicial powers.¹⁵⁰ Thus, the place of the Communist Party in the Vietnamese constitutional system is the central concern in Vu Cong Giao's discourse on constitutionalism.

In a joint essay, Dao Tri Uc and Vu Cong Giao discuss the relationship between (judicial) constitutional review, constitutionalism, and the rule of law.¹⁵¹ Their logic is that the rule of law requires constitutionalism which in turns requires constitutional review.¹⁵² The Vietnamese scholars contend that in centralized states (where there is no separation of powers), judicial review is absent or underestimated, because the legislature enjoys the supreme power, and consequently its laws cannot be judicially reviewed.¹⁵³ They did not explicitly refer to Vietnam, but their article was written in the context of a contentious debate on whether Vietnam should create an institution of judicial review, such as a constitutional court.¹⁵⁴ This argument implies a pessimistic view that it is difficult to create an institution of constitutional review in Vietnam, a centralized state, which rejects the principle of separation of powers.

One of the ardent advocates for constitutionalism and limited government in Vietnam is Professor Nguyen Dang Dung, a senior constitutional law scholar.

¹⁴⁷ *Id.* at 91–92.

¹⁴⁸ *Id.* at 98–99.

¹⁴⁹ *Id.* at 99–100.

¹⁵⁰ *Id.* at 100.

¹⁵¹ Dao Tri Uc & Vu Cong Giao, *Bao hien, Chu nghĩa Lập Hiến, và Nha nước Pháp Quyên* [Constitutional Review, Constitutionalism, and The Rule of Law State], NGHIÊN CỨU LẬP PHÁP (2012), <https://perma.cc/J8PX-W3GB>.

¹⁵² *Id.* at 16.

¹⁵³ *Id.* at 25.

¹⁵⁴ On this debate, see Bui Ngoc Son, *The Discourse of Constitutional Review in Vietnam*, 9 J. OF COMP. L. 191 (2014).

In 2005, he published a book entitled *Limiting State Power*.¹⁵⁵ He further engaged in public discourse on constitutionalism surrounding the Vietnamese constitutional reform process in the 2010s.¹⁵⁶

In 2010, when Vietnam was preparing to amend the 1992 Constitution, the official online newspaper *Ho Chi Minh City Law* conducted an interview with him on constitutionalism.¹⁵⁷ He said: “The focus of ‘constitutionalism’ is to limit the power of the state, to oppose the monopoly of power to protect the rightful interests of the people. It regulates what the state must do and how it must do it, concentrating in the direction of limiting power.”¹⁵⁸ He believed that the spirit of constitutionalism is not fully expressed in Vietnamese constitutions. Therefore, he suggests that constitutionalism should be the theoretical foundation for amending the 1992 Constitution.¹⁵⁹ He stated:

I think the spirit of this amendment is to strengthen control of power at all levels and everywhere. That control is closely linked with the purpose of protecting the interests that the people should enjoy. Power control needs to be regulated, institutionalized with a definitive procedural sequence, which cannot be said in general abstract. Because clearly establishing a state power apparatus is very necessary, but people always wonder about the authoritarian power, so there must be a system of regulations restricting that power.¹⁶⁰

To substantiate this view, he said: “That is why there should be a limit, control of power such as: accountability, explanation, and resignation. If you can’t do it, you have to resign, for example.”¹⁶¹

The discourse on constitutionalism in the above interview seems to be reformist as it tends to use constitutionalism as a framework for constitutional amendments. However, it did not go so far as to articulate reformist arguments on how the amendments should embody ideals of constitutionalism. Given its publication in a popular platform, the interview functioned more as a channel to diffuse the idea of constitutionalism among the public than as a call for constitutional reform.

In an article, Nguyen Dang Dung defines constitutionalism as limiting state power, comprised of elements such as popular sovereignty, constitutional

¹⁵⁵ NGUYEN DANG DUNG, SU HAN CHE QUYEN LUC NHA NUOC [LIMITING STATE POWER] (2005), <https://perma.cc/S66Z-NN3V>.

¹⁵⁶ See Hand, *supra* note 133.

¹⁵⁷ Minh Cuong, *G5-T5 Nguyen Dang Dung: Can Thiet Lap “Chu Nghia Hien Phap”* [Prof. Dr. Nguyen Dang Dung: The Need to Establish “Constitutionalism”], PHAP LUAT THANH PHO HO CHI MINH (Aug. 7, 2010), <https://perma.cc/5JJU-ESE6>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

review, judicial independence, and protection of fundamental rights.¹⁶² So, unlike Dao Tri Uc's formalistic definition, Nguyen Dang Dung's definition explicitly touches on the substantive core of liberal constitutionalism. Relatedly, different from Dao Tri Uc's view, Nguyen Dang Dung believes that Vietnam's four written constitutions (in 1964, 1959, 1980, and 1992) have few elements of constitutionalism because "the requirement for control of state power is not clearly reflected in the Constitutions."¹⁶³ He said:

For me, it is necessary to be aware of constitutionalism, the meaning, the importance and its elements, especially those related to the revision of constitutional provisions and the Constitution, so that we will have a real Constitution in the spirit of constitutionalism, the first basis for the serious and effective implementation of the Constitution in the future.¹⁶⁴

Many other Vietnamese intellectuals and activists did not explicitly employ the term and concept of constitutionalism, but advocated including in the new constitution limiting institutions such as a constitutional court, a human rights committee, and an anti-corruption institution.¹⁶⁵ The new Constitution adopted in 2013 rejected all of these limiting institutions, but appealed to the public by including a new principle which stipulates the mutual *control* among legislative, executive, and judicial powers.¹⁶⁶ This principle of controlling state power echoes "the central issue of constitutionalism."¹⁶⁷

The principle of controlled power provides a basis for the subsequent dynamic Vietnamese discourse on constitutionalism as limited government. Numerous writings have discussed the issue of controlled power.¹⁶⁸ Other writings explicitly made use of the concept of constitutionalism. To illustrate, in 2014, Nguyen Dang Dung published the revised version of his book *Limiting State Power*, consisting of eight chapters.¹⁶⁹ Chapter I explains the need to limit state power. Chapter II considers a constitution to be the most important

¹⁶² Nguyen Dang Dung, *Tu Chu Nghia Hien Phap Den Hien Phap* [From Constitution to Constitutionalism], LY LUAN CHINH TRI (Nov. 12, 2013), <https://perma.cc/J826-YP8C>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See generally *Special Issue: Vietnamese and Comparative Constitutional Law*, 11 ASIAN J. COMP. L. 129 (2016).

¹⁶⁶ CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Nov. 28, 2013, art. 2 ("The state power is unified and delegated to state agencies which coordinate with and control one another in the exercise of the legislative, executive and judicial powers.").

¹⁶⁷ Scott Gordon states that "the central issue of constitutionalism" is "the problem of controlling the power to coerce." See SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 7 (1999).

¹⁶⁸ A July 19, 2020 search for the phrase "kiem soat quyen luc nha nuoc" ("controlling the state power") in Hanoi Law University's online library generated 110 results.

¹⁶⁹ NGUYEN DANG DUNG, SU HAN CHE QUYEN LUC NHA NUOC [LIMITING STATE POWER] (2d ed. 2014).

instrument of limiting state power. Chapter III explores constitutionalism as the core embodiment of the limit of state power. The remaining chapters deal with elements of limited government, including the protection of human rights, elections, separation of powers, governmental responsibility, and external limits on state power (such as the media).¹⁷⁰ Thus, the book is the continued advocacy for constitutionalism as limited government.

In 2020, Vietnamese scholars published a collection entitled *Rule of Law and Constitutionalism: Some Theoretical and Practical Issues*, which includes their own writing on these issues.¹⁷¹ This collection was published by the *National Political Publishing House*, the main publisher of the Communist Party of Vietnam. The venue of the publication implies that the discussion on constitutionalism in Vietnam has been officially acceptable from the Party's point of view. Explaining the rationales of this book, its introduction mentions that along with the rule of law, constitutionalism has become a familiar concept widely discussed in Vietnam.¹⁷² It also states that "the 2013 Constitution continues to underline the objectives and requirements to construct the socialist rule of law state and to implement constitutional principles as the foundation for our country's development and international integration in the twenty-first century."¹⁷³ Thus, the implementation of the new Constitution provides the base for the continued discourse on constitutionalism in Vietnam.

In recent years, the subjects and spaces for Vietnamese constitutionalism discourse have been more diverse. Scholars from different institutions published articles on constitutionalism in different official journals, such as the *Journal of Legislative Studies*, the *Journal of Legal Studies* of the Hanoi Law University, and the *Journal of Political Theory* of the Ho Chi Minh National Academy of Politics. For example, in an article published in 2017, Nguyen Van Quan from the VNU Law School considers constitutionalism a universal standard, stating that:

The universality of the rule of law and constitutionalism is also the rise of a model for organizing the state power based on democracy and respect and protection of human rights. This universality demonstrates the attractiveness of a tested model [constitutionalism and rule of law] and becomes a universal value widely recognized by nearly every country and international institution.¹⁷⁴

¹⁷⁰ *Id.*

¹⁷¹ PHAP QUYEN VA CHU NGHIA HIEN PHAP: MOT SO VAN DE LY LUAN VA THUC TIEN [RULE OF LAW AND CONSTITUTIONALISM: SOME THEORETICAL AND PRACTICAL ISSUES] (Vu Cong Giao & Dang Minh Tuan eds., 2020), <https://perma.cc/EHJ2-6TPA>.

¹⁷² *Id.* at 9.

¹⁷³ *Id.*

¹⁷⁴ Nguyen Van Quan, *Su Pho Bien Cua Chu Nghia Hop Hien Va Nha Nuoc Phap Quyen Nhu Mot Chuan Muc Quoc Te* [The Universalism of Constitutionalism and the Rule of Law as International Norms], 343 *NGHIEN CUU LAP PHAP* 10, 19 (2017), <https://perma.cc/WN9Q-F2KA>.

In an article published in 2018, from a historical perspective, Dinh Ngoc Thang from the Law School of the Vinh University in central Vietnam explored the idea of constitutionalism in ancient and medieval times.¹⁷⁵ In a joint article published in 2020, Thai Vinh Thang from the Hanoi Law University and Hoang Van Nghia from the Ho Chi Minh National Academy of Politics explore the nature of constitutionalism and identify its seven elements: the supreme sovereignty of the state resting with the people, the rule of law, the separation of powers and checks and balances, judicial independence, guarantee for human rights and civil rights, control and supervision of power, and constitutional review.¹⁷⁶ The above writings share virtually the same understanding of constitutionalism as limited power with liberal components.

3. Analysis

The constitution-making process opened a window of opportunity for Vietnamese constitutionalism discourse. Local constitutional intellectuals adhered to the process to discuss the constitutionalist qualities of the existing constitution and to express their hope for an ideal, new constitution that would further embody fundamental principles of liberal constitutionalism. This discourse is also animated by a broader structural opportunity. As in the case of China, the 1992 Constitution of Vietnam included the amorphous language of “the socialist rule of law state” and “human rights,”¹⁷⁷ providing ample space for local jurists to attribute to them different meanings, including constitutionalist meanings. The disharmony between constitutional commitments to the rule of law and fundamental rights and the reality of corruption and various forms of abuse of power induces aspirations for a constitutionally limited government. To illustrate, in a joint essay entitled *The Constitution and the War Against Corruption*, two Vietnamese advocates of constitutionalism, Nguyen Dang Dung and Vu Cong Giao, expressed the aspiration that the future constitution in Vietnam should establish institutional mechanisms—such as government transparency, mutual checks among state bodies, and social oversight of state bodies—to combat corruption and the abuse of power.¹⁷⁸

Another aspect of the structural opportunity that Vietnamese constitutionalism discourse provides is different from the Chinese story. Unlike Chinese discursive constitutionalism, the Vietnamese counterpart was

¹⁷⁵ Dinh Ngoc Thang, *Tu Tuong Ve Chu Nghia Hop Hien Thoi Co Dai Va Trung Dai [Thought on Constitutionalism in Ancient and Medieval Times]*, 4 LUAT HOC 66 (2018).

¹⁷⁶ Thai Vinh Thang & Hoang Van Nghia, *Chu nghia hien phap: Ban chat, cac yeu to cau thanh [Constitutionalism: Nature and Its Elements]*, 6 LUAT HAC 3, 3–15 (2020).

¹⁷⁷ CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Apr. 25, 1992 (rev. 2001), arts. 2, 50.

¹⁷⁸ Nguyen Dang Dung & Vu Cong Giao, *Hien phap va Cuoc Chien Chong tham nhung [The Constitution and the War Against Corruption]*, in CONSTITUTION: THEORETICAL AND PRACTICAL ISSUES, *supra* note 139, at 379.

conditioned by the process of constitution-making. Vietnamese discursive constitutionalism involved the structural opportunity of normative disharmony. Normative disharmony refers to the gap between the Vietnamese constitution and the ideals of (liberal) constitutionalism. This gap might include, for example, the absence of judicial review, separation of powers, and mechanisms of checks and balances. This gap creates the room for Vietnamese constitutional intellectuals to explore liberal constitutionalist ideals and express their hope about the country's future normative constitution incorporating these ideals.

After the new Constitution was enacted in 2013, its text and implementation created the conditions for the continued development of Vietnamese constitutionalism discourse. In addition to the continued commitments to the socialist rule of law state and to human rights, the new principle of controlled power has become an important basis for Vietnamese discursive constitutionalism. The lack of concrete institutional design to materialize this amorphous principle provides a spacious room for constitutionalist discourse on various forms of controlled power, such as judicial independence, accountability, anti-corruption institutions, and the role of mass media in supervising the exercise of power.

That said, unlike the Chinese story, Vietnamese constitutionalism discourse does not feature the call for institutional reform. To be sure, as mentioned above, some Vietnamese constitutional intellectuals propose that constitutionalism should be a conceptual basis for constitutional amendment. This remains largely an expression of an aspiration to constitutionalism without substantive arguments on how the national constitution should be rewritten to incorporate normative ideas of constitutionalism. After the new constitution was adopted, Vietnamese constitutionalism discourse has not focused on how to carry out institutional reforms to bring the new charter in line with constitutionalist ideals. The tension between socialist and constitutionalist ideals may explain why Vietnamese constitutionalism discourse lacks reformist concerns. To realize constitutionalist ideals (such as the separation of powers) would challenge the core of socialist ideals (such as democratic centralism that concentrates the power on the supreme legislature). This tension prevents Vietnamese constitutionalism discourse from articulating reformist demands.

Consequently, the function of Vietnamese constitutionalism discourse is largely diffusionist. Vietnamese intellectuals seek to disseminate liberal ideas of constitutionalism from outside into their communities. Vietnamese constitutionalism discourse focuses mainly on the introduction of Western theories of liberal constitutionalism via publication of Vietnamese translations of these theories (or narratives thereof). The Vietnamese narratives of constitutionalism are largely convergent: the domestic constitution is used as the basis to describe and spread the ideas associated with liberal constitutionalism.

In their diffusionist discourse, Vietnamese constitutionalists adhere to the language in the national constitution. This renders the constitutionalism discourse locally relevant: constitutionalism is not an outlandish idea but is indeed embodied in the national constitution and connected to concrete national affairs, such as anticorruption. In addition, the adherence to the national constitution makes the discourse politically acceptable since it precludes the impression that constitutionalism is used to delegitimize the existing constitution and the broader socialist constitutional order in Vietnam.

Vietnamese diffusionist discourse on constitutionalism is informed by general ideas of constitutionalism being limited, which is ensured by principles such as the separation of powers, judicial review, and individual rights. Since the function of Vietnamese discourse is to diffuse general ideas of constitutionalism, it does not have much to do with specific ideas. Unlike the Chinese case, Vietnamese intellectuals have discussed a wide range of institutional mechanisms to limit state power rather than party power in particular. To be sure, limiting party power is also an important concern in Vietnamese discourse, as indicated in Vu Cong Giao's writings. However, as the function of Vietnamese discursive constitutionalism is diffusionist, it spreads diverse liberal ideas about a constitutionally limited government.

Relatedly, constitutionalism discourse in Vietnam is not controversial like that in China. Although there were disagreements on the extent to which Vietnam's constitutions embodied constitutionalist values, there was not a substantive divergence between liberal and socialist constitutionalism in the Vietnamese discourse, as in the Chinese story. Rather, the convergence toward liberal constitutionalism is the trend among the Vietnamese constitutionalists. Vietnamese constitutional intellectuals are attracted by the cognitive (for example, anti-corruption as a necessity) and normative (for example, human rights as values connected to human dignity and freedom) justifications of constitutionalism. In addition, unlike in China, there was not an anti-constitutionalism campaign in Vietnam, although Vietnamese propagandists did indoctrinate the public with the idea that Western theories, such as separation of powers, are not applicable to Vietnam.¹⁷⁹

The absence of controversy and resistance enables Vietnamese constitutionalism discourse to express itself in official spaces. Vietnamese constitutionalists have been able to publish their writings and commentaries in popular and academic venues, such as in journals of state institutions and law schools, and in party and university presses. Because constitutionalism has not

¹⁷⁹ Hoang Chi Bao, "Tam Quyen Phan Lap" Khong Phai La Su Lua Chon Mo Hinh To Chuc Nha Nuoc Cua Viet Nam [“The Separation of Powers” Is Not the Choice of the State Organization Model of Vietnam], TAP CHI QUOC PHONG TOAN DAN (Sept. 11, 2017), <https://perma.cc/Y4J4-J3XM>.

been a controversial and sensitive topic in Vietnam, local scholars can narrate and discuss it on official platforms.

Vietnamese constitutionalism discourse has not influenced the broader society, in contrast to the stories of Japan and China discussed above. This is due mainly to the limits of discursive power. Vietnamese constitutionalism discourse mainly involves coordinative dialogues among narrow intellectual communities. These discussions began with a group of scholars at VNU Law School and expanded to a few other educational institutions. Although there were some attempts (such as an interview with a popular newspaper) to communicate with the general public on the ideas of constitutionalism, there was no popular dialogue on constitutionalism in Vietnam of the kind that emerged in Japan and China. This limits the impact of Vietnamese constitutionalism discourse on the constitutionalist awareness of the general public. Relatedly, as constitutionalism discourse in Vietnam has not substantively reached out to the public, it has not resulted in meaningful institutional change.

However, the constitutionalism discourse induces the partial achievement of discursive constitutionalism in Vietnam. This achievement is manifested in the ideational aspect. Discursive power directs constitutional thinking within the academic community in Vietnam toward constitutionalism. For many years, constitutional thinking in Vietnam has been influenced by Soviet socialist constitutional theories, as many constitutional law scholars studied in Soviet Russia. The very idea of constitutionalism did not appear in Vietnamese socialist constitutional thought for many years, mainly because socialist constitutional theories consider a constitution as a tool of political power to control the society, rather than as a document for controlling or limiting political power. The concept of constitutionalism and its principled ideas merely entering Vietnamese constitutional discourse changed part of the local intellectual communities' understandings of the nature and function of a constitution in general and of the Vietnamese Constitution in particular. Some Vietnamese constitutionalists employ the ideas of constitutionalism to reconceptualize the Vietnamese Constitution as a charter to control political power. This is a significant ideational change in Vietnamese constitutional thought, and it occurred thanks to the discursive power. Consequently, socialist constitutional theories are no longer the exclusive precepts for thinking about Vietnam's Constitution and for envisioning the country's constitutionalism. Constitutionalism discourse pluralizes the conceptualization of the constitution and constitutionalism in Vietnam, and limits the dominance of the socialist constitutional ideology in the intellectual community.

There is spacious room for the continued development of diffusionist discourse on constitutionalism in Vietnam. In particular, the 2013 Constitution's entrenchment of the principle of mutual control among the state powers provides a base for the continuing spread into Vietnam of constitutionalist ideas

pertaining to controlled government, such as the separation of powers, checks and balances, and constitutional review.

It is possible that Vietnamese constitutionalism discourse may turn to more reformist concerns in the future. When the idea of constitutionalism becomes more familiar among the scholarly community and the larger society, national constitutional intellectuals may turn to more reformist discourse (institutional reform to implement constitutionalism) as in the Chinese story. There is precedent for such a development in Vietnam. Several decades ago, Western concepts like the rule of law, human rights, and constitutional review were mainly discussed in a narrow academic community. These ideas have now become the prevailing concepts in the Vietnamese public reformist discourse of the wider scholarly community, politicians, and the broader society.¹⁸⁰ Constitutionalism discourse may follow the same path.

However, the scope for a reformist turn in constitutionalism discourse in Vietnam may be narrow. This narrow scope is determined by the existing socialist constitutional framework. The Vietnamese socialist state can only partially, not comprehensively, embrace some constitutionalist practices. That partial embracement is due to the inherent tension between socialist ideals defined by Marxism-Leninism (confirmed in the Constitution as the official ideology of the Communist Party¹⁸¹) and constitutionalist ideals largely defined by Enlightenment liberalism. It can be anticipated that Vietnamese constitutionalism discourse may explore some narrow constitutionalist reforms within the existing socialist constitutional system, such as a legislative model of constitutional review.

IV. CONCLUSION

Constitutionalism is an amorphous concept, which understandably invites discursive contestation. It is an attractive concept because it touches on human beings' common constitutional resentment to despotic power. This Article has introduced the concept of discursive constitutionalism understood as the struggle of constitutionalism through public discourse. It has theorized about four elements (ideas, actors, actions, and space) and the constructive logic of discursive constitutionalism. On the one hand, discursive power is shaped by rules and principles governing power relations in existing constitutional order. On the other hand, discursive power generates constitutional knowledge that

¹⁸⁰ See Giao Cong Vu & Kien Tran, *Constitutional Debate and Development on Human Rights in Vietnam*, 11 ASIAN J. COMP. L. 235 (2016); Bui H Thiem, *Deconstructing the "Socialist" Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam's Constitutional Reform Process*, 36 CONTEMP. SOUTHEAST ASIA 77 (2014); Nguyen Houng, *Pursuing Constitutional Dialogue Within Socialist Vietnam: The 2010 Debate*, 13 AUSTL. J. ASIAN L. 69 (2012).

¹⁸¹ CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Nov. 28, 2013, art. 4.

shapes the real construction of constitutionalism. This study has illustrated the concept of discursive constitutionalism with three Asian cases: Japan, China, and Vietnam. I conclude with some reflections on comparative, international, and methodological implications.

First, discursive constitutionalism may be a useful lens to explore the public discourse on constitutionalism in seemingly stable constitutional democracies in Asia. Would-be authoritarian leaders in seemingly stable constitutional states have incrementally weakened, dismantled, or packed constitutional institutions that are designed to limit their power.¹⁸² The Japanese story demonstrates that constitutionalism has been attractive in its stressed context. In the same vein, recent discourse on constitutionalism in Indonesia can be attributed to the fact that constitutional democracy in the country is under tension, as captured by the Indonesian discourse on “constitutional retrogression.”¹⁸³ Particularly, one Indonesian scholar argues that the 2020 Coronavirus Law, which removed the courts’ role to check the government actions, “threatens the values of rule of law and constitutionalism in Indonesia.”¹⁸⁴ As the constitutional democracy in Indonesia is under tension, domestic intellectuals and other citizens have adhered to the idea of constitutionalism to defend the democracy from degeneration.

Second, discursive constitutionalism can explain the constructive logic of constitutionalism discourse in new democracies in Asia. For example, after the 2018 regime change in Malaysia, constitutionalism has operated as an attractive conceptual framework for public discourse on institutional change and state-building. Since the defeat of the Barisan Nasional coalition in the 14th general election, “the Malaysian public had professed high hopes for a positive shift in Malaysian constitutionalism, affected by the new ruling government. This is especially so in the areas of strengthening the rule of law, improvements to the national security legislation, and the restoration of judicial independence.”¹⁸⁵ Yvonne Tew argues that “political regime change alone is not enough. It is crucial to focus on building the institutions that can help a constitutional democracy endure. Courts and constitutionalism are central to that endeavor.”¹⁸⁶

¹⁸² See generally TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

¹⁸³ Abdurrachman Satrio, *Constitutional Retrogression in Indonesia*, INT’L J. CONST. L. BLOG (Feb. 15, 2019), <https://perma.cc/W4V6-634K>; Constitutionalism in Indonesia, CONSID, <https://perma.cc/YZW2-SVKF>.

¹⁸⁴ Abdurrachman Satrio, *Checking the Unchecked Power: The Role of the Indonesian Constitutional Court During the Pandemic*, IACL-AIDC BLOG (May 26, 2020), <https://perma.cc/6KCY-P78S>.

¹⁸⁵ Monash University, *Malaysian Constitutionalism Post GE-14: A New Dawn?*, MONASH UNIV. MALAY. (Feb. 28, 2019), <https://perma.cc/6M7G-QURK>.

¹⁸⁶ Yvonne Tew, *Constitutionalism in the Time of Corona*, INT’L J. CONST. L. BLOG (Jun. 10, 2020), <https://perma.cc/P4HJ-Q3MF>.

Constitutionalism has functioned as an attractive framework for the struggle for institutional reform through public discourse in Malaysia's emerging democracy.

Third, discursive constitutionalism can also be a useful approach to understand the struggle for constitutionalism through public discourse in authoritarian regimes in Asia. Asia is a home of many authoritarian regimes, including the single-party regimes (such as China and Vietnam), the military regimes (such as Myanmar), and an absolute monarchy (Brunei). The cases of the socialist single-party states in China and Vietnam demonstrate that constitutionalism has been attractive to public law discourse under authoritarianism. The lack of substantial institutional limitations on the public power, which are the roots of corruption and various forms of arbitrary power under the authoritarian setting monopolized by a single communist party,¹⁸⁷ has encouraged local intellectuals to endeavor for constitutionalism via public discourse. Discursive constitutionalism can be a useful lens to understand such constitutional dynamics.

Fourth, although this Article focused on discursive constitutionalism at a national level, it may have implications for constitutionalism discourse at an international level. The discourse on constitutionalism has been a part of international law. For example, drawing on Foucault's inquiry into the relationship between governmentality and truth¹⁸⁸ and William Connolly's idea of an "essentially contested concept,"¹⁸⁹ Jessica C. Lawrence argues that constitutionalism can be understood "not as something that can be measured or assessed in any objective sense, but rather as a site of discursive contest."¹⁹⁰ She contends that discursive contest on WTO constitutionalism generates important knowledge of how the world trade system works, how it should work, and how it should be possibly reformed.¹⁹¹ The constitutionalism debate at the WTO can be conceptualized as discursive constitutionalism at the international level, the dynamic process in which the ideas of constitutionalism are used to debate the world trade system. WTO constitutionalism discourse is shaped by the rules and principles of the world trade system, but at the same time may generate knowledge of international constitutional law and international economic law, which in turn may shape the possible reformation of the system.

¹⁸⁷ For China, see CARL MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* 29 (2018). For Vietnam, see Vu Ming Khuong, *The Institutional Root Causes of the Challenges to Vietnam's Long-Term Economic Growth*, 15 *ASIAN ECON. PAPERS* 159, 161, 183 (2014).

¹⁸⁸ MICHEL FOUCAULT, *POWER: THE ESSENTIAL WORKS OF MICHEL FOUCAULT 1954–1984* (2020).

¹⁸⁹ WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10 (1993).

¹⁹⁰ Lawrence, *supra* note 9, at 65.

¹⁹¹ *Id.*

Finally, this Article has implications for constitutional methodology. There are four new institutionalisms (rational choice, historical, sociological, and discursive) in political science.¹⁹² In the same vein, there can be four interdisciplinary approaches in comparative constitutionalism. The rational choice (or economic) approach to constitutionalism conceives constitutional actors as rational actors capable of material calculation of cost and benefits.¹⁹³ The historical approach to constitutionalism explores regularized patterns in constitutional development.¹⁹⁴ The sociological approach to constitutionalism focuses on “the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements.”¹⁹⁵ The discursive approach to constitutionalism explores the ideas of constitutionalism and the way these ideas are communicated in the public. These approaches focus on different objects, explanations, and explanatory factors, summarized in the table below:

Table 2. The Four Approaches to Constitutionalism¹⁹⁶

Approach	Object of Inquiry	Explanation	Explanatory Factors
<i>Rational Choice</i>	Practices and institutional design of constitutionalism	Form and scope of constitutional development	Political interests
<i>Historical</i>	Practices of constitutionalism	Patterns in constitutional development	Path-dependency
<i>Sociological</i>	Contextually specific practices of constitutionalism	Social evolution of constitutional norms	Cultural determinants
<i>Discursive</i>	Ideas, discourse on constitutionalism	Contents of constitutional development	Cogitative and normative appealing; discursive presentation, circulation, and legitimization

¹⁹² For three new institutionalisms, see Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996). For the fourth and latest new institutionalism, see Schmidt, *Taking Ideas and Discourse Seriously*, *supra* note 16.

¹⁹³ See generally JAMES M. BUCHANAN, CONSTITUTIONAL ECONOMICS (1991).

¹⁹⁴ See generally COMPARATIVE CONSTITUTIONAL HISTORY VOLUME ONE: PRINCIPLES, DEVELOPMENTS, CHALLENGES (Francesco Biagi et al. eds., 2020).

¹⁹⁵ Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 389, 390 (2004); see also SOCIOLOGICAL CONSTITUTIONALISM (Paul Blokker & Chris Thornhill eds., 2017); CHRIS THORNHILL, A SOCIOLOGY OF CONSTITUTIONS: CONSTITUTIONS AND STATE LEGITIMACY IN HISTORICAL-SOCIOLOGICAL PERSPECTIVE (2011); SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Denis J. Galligan & Mila Versteeg eds., 2013).

¹⁹⁶ This table is adapted from Schmidt's "Table 1. The four new institutionalisms." Schmidt, *Taking Ideas and Discourse Seriously*, *supra* note 16, at 5.

Despite their differences, these approaches in the comparative study of constitutionalism are complementary rather than exclusive. Discursive institutionalists indicate that it is possible for rational choice, historical, and sociological institutionalism to embrace ideas and discourse.¹⁹⁷ In the same vein, rational choice, historical, and sociological approaches to constitutionalism can incorporate the study of constitutionalist ideas and discourse. The reason for this incorporation is methodological pluralism. The creation and function of constitutionalism vary in different contexts and may not be explained by a single factor. Interests, path dependency, culture, ideas, and discourse are all relevant factors explaining different aspects of constitutionalization.

The rational choice approach to constitutionalism may add ideas and discourse on constitutionalism. Ideas provide the substantive content for constitutionalization. Here, discourse is the process through which self-interested political elites exchange their constitutional views and communicate with the broader public. The internal exchange may be for self-dealing, while the public communication may be for signaling the regime's turn to constitutionalism. In any case, discourse plays a role even within the rational choice approach to constitutionalism.

The historical approach to constitutionalism can also consider the ideas and discourse on constitutionalism. The ideas of constitutionalism may have different meanings in different historical contexts. Historical accounts, therefore, can trace the evolution of constitutionalist ideas. For example, Scott Gordon examines the development of the theory (and practice) of constitutionalism in Ancient Athens, Republican Rome, Renaissance Venice, the Dutch Republic, seventeenth-century England, and eighteenth-century America.¹⁹⁸ The historical context may also shape debate on constitutionalism. For example, in the American historical context, the debate on constitutionalism focuses on the proper judicial interpretation of the Constitution.¹⁹⁹ So, it is possible to explore the discursive evolution of constitutionalism. For example, H. Jefferson Powell examines the intellectual discourse on constitutionalism by different American constitutionalists.²⁰⁰

Finally, the sociological approach to constitutionalism can embrace ideas and discourse on constitutionalism. For example, one of the important themes in the sociological approach is the role of social movements in the formation of

¹⁹⁷ *Id.* at 15–19.

¹⁹⁸ See generally GORDON, *supra* note 167.

¹⁹⁹ See, e.g., THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM (Steven Kautz et al. eds., 2011).

²⁰⁰ H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION (1993).

constitutional norms.²⁰¹ Ideas and discourse are a part of social movements struggling for constitutionalism. Ideas of constitutionalism provide substantive content for social movement actors to frame their constitutional demands. Here, discourse is the process through which social movement actors coordinate their shared understanding on constitutionalism, reach out to the broader public, and mobilize for the popular support of constitutionalism.

²⁰¹ For social movements and constitutionalism in the U.S., see Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV. 559 (2020); Mark Tushnet, *Social Movements and the Constitution*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 241 (Mark Tushnet et al. eds., 2015); JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 977 (2013); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK L. REV. 27, 28 (2005); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 194 CAL. L. REV. 1323 (2006). For comparative experiences, see Binendri Perera, *People's Movements as a Strand of Popular Constitutionalism: Driving Forces, Distinctive Features, and Dilemmas*, 29 WASH. INT'L L. J. 341 (2020); Jiunn-rong Yeh, *Marching Towards Civic Constitutionalism with Sunflowers*, 45 H.K. L.J. 135 (2015); Albert Chen, *The Law and Politics of the Struggle for Universal Suffrage in Hong Kong, 2013–15*, 3 ASIAN J. L. & SOC'Y 189 (2016).