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Constitutional Dissonance in China

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CONSTITUTIONAL DISSONANCE IN CHINA

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I. INTRODUCTION: THE UNCERTAIN PLACE OF CHINA IN COMPARATIVE CONSTITUTIONAL LAW

The study of comparative law tends to receive less attention in the United States than elsewhere,[1] but there have been a couple of bright spots of scholarly activity in recent decades. One has been the study of Chinese law, which has benefited from the realization that the largest national market in the world should not simply be ignored by law schools that purport to train global lawyers. Another has been the field of comparative constitutional law. Better described as an offshoot of constitutional law than a subfield of comparative law,[2] comparative constitutional law has enjoyed a resurgence over the last two decades.[3]

Given the relative health of both Chinese law and comparative constitutional law, one might expect to find a thriving English-language literature that takes an explicitly comparative perspective on Chinese constitutional law or at least uses China as a comparator. That does not appear, however, to be the case. In

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1 *See* David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 1017–20 (2015) (noting the tendency of American legal education to give relatively short shrift to comparative law and the perception among American law students that such training is not "highly beneficial to their employment prospects"); *id.* at 1034–35 tbl.1 (contrasting the comparative law training of law clerks and law professors in Japan, South Korea, Taiwan, Hong Kong, and the United States).

2 *See* David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 232 (2016) (noting, and speculating as to the causes of, "the longstanding divide between comparative private law and comparative public law" and "the exclusion of comparative public law from the mainstream of comparative law scholarship").

3 *See* RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 151 (2014) (noting the "renaissance" enjoyed by comparative constitutional law since the 1980s).

constitutional law as in political science, mainstream comparative scholarship tends to steer clear of China.[4] Perusal of the English-language comparative constitutional law literature leaves the vague impression that there has been as much written on Singapore—an independent city-state with roughly the population of greater Miami—as on China, home to one-fifth of the world's population and a growing economy to match.

A variety of possible explanations come to mind. One is the tendency of the literature to focus on a handful of high-prestige jurisdictions in Western Europe and the English-speaking world that Ran Hirschl has aptly dubbed the "usual suspects".[5] As Rosalind Dixon and Tom Ginsburg observe: "It is probably the case that 90% of comparative work in the English language covers the same ten countries, for which materials are easily accessible in English."[6] Another is the tendency of many scholars to equate constitutionalism, or constitutional law more generally, with the decisional output of courts engaged in judicial review[7]—a tendency that disfavors the study of China because Chinese courts lack the power either to review the constitutionality of government action[8] or to enforce the supremacy of national law over provincial or local law.[9]

Yet another explanation is that scholars have, partly by design, limited the study of comparative constitutional law to democratic countries.[10] At the cutting edge

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[4] *See* Lily Tsai, *Bringing in China: Insights for Building Comparative Political Theory*, 50 COMP. POL. STUD. 295, 298 (2017) (lamenting that there has been "so little uptake of China scholarship by non-China scholars" in the field of comparative politics).

[5] HIRSCHL, *supra* note 3, at 4, 39, 241.

[6] Rosalind Dixon & Tom Ginsburg, *Introduction*, *in* RESEARCH HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 1, 13 (Tom Ginsburg & Rosalind Dixon eds., 2011).

[7] *See, e.g.*, HIRSCHL, *supra* note 3, at 153, 163 (noting the tendency of the contemporary literature on comparative constitutional law to focus on "questions of case law and jurisprudence"); Tom Ginsburg, *How to Study Constitution-Making: Hirschl, Elster, and the Seventh Inning Problem*, 96 B.U. L. REV. 1347, 1348–50 (2016) (analogizing the field's "narrow focus on court decisions" to the behavior of a baseball fan who watches only the seventh inning of a baseball game).

[8] *See infra* text accompanying notes 135–137 (discussing the Qi Yuling decision and its aftermath).

[9] The power to invalidate provincial or local law that conflicts with national law rests in the NPCSC, but the SPC has instructed judges to rely only on national law in the event of such conflict. *See* Eric C. Ip, *The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 COLUM. J. ASIAN L. 367, 419, 422 (2011) (noting the SPC's deliberate avoidance of the "politically sensitive issue of whether judges have authority to strike down provincial legislative acts"); Jim Yardley, *A Judge Tests China's Courts, Making History*, N.Y. TIMES (Nov. 28, 2005), http://www.nytimes.com/2005/11/28/world/asia/a-judge-tests-chinas-courts-making-history.html (describing the firestorm of criticism surrounding a judge's seemingly inconsequential invalidation of a provincial law in "a mundane case about seed prices").

[10] *See* STEVEN CALABRESI ET AL., THE U.S. CONSTITUTION AND COMPARATIVE CONSTITUTIONAL LAW: TEXTS, CASES, AND MATERIALS 9–11 (2016) (focusing on fifteen of the G-20 countries on the grounds

of the field, this tendency is counterbalanced by growing recognition of authoritarian constitutionalism as a practically important and intellectually rewarding object of study in its own right.[11] Nevertheless, some might take the view that satisfaction of some normative threshold or minimum performance standard is a prerequisite for qualifying as an object of study by comparative constitutional scholars. It is not difficult to understand how some scholars might conclude that there is little point to studying constitutional law in China on the grounds that China has in practice repudiated constitutionalism, if not law more generally.[12] Likewise, it is tempting to say that, because China chronically fails in practice to uphold its constitution,[13] it neither possesses a real "constitution" nor practices "constitutionalism" and therefore has no place in the study of comparative *constitutional* law. A place in the study of comparative law, yes; a place in the study of comparative constitutional law, no.

This chapter argues that it is a mistake—for both the field of comparative constitutional law and the development of constitutionalism in China—to define the core concepts of "constitution" and "constitutionalism" in a manner that excludes China. Even if such a move is well intentioned, it is likely to have the effect of marginalizing the comparative study of China by constitutional scholars. The marginalization of China as an object of study has deleterious effects not only for the field of comparative constitutional law, but also potentially for the development of constitutionalism in China itself. The goal should be to place China at the core of a genuinely comparative constitutional discourse, rather than relegating it to the domain of China specialists. This can be accomplished, moreover, without lapsing into apologism for either the Chinese Communist Party (CCP) or the regime that it controls, the People's Republic of China (PRC).

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that "powerful, wealthy, and very populous" countries are "more important" than "tiny, powerless emerging nations," but omitting the PRC from the list of focus countries–notwithstanding its enormous power, wealth, and population–on the grounds that it is not democratic).

11 *See, e.g.*, RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008); CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2013); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015).

12 *See* Carl Minzner, *China After the Reform Era*, 26 J. DEMOCRACY 129, 130–31 (2015) (describing China's backsliding in recent years from regularized and "institutionalized governance" to centralization of power in the hands of an individual ruler and politicized "purges of rivals"); Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 938 (2011) (describing "a top-down authoritarian political reaction to growing levels of social protest and conflict" that has taken the form of a "turn against law" and a resort instead to "ideological and bureaucratic controls").

13 *See* David S. Law & Mila Versteeg, *Sham Constitutions,* 101 CALIF. L. REV. 863, 905 tbl.9 (2013) (identifying China as one of the ten countries in the world that most severely violates the civil and political rights found in its own constitution).

Part II of this chapter develops a typology that highlights the numerous options for defining constitution[alism]. The definition of constitution[alism] can incorporate a combination of normative, practical, and formal standards, each of which in turn can be defined leniently or stringently. The fact that scholars have available to them not just the familiar binary choice between "thick" and "thin" definitional approaches, but rather a rich matrix of definitional possibilities, means that there are numerous options for placing China at the heart of comparative constitutional discourse without appearing even implicitly to endorse its current government.

Part III summarizes the competing views that scholars have taken on the state of constitutionalism in China, while Part IV highlights the value to the field of comparative constitutional law of taking China seriously as an appropriate object of study. Even though—or, perhaps, especially because—China lacks judicial review, the study of constitutionalism in China stands to benefit the field in several ways. China is not only an intrinsically important case to study, but also a rich and unique source of comparative data and experience with respect to several phenomena of considerable and increasing importance to comparative constitutional scholars. These phenomena are: (1) the role of statutes in the constitutional order; (2) the availability and operation of political rather than judicial forms of constitutional implementation and enforcement; (3) the relationship between domestic constitutional law and international law; and (4) the function of constitutions in regimes characterized by high levels of constitutional noncompliance.

With respect to the last of these phenomena, Part IV.A introduces two concepts: dissonant constitutionalism and constructive irritants. *Dissonant constitutionalism* exists when there is a contradictory relationship between the formal constitution and actual practice. This condition is not unique to authoritarian regimes and can exist to some degree even in liberal democracies, but it is especially pronounced in China. In such cases, the constitution is not entirely irrelevant but may instead perform the function of a *constructive irritant*. When a constitution enjoys normative or rhetorical force yet is chronically disobeyed, the ongoing and unresolved contradiction becomes a source of creative tension and can generate a dialectical and critical discourse that is uniquely difficult for the regime to suppress. In other words, the constitution acts as an irritant to the regime, with potentially constructive consequences. Finally, the chapter concludes by addressing the ability and responsibility of comparative constitutional scholars to contribute to the development of Chinese

constitutionalism by engaging critically with the Chinese experience.

II. Options for Defining Constitution[alism]: A Typology of Definitions

The terms at issue, "constitution" and "constitutionalism," can be defined in a wide range of ways. Indeed, even the relationship between the two terms is open to debate. It is not unusual to define the terms in such a way that a country can possess a "constitution" without also practicing "constitutionalism," or vice versa. This might happen, for example, if the definition of "constitutionalism" incorporates normative criteria that the definition of "constitution" does not, or if the definition of "constitution" incorporates formal criteria that the definition of "constitutionalism" does not.[14] It is common for scholars to define "constitution" using formal criteria and "constitutionalism" using normative criteria.[15] But it is also possible to take the position that "constitution" and "constitutionalism" are merely semantic variants of the same concept, meaning that a country characterized by a "constitution" is necessarily also characterized by "constitutionalism," and vice versa.[16]

An initial distinction might be drawn between "thick" and "thin" definitional approaches, where a "thick" definition requires that a country must satisfy certain normative and practical criteria (for instance, good governance by Western liberal standards)[17] in order to qualify as practising constitutionalism (or possessing a

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14 *See, e.g.*, Stephen Holmes, *Constitutions and Constitutionalism*, *in* The Oxford Handbook of Comparative Constitutional Law 189, 192 (Andras Sajó & Michel Rosenfeld eds., 2012) (arguing that constitutionalism "emerged only in the age of democratic revolutions, during the last three decades of the eighteenth century" and aims at "an ideal form of organization that subordinate[s] political incumbents to a higher law that they [are] forbidden, in principle, unilaterally to change"); Mark Tushnet, *Comparative Constitutional Law*, *in* The Oxford Handbook of Comparative Law 1225, 1230 (Mathias Reimann & Reinhard Zimmermann eds., 2008) (describing constitutionalism as both a "threshold concept" and a "normative concept," meaning that "[a]ll systems to which the term can be applied must satisfy some minimum requirements" that include "commitment to the rule of law," "a reasonably independent judiciary," and "reasonably regular and reasonably free and open elections with a reasonably widespread franchise").

15 *See, e.g.*, Larry Catá Backer, *From Constitution to Constitutionalism*, 113 Penn St. L. Rev. 671, 675–76 (2009) (observing that the "modern trend has been to distinguish between constitutionalism and constitution," and defining "constitutionalism" as "a means of evaluating the form, substance, and legitimacy" of "constitutions").

16 Because the two terms are at least capable of being equated with each other and susceptible to the same range of potential definitions, we will often refer in this chapter to "constitution[alism]" as shorthand for "constitution and/or constitutionalism." Our purpose in doing so is not to imply that the two terms should be treated as equivalent in meaning, but rather to simplify the discussion by employing "constitution[alism]" as verbal shorthand.

17 *See* Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3 Nat'l Taiwan U. L. Rev. 111, 115–16 (2008).

constitution).[18] Under a "thick" definitional approach, the label of "constitution[alism]" reflects favorable evaluation and is tantamount to conferral of a merit badge.[19] Under a "thin" definition, by contrast, every state possesses a constitution and practices constitutionalism because "constitution" refers simply to the way in which how the state operates—"the body of rules, practices, and understandings, written or unwritten, that *actually* determines who holds what kind of power, under what conditions, and subject to what limits"[20]—whereas "constitutionalism" is nothing more than "the whole of a community's practices and understandings about the nature of law, politics, citizenship, and the state."[21]

A binary choice between "thick" and "thin" definitions confronts conscientious scholars with the dilemma of either rewarding the PRC regime with implicit approbation, or excluding the PRC from discussion altogether. There are two ways out of this dilemma. One is to exclude China from the definition of constitution[alism] but nevertheless lavish attention upon China as an object of comparative constitutional study.[22] If all comparative constitutional scholars

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18 *See, e.g.*, KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 148 (2d ed. 1965) (using the term "nominal" to describe a constitution that is "not lived up to in practice," as opposed to either a "semantic" constitution, which is descriptively accurate but fails to shape behavior, or a "normative" constitution, which is both descriptively accurate and binding); CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 24 (1940) ("[C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law."); Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 855, 861 (1962) (distinguishing among "garantiste," "nominal," and "façade" constitutions on the basis of whether they not only describe the operation of the state accurately, but also seek to "restrict arbitrary power and ensure a 'limited government'"); Alec Stone Sweet, *Constitutions and Judicial Power*, *in* COMPARATIVE POLITICS 150, 152 (Daniel Caramani ed., 3d ed. 2013) (adopting a thick definition of constitutionalism, but also acknowledging that "[o]thers conceive of constitutionalism in wider terms").

19 *See generally* Anne Peters, *The Globalization of State Constitutions, in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 251 (Janne E. Nijman & André Nollkaemper eds., 2007).

20 David S. Law, *Constitutions*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376, 377 (Peter Cane & Herbert Kritzer eds., 2010).

21 Stone Sweet, *supra* note 18, at 152; *see also, e.g.*, MCILWAIN, *supra* note 18, at 5 (contrasting "the new definition of 'constitution'" as "the conscious formulation by a people of its fundamental law" with "the older traditional view in which the word was applied only to the substantive principles to be deduced from a nation's actual institutions and their development"); Tushnet, *supra* note 11, at 421 (observing that "every regime has a *descriptive* constitution," in the form of "some reasonably regular processes for policy development and conflict resolution").

22 *See, e.g.*, Mark Jia, *China's Constitutional Entrepreneurs*, 64 AM. J. COMP. L. 619, 620–21 (2016) (stating that, "while China's political system pays homage to a constitution, it cannot be said to exhibit constitutionalism, wherein constitutional provisions or norms provide a 'legal limitation on government' power," but then proceeding to explore at length the nature of Chinese constitutional advocacy and the role of the constitution in Chinese political discourse).

were to take this approach, the definition of constitution[alism] would be of little import. But this is clearly not the approach that the field of comparative constitutional law has taken. And it certainly cannot help that excluding China from the definition of constitution[alism] leaves comparative constitutional scholars to wonder why they should study a country that lacks either "constitutionalism" or a "real" constitution.

The other way out of the dilemma is to define constitution[alism] in a manner that places China squarely within the comparative discourse without appearing to endorse the PRC's current governing regime. Fortunately, there are numerous options for doing so. Between the extremes of "thick" and "thin" lies the intermediate option of dividing or "pluralizing" [23] the concept of constitution[alism] into categories or subtypes with criteria of varying thickness. In this vein, one might begin with a fairly modest or thin definition of constitution[alism] that most or all countries satisfy,[24] but also recognize the existence of different versions or gradations of constitution[alism], some of which are harder to achieve or more praiseworthy than others. Tushnet, for example, identifies "absolutist constitutionalism," "mere rule-of-law constitutionalism," and "authoritarian constitutionalism" as alternatives to the "liberal constitutionalism" that has long been treated as synonymous with constitutionalism itself,[25] while Law and Versteeg distinguish among strains of authoritarian constitutionalism[26] as well as between "sham constitutions" and "aspirational constitutions."[27]

Even these possibilities, however, do not capture the full range of possible definitional moves. To clarify the available options, it is necessary at the outset to

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23 Tushnet, *supra* note 11, at 396 (arguing that "pluralizing our understanding of constitutionalism" by recognizing multiple categories of constitutionalism "may contribute to analytic clarity").

24 *See id.* at 415–16, 420 (opting for a definition of "constitutionalism" that "requires (no more than) restraint on the arbitrary exercise of power"—a definition that can potentially be satisfied even by absolute monarchies).

25 *See id.* at 396–97 (describing and defining "three forms of constitutionalism other than liberal constitutionalism"—namely, "absolutist constitutionalism," "mere rule-of-law constitutionalism," and "authoritarian constitutionalism").

26 *See* David S. Law & Mila Versteeg, *Constitutional Variation Among Strains of Authoritarianism*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 165, 181–87 (Tom Ginsburg & Alberto Simpser eds., 2014) (finding systematic differences between "civilian," "monarchical," and "military" strains or variants of the more general phenomenon of authoritarian constitutions).

27 *See* Law & Versteeg, *supra* note 13, at 880–81 (recognizing the existence of a "conceptual distinction" between "sham constitutions" and "aspirational constitutions," albeit one that is "difficult, if not impossible" to apply in practice).

distinguish among three distinct types of criteria—regime goals, regime characteristics, and regime performance—that can form the basis, either individually or in combination, of a definition of "constitution[alism]" (or a category thereof). First, whether a country practices "constitutionalism" might be said to turn wholly or partly on the stated goals or aspirations of a given regime. To insist, for example, that a system must have democratic governance and respect for human rights as its primary goals in order to qualify as "constitutional[ist]" is to employ a definition that incorporates regime goals. Even though such a definition takes no account of what a country does in practice, it would still exclude certain states: the Saudi constitution, for example, is explicitly monarchical and subjugates individual rights to religious dictates.[28]

Second, the definition of constitution[alism] could depend wholly or partly on the formal or institutional characteristics of the regime. Thus, for example, whether a country possesses a court or analogous institution with the power of judicial review might be treated as determinative, regardless of how well or effectively the institution operates in practice. Under such an approach, both Japan and Sweden would qualify as possessing judicial review, even though their courts almost never exercise that power.[29] Likewise, emphasis might be placed on whether a country possesses a formal or "large-C" constitution that proclaims its status as supreme or fundamental law and purports to regulate the organization and powers of the state, even if the constitution is frequently or routinely disregarded in practice.[30]

Third, a definition of constitution[alism] can incorporate real-world performance requirements. To ask whether a country respects human rights in practice,

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[28] *See* SAUDI ARABIA CONST. art. 5(a) ("The system of government in Saudi Arabia shall be monarchical."); *id.* art. 7 ("The regime derives its power from the Holy Qur'an and the Prophet's Sunnah which rule over this and all other State Laws."); *see also* Law & Versteeg, *supra* note 13, at 870, 883 (characterizing the Saudi and Soviet constitutions as "weak" in the sense of professing relatively little commitment to the rights that are most basic and common by liberal western standards).

[29] *See* David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425 *passim* (2009) (describing and offering explanations for the Japanese Supreme Court's extreme reluctance to invalidate laws on constitutional grounds); Nils Stjernquist, *Judicial Review and the Rule of Law: Comparing the United States and Sweden*, *in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 129, 138 (Donald W. Jackson & C. Neal Tate eds., 1992) (noting "only a few unimportant instances of judicial review in Sweden" under its 1974 constitution); Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2786 n.25 (2003) (observing that the constitutional court created by Sweden's 1915 constitution did not invalidate any legislation "for more than seven decades")

[30] Law, *supra* note 20, at 377; Law & Versteeg, *supra* note 13, at 872–79; *see also* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 38-45 (2009).

regardless of what is said on paper, is to define constitutionalism in terms of regime performance. It is all too common for regimes to fall short of their stated goals, and if that shortfall is sufficiently extreme and chronic, it becomes fair to say that the goals are insincere and the constitution is merely a sham.[31] But it is also possible for a regime to perform better than its stated goals, as in the case of a country like Australia that guarantees few if any rights in its constitution yet upholds a wide variety of rights in practice.[32]

These three types of criteria, in turn, can vary in stringency. For the sake of discussion, let us say that each type of criteria can be formulated in either strict or lenient terms. The resulting three-by-two typology of definitions is shown in Table 1. Although the typology in Table 1 contains six categories, there are far more than six possible definitional approaches because a single definition can combine criteria from multiple columns. When scholars speak of a "thick" definition of constitution[alism], for example, that narrows down the range of possibilities but is still not very precise: it tells us only that the definition incorporates regime performance criteria, but it does not tell us how stringent those criteria are, or whether other types of criteria also apply.

Table 1: Typology of definitions

stringency of criteria	*type of criteria*		
	regime goals	*regime characteristics*	*regime performance*
lenient approach	The regime aspires to satisfy baseline normative standards, such as "democracy" and "rule of law,"	The regime possesses certain formal or institutional requirements, such as a formal constitution in the	In practice, the regime satisfies baseline normative standards, such as "democracy" and "rule of law," loosely defined.

31 *See* Law & Versteeg, *supra* note 13, at 881 (observing that "it is neither possible nor necessary" to distinguish empirically between "aspirational constitutions" and "sham constitutions," in part because the motives behind the adoption of a particular constitution are difficult to identify or distinguish, and that the two categories may in practice blend into each other because "[t]he knowing adoption of a wildly unrealistic constitution can itself be characterized as an act of insincerity or bad faith that is no better than an attitude of utter indifference toward constitutional compliance").

32 *See id.* at 882–83 (citing Australia, which lacks a bill of rights, as an example of constitutional "overperformance").

	loosely defined.[33]	form of a document or set of documents that claim constitutional status for themselves.	
strict approach	The regime aspires to satisfy more demanding criteria of liberal constitutional democracy, such as competitive multiparty democracy, secularism, and observance of human rights.	The formal requirements are more demanding. (E.g., the regime must possess a constitution in the form of a single document that is beyond the reach of amendment by ordinary legislative processes, and a court with the power to invalidate laws that are inconsistent with the formal constitution.)	In practice, the regime satisfies more demanding criteria of liberal constitutional democracy, such as competitive multiparty democracy, secularism, and observance of human rights, and the formal constitution is fully enforced and obeyed.

In the left-hand column are definitions that reserve the label of "constitution[alism]" for systems of government that have certain normative aspirations. A lenient definition keyed to regime goals (represented by the upper-left box) might encompass any state that aspires to "democracy" and the "rule of law," broadly defined, for example, while a stringent definition keyed to regime goals would go further and require more concrete or demanding normative ambitions on the part of the state, such as genuinely competitive multiparty

33 *See, e.g.*, FRANÇOIS VENTER, CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATES 20 (2000) ("The elemental components of constitutionalism are simply: limited, non-arbitrary government, legally enforceable rights and the dominance of the law."); Michael Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. POL. 1, 17 (2002) (accepting "the common notion that constitutionalism resides somewhere in the confluence of democracy and the rule of law"); Tushnet, *Comparative Constitutional Law*, *supra* note 14, at 1230 (arguing that "commitment to the rule of law," "a reasonably independent judiciary," and "reasonably regular and reasonably free and open elections with a reasonably widespread franchise," "and perhaps not much more," are the requirements of constitutionalism).

democracy, secularism, or respect for human rights.

In the middle column are definitions that apply based purely on the basis of formal regime characteristics. A strict definition of this variety (corresponding to the lower-middle box) keyed to the US Constitution might require a country to possess a single document that is labeled a "constitution," entrenched against amendment via ordinary legislation, and subject to binding judicial enforcement. Although purely formal in content, such a definition would nevertheless disqualify the constitutions of many parliamentary systems such as the United Kingdom and Israel, which subscribe to understandings of parliamentary sovereignty that make entrenchment conceptually difficult to achieve.[34]

Finally, the right-hand column contains performance-based definitions that require the achievement of certain practical goals, such as democracy or respect for basic human rights. Under this definitional approach, China fails miserably. By now, however, it should be clear that a performance-based definition is only one of a number of possible definitions. There is no scholarly consensus capable of supplying us with a single correct definition of constitution[alism].[35] For better or for worse, scholars have implicitly or explicitly employed definitions of constitution[alism] that incorporate different combinations of criteria with varying degrees of stringency, and it is hopeless to think that a consistent definition can be imposed by fiat.

Nor are performance-based definitions uniquely or clearly preferable on either logical or practical grounds. Any of the definitions in Table 1 is both internally coherent and capable of real-world application. To be sure, adoption of a very thin definition of constitution[alism] consisting entirely of goal-based or performance-based criteria—as opposed to strictly formal criteria—might make it difficult to distinguish comparative constitutional law from other fields, such as public law, political science, or indeed any discipline involving the study of a nation's structure.[36] From an intellectual perspective, however, that might not be

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34 *See* David S. Law, *The Paradox of Omnipotence: Courts, Constitutions, and Commitments*, 40 GA. L. REV. 407, 413–15 (2006) (discussing how traditional notions of parliamentary sovereignty make it difficult for governments to bind themselves).

35 *See* Stone Sweet, *supra* note 18, at 151 (observing that there is "no consensus" on how to define either "constitutions" or "constitutionalism").

36 *See, e.g.*, Law, *supra* note 20, at 378 (observing that "much of the literature in the fields of comparative politics and political economy can be characterized as empirical research on small-c constitutions"); Tushnet, *Comparative Constitutional Law*, *supra* note 14, at 1228 ("Constitutions lie at the intersection of law and high politics, and distinguishing between the study of

a bad thing. It would merely highlight that the study of constitutional law demands both interdisciplinarity and specialization.[37] The only basis for arriving at a "right definition" that excludes China from the ambit of the field, it seems, would have to be normative in nature. But there are equally good normative and intellectual reasons for the field to embrace rather than disregard China.

III. The Scholarly Debate Over the State of Constitutionalism in China

The political reforms that have occurred in the People's Republic of China (PRC) since the early 1980s have prompted scholars to debate whether China is finally embracing constitutionalism. Nearly four decades have passed since Deng Xiaoping decided in 1978 to open the Chinese market and push for economic reforms. With annual double-digit growth, China has emerged as the second-largest economy in the world and is expected to soon surpass the United States.[38] Parallel to these economic reforms, institutional and political reforms were also undertaken to support the transition to a market economy under socialist rule. Not least among these reforms was wholesale constitutional revision. The highly politicized constitution adopted in 1975 toward the end of the Cultural Revolution was replaced in 1978 with a less extreme document that in many respects represented a restoration of the PRC's initial 1954 Constitution.[39] Under Deng's continuing reformist influence, the 1978 Constitution was further revised in 1979 and 1980 before being entirely replaced yet again in 1982.[40] The 1982 Constitution was subsequently revised in 1988, 1993, 1999, and 2004 but remains in force to this day.

The PRC government is characterized by the existence of two parallel power structures. One structure is the formal institutional framework established by the 1982 Constitution. It provides that all power in the PRC belongs to the people,[41]

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comparative constitutional law and the study of comparative politics is sometimes particularly difficult.").

37 *See* Hirschl, *supra* note 3, at 153–64 (highlighting the strong historical linkages between constitutional studies and the social sciences, and bemoaning the "appropriation" by law schools of "contemporary comparative constitutional studies" and the resulting "legalistic" and "court-centric" flavor of the field).

38 Mike Patton, *China's Economy Will Overtake the U.S. in 2018*, Forbes (Apr. 29, 2016, 10:47 AM), http://www.forbes.com/sites/mikepatton/2016/04/29/global-economic-news-china-will-surpass-the-u-s-in-2018/#3f54ad51474b.

39 *See* Qianfan Zhang, The Constitution of China: A Contextual Analysis 44–46 (2012).

40 *See id.*

41 Xianfa [Chinese Const.] art. 2.

who exercise their power through the unicameral National People's Congress (NPC) and Local People's Congresses (LPC). The NPC is composed of deputies elected by the members of the LPCs, as well as by deputies elected from the armed forces and the representatives of designated minority groups.[42] As the highest organ of state, the NPC has supreme and undivided power to enact laws, amend or replace the Constitution and select the nation's highest officials.[43] From a theoretical perspective, all other state bodies and powers are subordinated to the NPC because the NPC embodies the will of the people, and the people are supreme.

Running parallel to this formal constitutional structure is the power structure of the Chinese Communist Party, which possesses a de facto constitution of its own in the form of the party charter. Although the Constitution makes little mention of the CCP—indeed, it is explicitly referenced only in the preamble[44]—the reality is that the CCP enjoys unchallenged political dominance and oversees all governmental decision-making.[45] This level of control is made possible in part by the manner in which the party structure deliberately mirrors the constitutional structure. Institutions created by the Constitution are matched by analogs or counterparts within the CCP. For example, the NPC and LPC are shadowed by the CCP's Political Consultative Committees, which lack any formal binding power under the Constitution but meet at the same time as—and exercise influence over—their constitutional counterparts.[46]

Another duality of Chinese constitutionalism, which is facially apparent even from the text of the constitution, is the tension between the officially socialist ideology of the state and the reality of an increasingly market-based economy. The opening article of the Constitution formally declares the PRC a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.[47] Such so-called democratic centrism of the

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42 *Id*. art. 59.

43 These officials include, among others, the President and Vice President, the Premier who heads the State Council, the Chairman of the Central Military Commission, the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate. *Id*. art. 62.

44 *See id*. pmbl. (noting the "leadership" of the CCP in the revolution of 1949, the subsequent "successes of [China's] socialist cause," and China's "system of multi-party cooperation and political consultation").

45 *See* ZHANG, *supra* note 39, at 122.

46 *See id*. at 53–54; *see also, e.g.*, *id*. at 152 (observing that there exist both a state Central Military Commission established by the Constitution and a CCP Central Military Commission that are "essentially the same institution sharing the same chairman and staff").

47 XIANFA art. 1.

proletariat is difficult to reconcile with the understanding of popular sovereignty found in modern constitutions, let alone the notion of a market economy.

Accordingly, several rounds of constitutional revision were undertaken to legitimize economic reform. In 1988, Articles 10 and 11 of the Constitution were amended to provide a constitutional basis for private enterprise and market economy and, most importantly, to permit lawful transfers of land use rights. In 1993, Article 15 was amended to formally replace the goal of a planned economy with that of a socialist market economy. In 1999, the rule of law—a core element of modern Western constitutions—was introduced via Article 5, in the form of an obligation on the part of the state to implement a socialist state on the basis of the rule of law. Perhaps the most striking ideological makeover, however, occurred in 2004, when three articles with an explicit focus on the protection of rights were added. Articles 10 and 13 were amended to guarantee "the rights of citizens to private property and to its inheritance" and provide compensation for private property expropriated or requisitioned," while Article 33 introduced new language that obligates the state to "respect and preserve human rights."[48]

These amendments were pivotal to creating an open market and encouraging economic reforms within the context of an officially socialist system. Given the PRC's explicitly socialist ideology, the making of formal constitutional commitments to the rule of law and human rights—even if only rhetorically—was arguably an even bigger step forward for the cause of constitutionalism. What the amendments did not do, however, was to alter the institutional framework of government or call into question the CCP's monopoly on power. Indeed, amendments to the preamble reaffirmed at length the political dominance of the CCP, while a focus on rule of law and human rights was clearly the lesser of two evils from the CCP's perspective as compared to the focus on democratization that had fueled the 1989 Tiananmen Square uprising. Far from undermining CCP control, the conspicuous placement of constitutionalism on the agenda might well have amounted to a strategy for diverting attention away from democratization toward goals less threatening to the regime.

Perhaps nothing sows greater doubts about the existence of constitutionalism in China, however, than the absence of any effective and independent mechanism for enforcing the constitution, such as judicial review. Although judicial review is

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[48] Official English translation of China's Constitution and constitutional amendments: http://www.npc.gov.cn/englishnpc/Constitution/node_2826.htm

widely considered a core element of modern constitutionalism,[49] the absence of judicial review remains a defining feature of the PRC's institutional framework. An abortive attempt in 2001 by the Supreme People's Court (SPC) to allow judicial enforcement of the constitutional right to education against private parties, hailed by some at the time as China's version of *Marbury v. Madison*,[50] was eventually crushed.[51] Instead, the power to interpret and enforce the Constitution is vested in the Standing Committee of the National People's Congress (NPCSC), a legislative rather than judicial body that has yet to exercise this power even once.[52]

The mixed signals sent by the formal commitments to the rule of law and human rights, on the one hand, and the continuing rejection of judicial review, on the other hand, have spurred a heated debate over whether and to what extent China has embraced constitutionalism. On this question, scholars divide into roughly three camps. The first camp is explicitly skeptical.[53] Some conclude, for example, that China possesses a constitution, but not constitutionalism, due to the absence of constitutional enforcement mechanisms.[54] Others in this camp argue that China is shifting away from formal law and legal institutions toward a reliance on informal rules and alternative dispute resolution mechanisms.[55] Various political

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49 *See, e.g.*, Stéphanie Balme & Michael W. Dowdle, *Introduction: Exploring for Constitutionalism in 21st Century China*, *in* BUILDING CONSTITUTIONALISM IN CHINA 1, 3 (Stéphanie Balme & Michael W. Dowdle eds., 2009) ("Constitutionalism is often closely associated with–and even conflated with–the judiciary's power and effectiveness in enforcing constitutional norms[.]"); Stone Sweet, *supra* note 18, at 160–61; Mark Tushnet, *Judicial Review of Legislation*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 164, 167 (Peter Cane & Mark Tushnet eds., 2003). We use the term "judicial review" here in the American sense of referring specifically to judicial review of the constitutionality of government action. Judicial review of administrative action for legality, by contrast, is well-established practice in China. *See infra* text accompanying note 143.

50 5 U.S. 137 (1803); *see, e.g.*, Ip, *supra* note 9, at 432 (noting that, in defending the Qi Yuling decision, the presiding judge of the SPC's civil section explicitly cited Marbury v. Madison in support of the view that judicial enforcement of the constitution "is a long-standing international trend that the PRC should follow").

51 *See infra* notes 135–138 and accompanying text (discussing the *Qi Yuling* case).

52 *See infra* notes 118–120 and accompanying text (discussing article 67(1) of the PRC Constitution).

53 *See, e.g.*, Thomas E. Kellogg, *Arguing Chinese Constitutionalism*, 11 U. PA. ASIA L. REV. 337, 351 (2016) (arguing that the Communist Party "seeks to use the Constitution to legitimize its rule by maintaining the political fiction that China is transitioning to constitutional governance," and that China's constitution "remains a sham constitution" that "simply does not describe the system of governance in China today").

54 *See, e.g.*, Cai Dingjian, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 COLUM. J. ASIAN L. 28, 5, 13–19 (2005); Keith Hand, *Constitutionalizing Wukan: The Value of the Constitution Outside the Courtroom*, 12 CHINA BRIEF 5, 6–7 (2012); Qianfan Zhang, *A Constitution without Constitutionalism? The Paths of Constitutional Development in China*, 8 INT'L J CONST. L. 950, 951–56 (2010).

55 *See, e.g.*, Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 940–59 (2011); Carl

scientists and law and society scholars, meanwhile, point to the continuing domination and control of the CCP over nearly all state institutions, including the judiciary. From their perspective, there is no true "constitutionalism" to speak of in China unless one regards the internal organization, practices, and policy documents of the CCP as the "functional" equivalent of a constitutional order.[56]

The second camp casts Chinese constitutional development in a more positive light and highlights signs of progress on various fronts.[57] Prominent scholars such as Randy Peerenboom,[58] Albert Chen,[59] and Tong Zhiwei,[60] among others,[61] argue that China has at least adopted a thin, procedure-based rule of law, but not yet a thick, substantive value-based rule of law that is common to Western constitutional democracies. Other scholars suggest that the Chinese judiciary is playing a growing and meaningful role of constitutionalist dimensions. Some emphasize the fact that, notwithstanding its lack of judicial review powers, the Supreme People's Court has been authorized to unify interpretations of statutory provisions.[62] Others point to expansion in the reach and capacity of the courts. Hualing Fu, for example, observes that despite the CCP's persistent control over state institutions including the judiciary, both the institutional independence and

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Minzner & Benjamin Liebman, *Legal Reform: China's Law-Stability Paradox*, 143 DAEDULUS 96, 99–102 (2014).

56 Rogier Creemers, *China's Constitutionalism Debate: Content, Context and Implications*, 74 CHINA J. 91, 93 (2015); Xin He, *The Party's Leadership as a Living Constitution in China*, 42 HONG KONG L.J. 73, 74, 93 (2012).

57 *See, e.g.*, Balme & Dowdle, *supra* note 48, at 1 ("[D]espite considerable weakness and deficiency, constitutionalism is fast becoming an important component of political dynamics in China."); Dowdle, *supra* note 32, at 27 (identifying China as "a prime example of significant constitutional development in an otherwise authoritarian regime," citing the growing power and prestige of the National People's Congress as evidence of this trend, and arguing that skeptics of the NPC's "constitutionalist development" offer "no justification for skepticism regarding the developmental potential of China's political system"); Kellogg, *supra* note 53, at 345, 354 (discussing the "emergence of a new stream of scholarly literature which argues that China is in the early stages of constitutional development").

58 *See* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARDS THE RULE OF LAW 65–71 (2002).

59 *See* Albert H.Y. Chen, *Toward A Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, *in* THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM 13, 13–51 (2000).

60 *See* Kellogg, *supra* note 53, at 382 (setting forth Tong Zhiwei's view that "because China has a written constitution, because this Constitution enumerates basic rights, and because it delineates the specific powers of different branches of government, China is close to full constitutionalism" and "merely lacks for implementation of that existing constitutional structure").

61 *See, e.g.*, *id.* at 399–400 (describing Qin Qianhong's argument that the CCP has already embraced "key elements of constitutional development" in the form of "inner-Party democracy, judicial reform, and new open government information regulations").

62 Ernest Caldwell, *Horizontal Rights and Chinese Constitutionalism: Judicialization Through Labor Disputes*, 88 CHI.-KENT L. REV. 63, 78, 89–91 (2012).

the professional capacity of the Chinese courts have advanced significantly,[63] while Vai Io Lo perceives a trend toward judicial activism in the increasing role of Chinese courts in resolving disputes and maintaining social order.[64] Ernest Caldwell contends that the concept of "constitutionalism" does not necessarily demand judicial control of government action, and that China's recent trend toward strong judicial protection of horizontal rights between individuals qualifies as the rise of constitutional adjudication.[65]

Defending the constitutionalist character of the Chinese regime in even stronger terms, Larry Catá Backer contends that the PRC has moved toward a "unique" and "legitimately constitutionalist governance system" that is "true both to the ideals of constitutionalism grounded in the core postulate of rule of law governance and to the Marxist principles" underpinning the PRC.[66] In his view, the PRC has a constitutional system that divides "administrative power" and "political power" between the government and the Communist Party respectively[67] and satisfies the "rule of law" requirement through its commitment to "collective governance."[68] The "ultimate test of constitutional legitimacy," in Backer's view, is not "imitation of Western political models" but rather a "healthy discourse on constitutional practice," which China manifests.[69]

The third camp takes the position that there exist multiple varieties of constitutionalism, and that China simply occupies a different point on the spectrum of possibilities than the Western liberal democracies to which it is often compared. For example, Li-ann Thio has argued for a special model of constitutionalism for illiberal democracy,[70] while Mark Tushnet has articulated

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63 Hualing Fu, *Access to Justice and Constitutionalism in China, in* BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 49, at 163, 168–69; Hualing Fu, *Building Judicial Integrity in China*, 39 HASTINGS INT'L & COMP. L. REV. 167, 174–75 (2016); *see also* Andrew Nathen, *Authoritarian Resilience*, 14 J. DEMOCRACY 6, 12 (2003).

64 Vai Io Lo, *Judicial Activism in China, in* LEGAL INNOVATIONS IN ASIA: JUDICIAL LAWMAKING AND THE INFLUENCE OF COMPARATIVE LAW 164, 167–75 (John O. Haley & Toshiko Takenaka eds., 2014).

65 Caldwell, *supra* note 61, at 79, 89–91.

66 Larry Catá 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, 334 (2012).

67 *Id*. at 343.

68 *Id*. at 341.

69 Larry Catá Backer, *Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism*, 40 MOD. CHINA 168, 170, 174 (2014).

70 Li-ann Thio, *Constitutionalism in Illiberal Polities, in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 13, at 133, 133–52; Graham Walker, *The Idea of Nonliberal Constitutionalism, in* ETHNICITY AND GROUP RIGHTS 154, 169 (Ian Shapiro & Will Kymlicka eds., 1997).

a theory of "authoritarian constitutionalism" that classifies regimes according to the extent of free and fair elections and respect for liberal freedoms.[71] Tushnet conceptualizes authoritarian constitutionalism as a distinctive form of constitutionalism unto itself rather than a mere transitional stage between the extremes of democratic constitutionalism and despotism. Building upon Tushnet's approach, Gordon Silverstein proposes a more elaborate typology that distinguishes among varieties of constitutionalism along three dimensions—namely, respect for a "thin rule of law," adherence to "norms of consent and legitimacy" (exemplified by free and fair elections), and commitment to limited government.[72] Although these typologies are inspired by the particular case of Singapore, they are capable of encompassing China.[73]

Whichever of these views one finds most persuasive, it should be obvious that China offers an interesting and important test case for competing definitions of core concepts. As Part IV will show, however, the study of China has more to offer constitutional comparativists than fuel for debate over typologies and definitions.

IV. The Value of China as a Comparative Case Study

The fact that China lacks judicial review does not mean that constitutionalism in China does not merit study, much less that there is simply nothing to study by the name of Chinese constitutionalism. Although judicial review is now closely identified with constitutionalism,[74] this was historically not the case. For well over a century, the concept and study of constitutionalism were concerned primarily with constitution-making rather than judicial review,[75] which became truly widespread only in the decades following World War II.[76] The preoccupation of today's comparative constitutional scholars with judicial review

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71 Tushnet, *supra* note 11, at 420–21.

72 Gordon Silverstein, *Singapore's Constitutionalism: A Model, but of What Sort?*, 100 Cornell L. Rev. Online 1, 9, 29–16 (2015).

73 Hualing Fu, *Putting China's Judiciary Into Perspective: Is It Independent, Competent and Fair?*, *in* Beyond Common Knowledge: Empirical Approaches to the Rule of Law 193 (Erik Jensen & Tom Heller eds., 2003).

74 *See supra* note 49 and accompanying text.

75 *See* Miguel Schor, The Federalist as a Primer on Constitutional Design: A Critical Appraisal of Separation of Powers and Written Constitutionalism (2017) (unpublished manuscript) (on file with authors).

76 *See* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. Rev. 762, 793–94 (2011) (observing that only one-quarter of constitutions provided explicitly for judicial review as of 1946, whereas more than 80% do so now).

is hardly an unalloyed good.[77] Studying China provides a valuable corrective by enabling and, indeed, forcing us to confront significant yet underexplored aspects of constitutionalism beyond judicial review.

For examples, one needs look no further than the very first words of the PRC Constitution. The preamble, which goes on for several pages, is key to understanding the character and function of the document and immediately gives the impression that the Chinese Constitution is a different creature, created for different purposes, than the usual Western constitution: it has the character of an ideological manifesto. The tendency of the comparative constitutional law literature, however, has been largely to ignore preambles as judicially unenforceable[78] and therefore unworthy of study.[79]

Likewise, the role of ideology in constitutionalism, which is highlighted by the PRC Constitution, cries out for attention from comparative constitutional scholars. Constitution-writing faces governments with "both the opportunity and the obligation" to justify and rationalize the operation and existence of the state, and to depict themselves to the world in a normatively defensible manner.[80] There is therefore no such thing as a constitution that lacks an implicit narrative and ideology of the state; indeed, in certain cases, these ideological and narrative functions may be of paramount importance to the regime. China in particular happens to be a leading example of socialist constitutionalism in particular and constitutional statism more generally.[81]

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77 *See* HIRSCHL, *supra* note 3, at 163–66 (noting that the "comparative study of constitutionalism" has taken a "legalistic" and "court-centric" bent since the mid-twentieth century, at the expense of examining other phenomena such as "the constitutional text in its entirety").

78 *See* Law, *supra* note 2, at 184 n.111.

79 *See id.* at 188 (explaining how constitutional preambles are both "rich in ideological content" and "widely overlooked by scholars"). Rare exceptions to date include JUSTIN O. FROSINI, CONSTITUTIONAL PREAMBLES AT A CROSSROADS BETWEEN POLITICS AND LAW (2012); SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 55 (2012); and Tom Ginsburg et al., *"We the Peoples": The Global Origins of Constitutional Preambles*, 46 GEO. WASH. INT'L L. REV. 101 (2014).

80 Law, *supra* note 2, at 156.

81 *See, e.g.*, *id.* at 169–74, 212 tbl.5 (contrasting the "statist archetype" of constitutionalism with the "liberal" and "universalist" archetypes, and identifying China's preamble as the most "statist" in the world based on a computational empirical analysis of its semantic content); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1228 tbl.6 (2011) (identifying the Chinese constitution as one of the most "statist" constitutions in the world based on empirical analysis and comparison of its rights-related provisions); William Partlett & Eric C. Ip, *Is Socialist Law Really Dead?*, 48 INT'L L. & POL. 463, 483 (2016) (describing China's "model of constitutional statism" that rejects the "rights-based model" of Western constitutionalism and instead "draws on the most statist elements of the Russian tradition and

These ideologies are, moreover, hardly unique to China. There are of course explicitly socialist states in addition to China, such as Vietnam, Laos, and North Korea, in which the parallels are obvious. And if we move away from the extreme end of the ideological spectrum represented by socialism toward mere statism, we find that some version of statism manifests itself to varying degrees in constitutions around the world.[82] Nevertheless, the existing comparative constitutional law literature has relatively little to say about the ways in which constitutional systems are defined and driven by ideas about the nature and role of the state. Given that constitutions perform ideological and expressive functions, the neglect of both preambles and ideology fails to capture what is most interesting and important about constitutionalism in many jurisdictions.

It is by no means random that jurisdictions such as China, and phenomena such as preambles and ideology, receive less attention in the literature. The criteria that determine what falls within the scope of the field or receives scholarly attention have historically narrowed the focus of the field to the study of case law in democratic countries with some form of judicial review.[83] These criteria may be implicit, as when scholars simply do not write on certain topics, or they may be explicit, as when key concepts such as "constitution" or "constitutionalism" are narrowly defined. But either way, they are highly problematic. Failure to study China is partly a manifestation of what Tom Ginsburg has aptly dubbed the "seventh-inning problem."[84] A comparative constitutional scholar who studies only judicial review or case law is akin to a baseball spectator who watches only the seventh inning of each game. Although the seventh inning is undeniably an interesting and important part of a baseball game, it is ultimately only one of (at least) nine innings and may not be the most important or informative inning.

A broader conception of the field invites investigation of a full range of constitutional phenomena, many of which are conspicuously on display in China.

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creates a highly centralized institutional structure that sees law as an instrument of state mobilization").

82 *See* Law, *supra* note 2, at 237 app.I (reporting the proportion of statist content contained in the preamble of every national constitution and selected international human rights treaties as of 2012); Law & Versteeg, *supra* note 80, at 1253 app.II (reporting ideology scores for all national constitutions as of 2006 calculated on the basis of how "statist" or "libertarian" their rights-related provisions are).

83 *See supra* notes 5–13 and accompanying text.

84 *See* Ginsburg, *supra* note 7; *see also* Dowdle, *supra* note 32, at 14–15 (arguing that the institutional features that attract the greatest scholarly attention, such as constitutional entrenchment and judicial review, are designed to promote the stability and efficacy of existing arrangements rather than transform existing arrangements).

Preambles and ideology aside, at least three aspects of Chinese constitutionalism are common to constitutionalism around the world yet remain underexplored in the scholarly literature. First is the extent to which Chinese constitutionalism relies upon statutory law as opposed to an entrenched constitutional text. While the implementation and enforcement of China's "large-C" Constitution remains deeply problematic, "small-c" constitutional law–in the form of quasi-constitutional statutes–has gained prominence.[85] In relying heavily at times on legislation as a substitute for formal constitutional amendment, China is by no means unique but instead provides an opportunity to study a relatively common phenomenon.[86]

Second is the manner in which the Chinese constitutional system places responsibility for constitutional interpretation and enforcement in the political system rather than in the courts.[87] The extent to which China's constitution is (and should be) political rather than legal in nature has been a matter of recurring debate among Chinese scholars. Last but not least is the relationship between domestic constitutional law and international law, a live issue in China as elsewhere. The impact of international human rights discourse on Chinese human rights advocacy and practice, in particular, merits serious scholarly attention.

Some may find these developments of little interest because they are not court-centered and therefore offer little that can be used as fodder in either domestic constitutional litigation or academic discussion how courts in general should decide certain types of questions. But they are of profound importance for several reasons. First, China's sheer size and heft render it of intrinsic importance. Second, and relatedly, developments in China cast a shadow over the rest of Asia. Third, constitutionalism in authoritarian regimes is (rightfully) of growing

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85 *See* Law, *supra* note 20, at 377 (contrasting "large-C" and "small-c" constitutions); Yan Lin, *Constitutional Evolution Through Legislation: The Quiet Transformation of China's Constitution*, 13 INT'L J. CONST. L. 61, 63–71 (2015).

86 *See, e.g.*, Lin, *supra* note 84, at 87–88; Matthew Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587, 609–13 (2006) (identifying various statutes among New Zealand's "key constitutional elements").

87 *See* Michael W. Dowdle & Kevin Y.L. Tan, *Is Singapore's Constitution Best Considered a Legal Constitution or a Political Constitution?*, *in* CONSTITUTIONAL INTERPRETATION IN SINGAPORE: THEORY AND PRACTICE 363, 363 (Jaclyn L. Neo ed., 2016) ("A legal constitution places ultimate normative authority to issue constitutional interpretation in the judiciary[.] A political constitution places ultimate normative authority to interpret the Constitution in the political system.").

scholarly interest,[88] and China is a valuable source of data on the possibilities facing authoritarian and transitional regimes. Finally, attention to Chinese constitutional developments promotes the development of a less parochial and more genuinely global and inclusive discipline of comparative constitutional law that extends beyond the handful of "usual suspects"[89] in the English-speaking world and Western Europe that have long dominated the scholarly literature.

A. Quasi-Constitutional Statutes: "Large-C" vs. "Small-c" Constitutions

There is no formal or "large-C" constitution in the world that accurately and completely prescribes the basic organization and operation of the state. Formal constitutions are inevitably underinclusive, if not also overinclusive: they omit rules and practices that are fundamental to the operation of government, while including provisions that are not as fundamental as their inclusion in the constitution might suggest. Anyone reading only the unadorned text of the United States Constitution, for example, would come away with an incredibly inaccurate and incomplete understanding of American government: the document called the Constitution acknowledges the existence of neither political parties nor administrative agencies, paints a misleading picture of how presidents are actually selected,[90] and includes anachronistic provisions of little or no practical relevance,[91] to name but a few of the ways in which America's large-C or formal constitution departs from its "small-c" or de facto constitution.[92]

Instead, it is invariably the case that, in order to understand how constitutional law works in a given country, it is necessary to look beyond the text of the formal constitution to other rules and practices of both the written and unwritten varieties. In the United States, law professors place heavy emphasis on judicial decisions to fill the gaps in the constitutional fabric, but in reality, one must also

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88 *See supra* note 11 and accompanying text.

89 HIRSCHL, *supra* note 3, at 39.

90 The Electoral College "persists in form as the means by which presidents are chosen, but it does not in substance make the decision, as the framers of the Constitution had intended; rather, its members are expected to cast their votes in accordance with the wishes of those who elected them." David S. Law, *The Myth of the Imposed Constitution*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 239, 248–49 (Denis Galligan & Mila Versteeg eds., 2013) (citing the electoral college provisions as examples of "zombie provisions" that "persist in form" but not in function).

91 *See, e.g.*, U.S. CONST. amend. III (prohibiting the quartering of soldiers in private homes).

92 *See* Law & Versteeg, *supra* note 13, at 872–73 (observing that the "formal self-styled 'Constitution' is a woefully incomplete statement of the country's working constitution," and citing the Administrative Procedure Act and Civil Rights Act of 1964 as examples of statutes "so fundamental" as to enjoy "quasi-constitutional status").

take into account legislative enactments that are, in practice, at least as important as any number of formal constitutional provisions.[93] In this sense, the study of Chinese constitutionalism presents challenges no different from the study of constitutionalism anywhere else: one cannot look simply at the large-C Constitution to understand what is happening. It is simply that, in China as opposed to the United States, the filler of choice tends not to be judicial in origin.

At the outset, it would be a mistake to view the Constitution itself as inconsequential. China's leaders consistently express fealty to the notion of governance within the formal constitutional framework,[94] and in doing so, they bestow legitimacy and normative weight upon the Constitution. More importantly, however, the seemingly minor constitutional amendments of the 1990s and 2000s are viewed as having played a substantial role in enabling the institutional reforms th at underpinned China's tremendous economic progress over this period.[95] It is thus unsurprising that there have been persistent calls for further constitutional reform. Since 2004, however, reliance on constitutional amendment to spearhead reform has subsided. Fears that further reform may threaten its political dominance have caused the CCP to become quite cautious about initiating constitutional change. Disagreement between reform advocates keen on further political transformation and party elites fearful of undermining their grip on power has led to stalemate.

The suppression of a proposal for a new constitution in 2008 illustrates how challenging the political environment has become for reformers. A group of intellectuals including Liu Xiaobo, the subsequent recipient of a Nobel Peace Prize, proposed a new constitution, the so-called Charter 08. From the CCP's perspective, however, the mere contemplation of a liberal, democratic constitution posed a threat to its very existence, and the authors of the proposal, including the Nobel laureate, faced persecution. A less dramatic but equally

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93 *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1266 (2001) (rejecting a sharp dichotomy between the "higher lawmaking" associated with formal constitutions and the "ordinary lawmaking" entailed in statutes, even in the context of countries with formal constitutions).

94 As recently as the 4th Plenum of the 18th CCP Central Committee held in 2014, President Xi Jinping reaffirmed the importance of governance on the basis of the Constitution, pledged to strengthen constitutional interpretation and review of laws and regulations and to further judicial reforms, and even designated December 4th as Constitution Day. *See China with Legal Characteristics*, ECONOMIST, Nov. 1, 2014, at 17; *National Constitution Day to Shore Up Awareness*, CHINA DAILY (Dec. 4, 2014), http://www.chinadaily.com.cn/china/2014-12/04/content_19021263.htm.

95 PEERENBOOM, *supra* note 57, at 58–63.

revealing episode of constitutional reform activity and subsequent government crackdown occurred in late 2012 and early 2013. In December 2012, China's President Xi Jinping stressed the importance of implementing the Constitution in one of his official speeches.[96] A group of liberal constitutional scholars seized the opportunity presented by these remarks to advance variety of constitutional reform proposals ranging from expanding electoral democracy and freedom of expression and association, to deepening the market economy and ensuring judicial independence.[97]

These proposals were perceived by the CCP as threatening to regime stability. The government media criticized advocates of "constitutionalism" for betraying China's own Constitution and attempting to impose Western, capitalist, constitutional models on China. This episode is said to have resulted in an unofficial ban on seven words of a constitutional nature in 2013. Terms such as universal values, press freedom, civil society, civil rights, the CCP's historical mistakes, privileged capitalist class, and judicial independence were said to have been banned from public discourse.[98] Mere discussion or use of the word "constitutionalism" (which in Chinese is quite distinct from the word "constitution"[99]) has become sensitive, while the concepts of "constitutional democracy," "separation of powers," and "judicial independence" have drawn explicit public condemnation from the Chief Justice himself.[100] The CCP's fear of unleashing high-legitimacy constitutional arguments that it cannot control may help to explain why constitutional amendments have come to a halt since 2004.

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96 *See* Kellogg, *supra* note 52, at 341.

97 *See id.* at 343.

98 These were the so-called "seven unspoken words" (七不講). The prohibition of these seven terms was never officially confirmed by the government. News of the ban was first reported by a professor over the internet and subsequently confirmed by other scholars. Internet searches within China for these seven words are usually blocked or confront technical difficulties. *See* Benjamin Carlson, *7 Things You Can't Talk About in China*, GLOBALPOST (June 3, 2013), https://www.pri.org/stories/2013-06-03/7-things-you-cant-talk-about-china; *高瑜因抄录七不讲机密文件给境外网站被拘捕*, VOICE OF AMERICA (May 8, 2014), http://www.voachinese.com/a/gaoyu-20140508/1910148.html (reporting on the detention of journalist Gao Yu for disclosing the CCP internal document prohibiting the seven words); *cf.* ZHANG, *supra* note 38, at 106 (noting that the entire subject matter of "constitutional judicialisation" was "banned from public discourse" following the repeal of the Qi Yuling decision).

99 In Chinese, the terms for "constitution" and "constitutionalism" involve different characters, rather than the mere addition of a suffix as in English: 憲法 refers to the former, while 憲政 refers to the latter.

100 *See* Michael Forsythe, *China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince*, N.Y. TIMES, Jan. 19, 2017, at A8 (quoting a speech given by Chief Justice Zhou Qiang).

The most recent attempt at amendment occurred in 2013, when serious ongoing air pollution issues prompted discussion of a constitutional right to a healthy environment, but the proposal eventually failed.

However, moderate constitutional reform of the small-c variety, in the form of statutory enactments and administrative practice, remains common.[101] There has been no shortage in China of what Eskridge and Ferejohn call "super-statutes" of constitutional magnitude and significance.[102] In this vein, Yan Lin contends that China has made copious use of statutes to develop rules, elaborate principles, and fill lacunae in the constitutional scheme,[103] and that the cumulative effect of this legislation has been nothing less than "a more reasonable and balanced governmental structure"[104]

Nowhere is small-c constitutional reform more urgently needed than in the area of administrative law, given the outsized importance of the executive apparatus relative to both the legislature and the judiciary in the Chinese system.[105] And nowhere has small-c constitutional reform been more evident than in this area. For example, Article 5 of the Chinese Constitution provides that "[n]o laws or administrative or local rules and regulations may contravene the Constitution," and that "[a]ll acts in violation of the Constitution or the law must be investigated."[106] The Legislation Law enacted in 2000 implements this provision and modestly advances the rule of law by specifying the hierarchical relationship between statutes and regulations and setting forth mechanisms for enforcing this hierarchy.[107] The law incorporates the principle of statutory reservation, which is akin to American non-delegation doctrine and requires that certain rights can be infringed only by statute or pursuant to express statutory authorization. It also grants individuals the right to petition the NPCSC to review administrative regulations and local laws for consistency with the Constitution or other national

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101 *See* Lin, *supra* note 84, at 65–66.

102 Eskridge & Ferejohn, *supra* note 92, at 1265–66 (rejecting a sharp dichotomy between the "higher lawmaking" associated with formal constitutions and the "ordinary lawmaking" entailed in statutes, even in the context of countries with formal constitutions).

103 *See* Lin, *supra* note 84, at 65–66.

104 *Id.* at 63.

105 *See* ZHANG, *supra* note 38, at 149 ("The power of administration … is quintessential to China, a country that has remained an administrative state ever since its first reunification in 221 bc.").

106 XIANFA art. 5.

107 *See* Laura Paler, *China's Legislation Law and the Making of a More Orderly and Representative Legislative System*, CHINA Q., No. 182, at 301, 308–09 (June 2005).

laws.[108] In 2015, the law was revised to further strengthen the hierarchy of laws and provide for judicial review of regulations and local laws for their consistency with statutory law.

Various reforms have aimed to strengthen the ability of individuals to pursue grievances against the government. Enactment of the Civil Servant Law in 2005 granted civil servants the ability to file administrative appeals against personnel decisions, including but not limited to disciplinary measures. Revision of the State Compensation Law in 2010 implemented the constitutional right to compensation for losses arising from governmental infringement of rights.[109] In 2014, the Administrative Ligation Law was revised to strengthen government accountability at all levels and broaden the range of permissible litigation to include sensitive areas such as land expropriation and property seizure. Most recently, in 2015, new legislation authorized prosecutors to bring public interest litigation in cases of pollution, food safety, and other harm to the public interest.

Other enactments have sought to implement constitutional principles or vindicate constitutional rights in areas ranging from criminal procedure to voting rights. For example, in 2001, the Judges Law was substantially revised to ensure the independence of the judiciary, as guaranteed in Article 126 of the Constitution. In 2006, the People's Courts Organic Law was amended to empower the SPC to review all impositions of the death penalty anywhere in the country.[110] The following year, the Law on Property was passed to protect the private property rights envisioned by Article 13 of the Constitution, while the Lawyers Law was also substantially revised in a move to institutionalize the legal profession.[111] In 2010, the Election Law was revised to permit courts to rule on issues of voting eligibility and electoral malapportionment between urban and rural areas. The Criminal Procedure Law—which provides the basis for rights of a constitutional nature such as the presumption of innocence—was revised in 2012 to grant criminal

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108 *See* Keith Hand, *Citizens Engage the Constitution: The Sun Zhigang Incident and Constitutional Review Proposals in the People's Republic of China*, *in* BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 49, at 221, 221.

109 Article 41 (3) of the PRC Constitution provides that citizens who have suffered losses as a result of infringement of their rights by any state organ or functionary have the right to compensation in accordance with the law. XIANFA art. 41(3).

110 *See* Ip, *supra* note 9, at 430–31 (quoting one PRC scholar's characterization of the introduction of SPC review as one of the "ten major constitutional incidents" of the decade).

111 The Lawyers Law was first promulgated in 1996 and subsequently revised in 2001, 2007, and 2012. The 2007 revision was the most substantial: it simultaneously restricted the representation of clients in court to licensed lawyers and stipulated the rights and duties of lawyers.

defendants the right to representation by legal counsel (albeit not at state expense).[112]

Perhaps the most surprising small-c constitutional change in recent years was the government's decision in 2015 to introduce an oath of obedience to the constitution for officeholders. Although most government officials are CCP members and have sworn loyalty to the party in their capacity as party members, they must now swear loyalty to the Constitution in their capacity as government officials. The new oath is worded as follows:

> "I pledge to be loyal to the PRC Constitution, to safeguard the authority of the Constitution, to perform obligations imposed by law, to be loyal to the country and to the people, to be fully committed in performing my official duties, to have integrity and always work in the interest of the public, to accept the supervision of the people, and to work hard for the great cause of building a prosperous, democratic, civilized, and harmonious socialist country!"[113]

Officials required to take this oath include those elected or appointed by the people's congresses at all levels, as well as those appointed by the government, the people's courts, and the people's procuratorates at all levels. Given the CCP's political dominance, it is of no small significance that Chinese government officials are required to take an oath of loyalty to the Constitution rather than a particular party or ideology. Were it actually to be achieved, the loyalty of Chinese government officials to the Constitution—as opposed to a specific party or leader—could mark at least the beginnings of democratic constitutionalism.

Constitutional reform in China has not been swift or momentous in recent years, but it has not come to a complete standstill either. In order to understand the changes that have occurred, however, it is necessary to study the ways in which "small-c" constitutional change has occurred at the statutory level. The Chinese experience serves as a valuable reminder that one cannot gain a complete picture of a constitutional system by studying only formal constitutional amendments or constitutional jurisprudence. The traditional emphasis of comparative constitutional scholars on judicial review encourages a potentially unhealthy habit of dismissing statutory law as a poor man's version of constitutional law.

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112 Xing Lijuan, *The Rhyme of History: A Transition of Legal Culture in China Crowned by the Criminal Procedure Law 2012*, 23 ASIA PAC. L. REV. 31, 48 (2015).

113 *China: Government Officials to Take Constitutional Oath*, LIBRARY OF CONGRESS (July 27, 2015), http://www.loc.gov/law/foreign-news/article/china-government-officials-to-take-constitutional-oath.

The more that we focus on the power of courts to invalidate legislation that is inconsistent with the constitution, the harder it becomes to think of statutory law as playing more than an interstitial or supporting role in the constitutional realm.

But in a system where statutes are never struck down on constitutional grounds—or, indeed, the only body with the power of constitutional review is the legislature itself[114]—statutes do not play second fiddle to the formal constitution as a practical matter. Whether this is cause for concern or celebration cannot be answered in the abstract. Many familiar with the uncodified constitutions of the United Kingdom or New Zealand might argue that there is nothing inherently troubling about the idea of a constitutional system that accords a leading role to legislative enactments.[115]

How we should feel about the reliance of Chinese constitutionalism on statutes ought to depend on what statutes are passed. Like many countries, China has its fair share of laws that undermine or violate its constitution.[116] But it also has a meaningful number of quasi-constitutional statutes that build or improve upon the Constitution. What ought to be clear, however, is that the absence of judicial review and the concomitant importance of statutes do not render Chinese constitutionalism uninteresting or irrelevant to comparative scholars. On the contrary, they suggest that the PRC may offer an unexpectedly relevant point of comparison with certain Commonwealth countries, and that a British conceptual framework may be more appropriate than an American one when it comes to studying Chinese constitutionalism.

B. Alternative Forms of Constitutional Implementation: Court-Centered vs. Politics-Centered Constitutionalism

From the court-centered perspective that dominates most constitutional scholarship,[117] China might seem neither to possess an enforceable constitution

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114 *See infra* notes 118–120 and accompanying text (describing the NPCSC's monopoly on constitutional interpretation).

115 *See, e.g.*, Law & Versteeg, *supra* note 81, at 1188, 1230 (counting the Magna Carta, the Bill of Rights 1689, and the Human Rights Act 1998, among other statutory instruments, as part of the United Kingdom's "constitution" for purposes of empirical analysis); Palmer, *supra* note 86, at 608–09 (observing that much of New Zealand's constitution is in statutory form).

116 *See, e.g.*, Ben Blanchard, *China Passes Controversial Counter-Terrorism Law,* REUTERS (Dec. 28, 2009), http://www.reuters.com/article/us-china-security-idUSKBN0UA07220151228; Israel Kanner & Doron Ella, *China's New Cybersecurity Law,* 912 INSS INSIGHT (Apr. 2017), http://www.inss.org.il/index.aspx?id=4538&articleid=13228.

117 *See supra* note 8 and accompanying text.

nor to practice constitutionalism. The Constitution of China expressly vests "the power to interpret the Constitution and supervise its enforcement" not in the judiciary but rather in a political body, the Standing Committee of the NPC.[118] It is up to the Standing Committee to annul unconstitutional rules, regulations or decisions, among others, made by the State Council or by provinces, autonomous regions, and municipalities directly under the national government.[119] In other words, the NPC—the highest organ of the state—enjoys the power to amend the Constitution, and the Standing Committee—a body of the NPC—interprets the Constitution and supervises constitutional implementation. Although the Standing Committee has never formally exercised its power of constitutional interpretation,[120] Lin and Ginsburg argue that the NPC has played an "active" role in "illuminating constitutional meaning in China"[121] by referencing and interpreting constitutional norms in the course of its legislative activities, and that the NPC's attention to constitutional norms amounts to an "invisible constitutional enforcement mechanism."[122]

A political model of constitutionalism that entrusts both the articulation and enforcement of constitutional and legal norms to political institutions—or, indeed to the same institution—may be out of vogue today, but it is hardly novel. Neither reliance on the political branches for constitutional enforcement nor the absence of a strict separation of powers was historically viewed as fatal to the very concept of constitutionalism. In the United Kingdom, for example, the highest judicial power lay for centuries in the hands of the legislature: prior to the establishment of the Supreme Court in 2009, a specialized committee of the House of Lords–the upper house of Parliament–had exercised the highest judicial power.[123] Similarly, the highest court in administrative disputes in France is the Conseil d'État, an elite executive body that counts adjudication as just one of its many functions.[124]

The fact that the Chinese constitutional system relies primarily on political rather

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118 XIANFA art. 67(1); *see* Yan Lin & Tom Ginsburg, *Constitutional Interpretation in Lawmaking: China's Invisible Constitutional Enforcement Mechanism*, 63 AM. J. COMP. L. 467, 468 (2015).

119 XIANFA arts. 67(7), 67(8).

120 *See* ZHANG, *supra* note 39, at 85.

121 *Id.* at 487.

122 *Id.* at 467.

123 *The Supreme Court*, JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, https://www.supremecourt.uk/about/the-supreme-court.html (last visited May 13, 2017).

124 JOHN BELL, FRENCH CONSTITUTIONAL LAW 29 (1992); ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 30 (1992)

than legal processes and institutions demands attention to the role of nonjudicial actors such as the party, the legislature, and the people themselves. Xin He, for example, has argued for a party-centered approach to the study of Chinese constitutionalism. In order to understand the division and exercise of power in China today, it is necessary in his view to study the role that party leadership plays in four areas–namely, the party and the national and local legislatures; the relationship between the party and the courts; central-local relations; and the observance of basic rights.[125] Michael Dowdle, meanwhile, points to the growing power and prestige of the NPC since the 1980s as reason to think that the locus of China's constitutional development lies "much more in its parliament than in its courts."[126]

Scholars have used the Sun Zhigang incident of 2003 to highlight the potential role of the public in maintaining and enforcing constitutional norms.[127] In this case, a young university graduate and migrant worker detained for failing to carrying his temporary residence permit was beaten to death in police custody.[128] This incident caused a level of public outrage that demanded an immediate government response. Meanwhile, a group of legal scholars seized upon a then-obscure provision of the Law on Legislation that entitles private parties to petition the NPCSC to review the constitutionality of government action.[129]

Although the NPCSC formally accepted the proposal for review, it did not actually exercise its power of constitutional interpretation. However, the pressure from the public led to adoption of a new set of detention rules by the State Council and, ultimately, a 2004 constitutional amendment aimed explicitly at the protection of human rights.[130] Zhang Qianfan cites the Sun Zhigang incident as evidence of a "populist" model of obtaining redress for constitutional grievances[131] that also manifests itself in the so-called "letters and visits" system.[132] Individuals who

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125 *See* He, *supra* note 56, at 73–93.

126 Dowdle, *supra* note 33, at 174.

127 *See, e.g.*, Hand, *supra* note 108, at 221, 222–23; Zhang, *supra* note 54, at 951–52, 964 (describing a "populist path" or "Sun Zhigang 'model'" of Chinese constitutional development that is characterized by a repeated "pattern of interactions between the people, the media, and the central and local governments" and "has brought about several progressive constitutional developments").

128 *See* Hand, *supra* note 108, at 222–23; Jia, *supra* note 22, at 633–35.

129 *See* Hand, *supra* note 108, at 223–24.

130 *See id*. at 225–31.

131 Zhang, *supra* note 54, at 963–68.

132 Weixia Gu, *Courts in China: Judiciary in the Economic and Societal Transitions, in* ASIAN

have grievances may submit petitions and make visits to government bodies of all varieties and at all levels, including the courts. The system has proven so popular that the courts have experienced difficulty managing the volume of communications.[133]

The judiciary, meanwhile, plays a smaller role in China than in many other countries. Its importance and influence are undermined by such factors as the extent of political control over the judiciary and the quality and professionalism of the judges themselves.[134] Most importantly for present purposes, however, it lacks the power to enforce the Constitution. China's longtime resistance to judicial review was briefly put to the test following the 2001 case of Qi Yuling.[135] Qi had been admitted to business school on the basis of her examination results, but her admission letter was stolen by the defendant, Chen, who attended in her place. Ten years later, Qi discovered the plot and sued Chen for infringing both her right to use of her name and her constitutional right to education.[136] The SPC eventually ruled that Qi's right to education under the Constitution had been violated, and that she could bring suit against the defendant on this basis.

The Qi Yuling case raised hopes on the part of many legal scholars, in China and elsewhere, that judicial protection of constitutional rights, or even constitutional

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COURTS IN CONTEXT 487, 505 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2014).

133 *Id.* at 505–06.

134 Prior to 2001, Chinese judges were not required to have any legal training. In addition, Chinese courts receive political supervision from both the CCP party committees within each court and the Party Political Legal Committee at each level of the judicial hierarchy. Worse still, local courts have been dependent upon local governments for their budget and resources, leading to corruption and local protectionism. Nevertheless, reform measures have been gradually undertaken. For instance, substantial revisions in 2001 to the Judges Law have required new judges to pass a unified national judicial exam and sitting judges to receive judicial training. To curtail outside political influence and enhance the quality of judgments, adjudicative committees have been established at all levels of the judiciary. Concerns have been raised, however, about whether these committees—though judicial in composition—interfere unduly with the adjudication of specific cases. *See id.* at 494–99. Meanwhile, to combat local protectionism, Circuit Courts of the Supreme People's Court have been created. The First and Second Circuit Courts, covering the jurisdictions of Northeast and Southeast provinces, commenced operation in January 2015. *See* Benjamin L. Liebman, *Authoritarian Justice in China: Is There a "Chinese Model"?, in* THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 223, 228 (Weitseng Chen ed., 2017); *Supreme People's Court Adds Four More Circuit Courts*, SUPREME PEOPLE'S COURT MONITOR, (Dec. 30, 2016), https://supremepeoplescourtmonitor.com/2016/12/30/supreme-peoples-court-adds-four-more-circuit-courts.

135 Qi Yuling v. Chen Xiaoqi, 2001 SUP. PEOPLE'S CT. GAZ. 152 (Shandong Higher People's Ct., Aug. 13, 2001) (China).

136 *See* Qianfan Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development*, 8 INT'L J. CONST. L. 950, 960–61 (2010).

review of statutes and regulations, might become regular practice.[137] Those hopes were soon dashed. Not only was the Qi Yuling decision officially voided by the SPC in 2008, but the progressive judge in charge of the SPC's civil section at the time of the decision was investigated for corruption and ousted from office.[138]

The continuing absence of judicial review does not mean, however, that Chinese courts lack other ways of implementing and applying constitutional norms, or that legal processes and institutions play no role in Chinese constitutionalism. A focus on constitutional jurisprudence alone understates the impact and importance of the courts. First, the adjudication of rights-based grievances in Chinese courts has risen rapidly.[139] Courts now handle class actions, discrimination claims, women's rights, environmental protection, and public interest litigation more generally, although they do so with some timidity and only within limits set by the CCP as well as the courts themselves.[140] Second, reform measures have given the courts a role in statutory interpretation. The NPC has partly delegated its power to interpret laws and regulations to the SPC,[141] whose opinions in turn are considered authoritative and practically binding on the lower courts.[142]

Third, and perhaps most significantly, the judiciary plays a meaningful and growing role in reviewing administrative action. Revision of the Administrative Litigation Law in 2014 not only expanded the range of administrative actions that can be challenged in court, but also specified the grounds on which administrative actions can be invalidated.[143] Perhaps more importantly, the courts are now empowered to review subsidiary rules and regulations made by ministries under the State Council, local governments, and their departments, and if the rules are found unlawful, the courts are empowered to disapply them in specific cases as

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137 *See, e.g.*, Ip, *supra* note 9, at 432; Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT'L J. CONST. L. 215, 233 (2009); Thomas E. Kellogg, *The Death of Constitutional Litigation in China?*, 9 CHINA BRIEF 4 (2009); *see also* Robert J. Morris, *China's Marbury v Madison: Qi Yuling v Chen Xiaoqi – The Once and Future Trial of Both Education and Constitutionalization*, 2 TSINGHUA CHINA L. REV. 273, 296–97 (2010).

138 *See* Zhang, *supra* note 136, at 962.

139 *See* Gu, *supra* note 132, at 519-21.

140 *See id.*

141 Article 33 of the Organic Law of People's Court was adopted by the NPC in 1979 and amended in 1983 and 2006.

142 *Id.* at 507–08.

143 *See* Cheng-Yi Huang & David S. Law, *Proportionality Review of Administrative Action in Japan, Korea, Taiwan and China, in* COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 305, 306 (Francesca Bignami & David Zaring eds., 2016).

well as to offer their opinions and suggestions to the administrative bodies responsible for adopting those rules.

Although these powers are conferred by statute and not by the constitution, they enable the judiciary to advance the rule of law at a small-c constitutional level and also render the judiciary a relevant player in Chinese constitutional politics. The exercise of similar powers by Taiwanese courts during Taiwan's authoritarian era proved vital to the long-term development of the judiciary. In the long run, these powers not only enabled Taiwan's administrative courts and Constitutional Court to serve as a check on the executive, but also enhanced their capacity to protect constitutional rights and perform full-fledged constitutional review of statutes.[144] There is at least some possibility that the Chinese judiciary could follow a similar trajectory. In the meantime, the judiciary cannot be written off as politically inconsequential. It is, like other government institutions, a strategic actor in its own right that interacts and competes for power with other institutions. Eric Ip argues, for example, that the SPC has bolstered its autonomy and influence within the existing constitutional framework by reading administrative statutes broadly and thus forging a "strategic partnership" with the State Council at the expense of the NPC.[145]

C. International human rights discourse: National versus transnational constitutionalism

A defining characteristic of modern constitutionalism, particularly since the turn of the millennium, has been the emergence of transnational constitutionalism, or constitutional law that is transnational rather than national in origin, content, or applicability.[146] Key features of transnational constitutionalism—sometimes also discussed under the rubric of the "globalization"[147] or "internationalization"[148]

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144 Wen-Chen Chang, *The Evolution of Administrative Adjudication in Taiwan: A Model of Judicial Cooperation, in* THE FUNCTIONAL TRANSFORMATION OF COURTS: TAIWAN AND KOREA IN COMPARISON 65, 84-90 (Jiunn-rong Yeh ed., 2015).

145 *See* Eric C. Ip, *Judicial Review in China: A Positive Political Economy Analysis*, 8 REV. L. & ECON. 33, 333–39 (2012).

146 *See, e.g.*, VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 1 (2010); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005); Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN ST. INT'L L. REV. 89, 91–111 (2008).

147 *See, e.g.*, David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985 (2009).

148 *See, e.g.*, Wen-Chen Chang & Jiunn-Rong Yeh, *Internationalization of Constitutional Law*, *in*

of constitutional law–include but are not limited to supranational governance regimes, judicial usage of foreign law as persuasive authority, and patterns of substantive and textual similarity among national constitutions.[149] Regional and international trade pacts, global competition for capital and skilled labor, and the judicial pursuit of diplomatic objectives are among a multitude of factors that have fueled the emergence of transnational constitutionalism.[150] Human rights discourse in particular has assumed a highly transnational or global character[151]: a creature of both constitutional law and international law, it passes seamlessly between national and supranational courts, and between constitutions and treaties.[152]

The story of human rights discourse in China is complex and worthy of mining for insights into how nondemocratic regimes can navigate the tension between the local and the global–between political authoritarianism, anti-capitalist ideology, global capitalism, and transnational constitutionalism. On the one hand, an authoritarian regime such as the PRC would not seem to offer fertile ground for transnational constitutionalism, especially human rights discourse. This is all the more so given the PRC's ambivalent attitude toward international institutions and strong affinity for traditional principles of sovereignty and non-interference.[153] On the other hand, it is questionable whether a country as deeply embedded in the international economic order as China can truly reject transnational constitutional norms entirely. The somewhat awkward result might be dubbed "transnational constitutionalism with Chinese characteristics."[154]

THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 14, at 1165.

149 Yeh & Chang, *supra* note 146, at 91–98.

150 *See, e.g.,* David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 570 (2011).

151 *See, e.g.*, Kenneth Cmiel, *The Recent History of Human Rights*, *in* THE HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY 27, 32 (Akira Iriye et al. eds., 2012) ("[H]uman rights talk communicates across cultures in ways similar to money, statistics, pidgin English, or a discussion of soccer. … [H]uman rights have become one of the linguae francae of a globalized world[.]"); David S. Law, *The Global Language of Human Rights: A Computational Linguistic Analysis*, 12 LAW & ETHICS OF HUM. RTS. (forthcoming 2017) (identifying two linguistic genres or "dialects" of "rights talk" common to both national constitutions and international human rights agreements).

152 *See, e.g.,* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996) (noting the breakdown of the traditional dichotomy "between domestic and international" in international legal scholarship).

153 *See* Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525, 527–28, 528 n.13 (2014) (observing, inter alia, that China "has played a relatively passive role in many international institutions" and tends to act out of a "long-held belief that national sovereignty is paramount").

154 *See China with Legal Characteristics*, *supra* note 94, at 17 (reporting on the CCP's highly public

As previously noted, the PRC Constitution was amended in 2004 to include a provision that obligates the state to respect and preserve "human rights". This was progress in the sense that the term "human rights" had never before appeared in the Constitution. In practice, however, this provision has lacked any meaningful enforcement mechanism—judicial or otherwise—and its impact has been questionable. The regime's tangible activities in the area of human rights have been modest at best. Since 1991, the State Council has issued periodic white papers on the state of human rights policy and protection,[155] including most recently reports on poverty reduction and human rights[156] and judicial protection of human rights.[157] The latter report makes no mention of judicial review—arguably the most obvious mechanism for securing judicial enforcement of human rights—but instead emphasizes less controversial institutional reforms such as judicial capacity-building and strengthening of the administrative litigation system as a means of addressing grievances against the government.[158]

China's experience raises the question of the extent to which international law can function as a transnational substitute for constitutional law in the area of basic rights. Since the 1990s, China has signed and ratified most core international human rights conventions[159] including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture (CAT), the Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of Persons with Disabilities (CRPD).[160] An

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adoption of the slogan of "Socialist rule of law with Chinese characteristics").

155 Official English translations are available at http://www.scio.gov.cn/zfbps/rqbps.

156 *China's Progress in Poverty Reduction and Human Rights*, STATE COUNCIL AND INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 17, 2016), http://www.scio.gov.cn/zfbps/rqbps/Document/1494405/1494405.htm.

157 *New Progress in the Judicial Protection of Human Rights in China*, STATE COUNCIL AND INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 2016), http://www.scio.gov.cn/zfbps/rqbps/Document/1490976/1490976.htm.

158 *Id.*

159 The Office of the High Commissioner for Human Rights (OHCHR) at the United Nations classifies nine international human rights conventions as "the Core International Human Rights Instruments." Information on these nine instruments, along with the treaty bodies responsible for monitoring compliance, is available from the Office's website: http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

160 The Office of the U.N. High Commissioner for Human Rights Information maintains information regarding China's accession to core international human rights instruments. *Reporting Status for China*, UNITED NATION HUMAN RIGHTS, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CHN

important exception is the International Covenant on Civil and Political Rights (ICCPR), which China signed in 1998 but has yet to ratify.[161] The PRC has on occasion enacted domestic implementing statutes to fulfill relevant treaty obligations, such as the Act on Protecting Persons with Disabilities enacted in 2008 pursuant to the requirements of the CRPD.[162]

This commitment to the human rights regime triggers a degree of institutionalized international scrutiny. Accession to the various covenants obligates the PRC to submit reports on its progress toward implementing them, and to engage in constructive dialogue with the international bodies charged with monitoring progress and compliance. In addition, since the United Nations established the Human Rights Council in 2006 and initiated the universal periodic review (UPR) of human rights for all UN Member States,[163] China has undergone the UPR process twice, in 2009 and 2013.[164] The function of the UPR is not to implement or enforce state obligations in the area of human rights, but rather to provide an institutionalized platform for human rights dialogue at the international level between state and non-state actors such as NGOs.[165] Political dialogue of this type is, of course, a far cry from genuine respect for human rights, but it is a central premise of the international legal system that such dialogue can focus states on human rights issues and pave the way for increasingly law-governed state behavior. China poses a difficult and important test of that premise.

Complicating matters are the pockets of Chinese soil where transnational constitutionalism enjoys greater traction—namely, the special administrative regions of Hong Kong and Macau, which are heavily exposed to both foreign law

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&Lang=EN (last visited May 13, 2017).

161 *Id.*

162 Jihong Mo, *Human Rights as the Basis for a New Chinese Constitutionalism*, 16 IUS GENTIUM 141 (2012).

163 The UPR was created by the UN General Assembly on 15 March 2006 by Resolution 60/251, which established the Human Rights Council itself. *See Universal Periodic Review*, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx (last visited May 13, 2017).

164 *See Universal Periodic Review – China*, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/UPR/PAGES/CNSession4.aspx (last visited May 13, 2017).

165 For instance, a summary prepared for China's 2014 UPD by the Office of High Commissioner for Human Rights contained suggestions from no fewer than eighty-two nongovernmental organizations (NGOs) from China and elsewhere. The majority of the suggestions, especially those made by domestic NGOs, proposed institutional reforms of a moderate and incremental variety, but a few directly raised sensitive human rights concerns such as the persecution of Falun Gong members and failure to ratify the ICCPR. A/HRC/WG.6/17/CHN/3, GE.13-1599 ¶¶ 1, 40.

and international law. For a combination of historical and legal reasons, the courts of both regions employ foreign judges and routinely rely upon foreign law.[166] These tendencies are especially pronounced in Hong Kong: its Court of Appeal decides most cases with the participation of a foreign judge and cites foreign law more often than domestic law in its constitutional jurisprudence.[167] This intimate relationship with foreign law forms the backbone of the region's approach to consolidating the distinctiveness and autonomy of its legal system.

The two regions also lead the way within China when it comes to engagement with international law. The ICCPR, to which China is not yet a state party, continues to apply in both regions (and, in the case of Hong Kong, has also been adopted in statutory form[168]). Following its return to Chinese sovereignty in 1997, Hong Kong submitted its required report on compliance with the ICCPR via Beijing in 1999,[169] while Macau's first report was received and considered by the U.N. Human Rights Committee (UNHRC) in 2011.[170] At the time of Hong Kong's handover, the UNHRC formally took the position that the ICCPR remains in force even when there is a change in government or state succession.[171] Although the situation in Hong Kong and Macau cannot be generalized to the rest of the country, China's compliance with the ICCPR in respect of both regions breaks new ground insofar as it opens the door to international supervision of the implementation of civil and political rights guarantees within Chinese territory.

D. Dissonant Constitutionalism: Constitutions as Constructive Irritants

The existence of a sizable gap between what China's formal constitution says and how China's government behaves is not a reason for comparative constitutional

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166 *See* Jorge Godinho & Paulo Cardinal, *Macau's Court of Final Appeal*, *in* HONG KONG'S COURT OF FINAL APPEAL: THE DEVELOPMENT OF THE LAW IN CHINA'S HONG KONG 608, 615, 617, 625–26 (Simon N.M. Young & Yash Ghai eds., 2013) (noting the presence of a Portugese judge on Macau's Court of Final Appeal, and discussing the court's analysis of Portugese as well as Chinese law in public law cases); Law, *supra* note 1, at 986–94.

167 *See* Law, *supra* note 1, at 989–90, 992–94.

168 *See* Johannes M.M. Chan, *Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence*, 47 INT'L & COMP. L.Q. 306, 306 (1998) (discussing the Hong Kong Bill of Rights Ordinance, which entered into force in 1991).

169 Report of the HKSAR of the People's Republic of China in the Light of the International Covenant on Civil and Political Rights (ICCPR) U.N. Doc. CCPR/C/HKSAR/99/1 (1999).

170 U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties: Macao, China, U.N. Doc. CCPR/C/CHN-MAC/1 (2011).

171 U.N. Human Rights Comm., CCPR General Comment No. 26: Continuity of Obligations, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, http://www.refworld.org/docid/453883fde.html (1997).

law scholars to ignore China. It should be understood, instead, as both a worthwhile topic of study in and of itself and a point of departure for exploring constitutionalism in countries where there exists a chronic gap between parchment and practice. [172] In possessing a formal constitution that is systematically violated, China is hardly alone. The field of comparative constitutional law has far to go when it comes to understanding the long-term role and impact of constitutions in what we might call *dissonant constitutional systems*, or systems in which the practice of constitutionalism is seriously at odds with the content of the formal constitution.

Constitutional dissonance is not simply a characteristic of authoritarian regimes. On the one hand, authoritarian regimes can exhibit low levels of dissonance. A central insight of the recent literature on authoritarian constitutionalism is that, even in authoritarian systems, constitutions are not necessarily inconsequential or descriptively inaccurate.[173] There are good reasons for authoritarian regimes to practice constitutional candor, and some in fact do so. [174] The Saudi constitution, for example, is candidly illiberal and forthright about the extent to which rights are subject to abridgement by the government.[175] On the other hand, even liberal democracies that are widely accepted as specimens of successful constitutionalism exhibit divergence between what is found on paper and what happens in practice. The reason why scholars routinely distinguish between a country's formal or large-C Constitution and its actual or small-c constitution is precisely because the two never coincide perfectly.[176] It would be inaccurate to assume based purely on constitutional text, for example, that the Electoral College chooses who will be president of the United States,[177] or that Japan lacks

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172 Law & Versteeg, *supra* note 13, at 881.

173 *See* CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra* note 11, at 5–9 (observing that constitutions in authoritarian regimes serve a variety of functions as "operating manuals," "billboards," "blueprints," and "window dressing"); Law & Versteeg, *supra* note 26, at 165, 165–66, 174 (observing that … authoritarian regimes may use constitutions to exhibit fealty to "the norms of world society" or appeal ideologically to potential supporters).

174 *See* Law & Versteeg, *supra* note 26, at 185–86 (observing that some authoritarian constitutions "are relatively accurate reflections of a country's legal and political institutions, to the point of brutal candor," and finding empirically that authoritarian regimes of the monarchical and military varieties are more likely than those of a civilian variety to adopt candid constitutions).

175 *See* Law & Versteeg, *supra* note 13, at 870, 902 tbl.6 (describing the Saudi constitution as "honest," and classifying Saudi Arabia as possessing a "weak constitution" rather than a "sham constitution" because it neither promises nor delivers much in the way of constitutional rights).

176 *See* Law, *supra* note 20, at 377.

177 *See* U.S. CONST. art. II, § 1; *id.* amend. XII; Law, *supra* note 90, at 249 (citing the Electoral College and the "notwithstanding clause" of the Canadian Charter of Rights and Freedoms as

any "land, sea, and air forces" or "other war potential."[178] Well-functioning constitutional systems are likely to possess mechanisms—such as de facto amendment under the guise of interpretation—for keeping dissonance within limits.[179] But such mechanisms manage dissonance rather than preventing or eliminating it altogether.

Nor is constitutional dissonance merely a euphemism for the adoption of a sham constitution.[180] A sham constitution—in the sense of a constitution that is simply irrelevant and ignored—generates only an insignificant and uninteresting form of dissonance. In a country like North Korea, the conflict between text and practice is inconsequential because the constitution fails to play a meaningful role in public discourse and does not serve as a source of creative tension. There is hardly any dissonance because the formal constitution does not make itself heard. In such cases, the concept of constitutional dissonance adds little that is not already captured by the existing concept of a sham constitution.

A more interesting form of dissonance exists when a constitution is nowhere close to being realized (and, indeed, is unlikely ever to be realized) yet nevertheless has a real effect on how things are done. To return to the example of Japan's militarized state of pacifism, there is a huge and growing gap between the aforementioned constitutional text (which categorically prohibits "land, sea, and air forces" and "other war potential" [181]) and constitutional practice (which allows for "self-defense forces" backed by one of the world's largest military budgets[182] and, most recently, participation in international peacekeeping activities and

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examples of "zombie provisions" that, being "[n]either truly alive nor officially dead," "persist in form and not in function").

178 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 9, para. 2 (Japan) ("[L]and, sea, and air forces, as well as other war potential, will never be maintained.").

179 The interpretation in question need not be judicial: in Japan, it has fallen upon the Cabinet Legislation Bureau, not the Supreme Court, to walk the tightrope between the dictates of text and politics when it comes to the meaning of Article 9. *See* Jeffrey P. Richter, *Japan's "Reinterpretation" of Article 9: A Pyrrhic Victory for American Foreign Policy?*, 101 IOWA L. REV. 1223, 1239–47 (2016) (describing Prime Minister Shinzo Abe's successful pressuring of the Cabinet Legislation Bureau to alter its decades-long interpretation of Article 9); Yasuo Hasebe, *Analysis: The End of Constitutional Pacifism in Japan?*, BLOG OF THE IACL, AIDC, http://iacl-aidc-blog.org/2015/09/23/analysis-the-end-of-constitutional-pacifism-in-japan (last visited Apr. 1, 2017).

180 *See* Law & Versteeg, *Sham Constitutions*, *supra* note 13, at 880–82 (noting the "conceptual distinction" between "sham constitutions" and "aspirational constitutions").

181 *See* KENPŌ art. 9, para. 2 (Japan) ("[L]and, sea, and air forces, as well as other war potential, will never be maintained.").

182 *See* Law, *supra* note 90, at 248 (observing that "Japan's artfully named Self-Defense Forces … are backed by one of the ten largest military budgets in the world").

"collective self-defense"[183]). Yet it would be incorrect to say that the constitutional text has been irrelevant or inconsequential. The ruling Liberal Democratic Party has struggled for decades with the bureaucracy to achieve its desired role for the military notwithstanding the pacifist provisions found in Article 9.[184] Although current practice is extraordinarily difficult to square with the text of Article 9, it is also clear that Article 9 continues to limit the scope of Japan's military activities to a much greater degree than the government would prefer.

This scenario is neither one of simple compliance with the constitution, nor one of straightforward disregard for the constitution. It might best be described, instead, as a dynamic reconciliation of conflicting textual and political imperatives in which neither parchment nor politics ever fully prevails. The constitution fails to remake the political order in its own image, but it also resists being remade in the image of the political order. This can happen if the constitution is blatantly disobeyed but nevertheless possesses considerable normative or rhetorical force.

In such cases, the constitution might be said to serve as a *constructive irritant*. It is rightly described as constructive if and to the extent that the resulting state of deep tension and contradiction furnishes the intellectual material and generates the dialectic needed for transformation of the constitutional order. Like a grain of sand in an oyster, it is simultaneously alien to, and deeply embedded within, the constitutional order. Its existence can be, at times, inconvenient or awkward for the regime, but it is precisely for this reason that it has the potential to ripen into something precious and new. The pull of opposing forces does not necessarily spell doom for a constitutional system but can instead be a source of creative tension. Constitutional syncretism—the amalgamation and reconciliation of opposites into a functioning whole—is a more urgent necessity in some systems than in others, but it cannot and need not be avoided. It is at worst a necessary evil and at best an engine of organic growth and change.[185]

It is not difficult to see how an authoritarian regime can wind up with a

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183 Richter, *supra* note 179, at 1239–47, 1258–59; Hasebe, *supra* note 179.

184 *See* sources cited *supra* note 179.

185 *See* Law, *supra* note 90, at 241 (arguing that both "the need for syncretic constitutionalism" and "the mechanisms employed to achieve it" are widespread); *cf.* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 86 (2001) (arguing that "[u]nresolvable conflicts between … paired opposites … can build community by allowing losers to attack entrenched arrangements").

constitution that acts as an irritant. A truism of the constitutional design literature is that rules and institutions can backfire on their creators in unexpected and unwanted ways.[186] So too can constitutions generate unwanted consequences for their drafters.[187] To the chagrin of the regime that adopted it, a dissonant constitution can provide the basis for forms of political argumentation and contestation that are uniquely awkward for the regime to ignore or suppress due to their formal pedigree.[188] Liberal constitutions were a constant irritant to illiberal regimes in Latin America, for example, throughout the nineteenth century and much of the twentieth century for precisely such reasons.[189]

China arguably belongs in this category as well. Its constitution might be said to function partly as an operating manual or blueprint for the government, partly as a billboard for advertising the government's intentions, and partly as a form of window dressing.[190] But it also functions as an irritant to the regime: it cannot easily be expelled from the system but instead creates space for a normatively privileged form of discourse that cannot easily be ignored. By its own actions, the

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186 Judicial review is an example. Martin Shapiro famously explains the emergence of judicial review by likening courts to junkyard dogs: like a "junkyard dog" that is introduced for the purpose of patrolling one area but ends up straying into other areas and perhaps even biting its owner, courts are given the power to police the constitutional allocation of power among competing governmental institutions but expand over time into the enforcement of individual rights against the government. *See* Martin Shapiro, *The Success of Judicial Review and Democracy*, *in* ON LAW, POLITICS, & JUDICIALIZATION 149, 176 (Martin Shapiro & Alec Stone Sweet eds., 2002) ("[I]f you buy the junkyard dog to protect the separation of powers junk, you can't keep it from roaming into the rights part of the yard as well.").

187 *See* Ginsburg & Simpser, *supra* note 11, at 9 (observing that certain provisions of authoritarian constitutions can "provide resources for the regime's endgame"); Law & Versteeg, *Constitutional Variation Among Strains of Authoritarianism*, *supra* note 25, at 170–71 (observing that a "sham constitution can be turned against the regime" and serve as a "rallying point" for domestic and international opposition).

188 *See, e.g.*, Hand, *supra* note 108, at 232–39 (noting signs of this dynamic in the filing of petitions for constitutional review in the aftermath of the Sun Zhigang incident); Jia, *supra* note 22, at 623 (noting the use by "constitutional entrepreneurs" of "legal and constitutional frames" that "enjoyed official legitimacy, helped co-opt state rhetoric, and legalized dormant social frustrations").

189 *See* Law & Versteeg, *supra* note 13, at 911 (observing that Latin America has historically exhibited "a combination of ambitious constitution-writing and inconsistent implementation"); Miguel Schor, *The Once and Future Democracy: Argentina at the Bar of Constitutionalism*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS, *supra* note 90, at 561, 564, 578 (noting the "gap … between republican constitutions and the political reality of oligarchic rule" that characterized nineteenth-century Latin American constitutionalism, and observing that dictatorship was more common in Latin America in the early twentieth century, when constitutions rarely granted executive decree powers, than it is now, even though "executive decree powers have become the norm").

190 *See* Ginsburg & Simpser, *supra* note 11, at 5–9 (identifying various functions performed by constitutions in authoritarian regimes).

CCP has made it difficult to ignore the PRC Constitution. Having repeatedly deployed the Constitution as a means of announcing and enshrining major policy shifts, such as market reforms,[191] China's leaders cannot now easily treat the Constitution as meaningless or irrelevant. Instead, they have imbued it with legitimacy and made it a feature of the ideological and political landscape that even hard-core leftists must find ways of navigating.[192] The resulting state of contradiction or dissonance cannot help but inspire a combination of rationalization and critique. Scholarly debate in China over the possibility of "benign constitutional violations" offers evidence that constitutional dissonance need not signal the failure of constitutionalism but can instead provide the grist for meaningful constitutional discourse.[193]

The role that the PRC Constitution plays in Chinese political life should not be overstated. But it should not be oversimplified either. Recent negative trends such as the consolidation of party in individual rather than institutional hands[194] and the suppression of constitutionalism as a mere topic of public discussion[195] suggest that it would be unwise to place much confidence in either the development of Chinese constitutionalism or the efficacy of constitutional arguments in Chinese political discourse. Nevertheless, it is certain that there will continue to be change in the Chinese political order. And it is not mere gullibility or naïvete to suspect that appeals to the text of the constitution may play at least some role in the changes to come.

V. Conclusion

Is Chinese constitutionalism an oxymoron? From both a scholarly and a normative perspective, the answer should be no. From a scholarly perspective, a

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191 *See supra* note 94 (discussing the extensive invocation of the Constitution and use of constitutional rhetoric by Xi Jinping at the 4th Plenum of the CCP Central Committee in 2014).

192 *See* Kellogg, *supra* note 52, at 387–97 (describing the arguments made by Leftists in their 2003 debate with Socialist Constitutionalists and Liberals); Jia, *supra* note 22, at 648–59 (describing how the explicitly Marxist arguments of constitutional scholar Gong Xiantian emphasize the heavily socialist provisions of the constitution that date back to its original adoption in 1982).

193 On this view—championed by Chinese scholar Tie-Chuan Hao and vigorously disputed by others such as Zhi-Wei Tung—constitutional violations can be "benign" if, for example, fast-changing social and economic conditions or lacunae in the formal constitution render strict compliance unattainable or undesirable. *See* 郝铁川[Hao Tie-Chuan], 論"良性*违宪*"[*On Benign Constitutional Violations*], 4 FAHSUEH YENCHIU [CHINESE J. L.] 89 (1996); 童之伟 [Tung Zhi-Wei], "*良性违宪*" *不宜肯定* ["*Benign Constitutional Violations*" *Are Inadvisable*] 6 FAHSUEH YENCHIU [CHINESE J. L.] 19 (1996) (debating the concept of "良性违宪" or "benign constitutional violations").

194 *See* sources cited *supra* note 12.

195 *See supra* notes 98–100 and accompanying text.

variety of phenomena including the use of quasi-constitutional statutes, the role of nonjudicial institutions in constitutional interpretation and implementation, the deployment of constitutional arguments in public and political discourse, the interaction between domestic and transnational law, and the consequences of constitutional dissonance all render the PRC fertile terrain for study. Any definition of constitution[alism] that confines our attention to the study of judicial review in democratic states serves only to impoverish our understanding of what we purport to study. A capacious definition of "constitution" and "constitutionalism" that encompasses the PRC, by contrast, benefits the development of comparative constitutional law as a "big tent" discipline that is truly interdisciplinary and global in perspective and embraces the study of a broad range of constitutional practices around the globe, rather than just a narrow range of court-centric activities in historically privileged parts of the world.[196]

Without a doubt, Chinese constitutionalism remains largely a story of potential unfulfilled and promises broken. It does not follow, however, that scholars should therefore ignore China and focus their attention on countries that embody the Western constitutional model of liberal democracy with judicial review. In medicine, no one would dream of studying only healthy patients on the grounds that a field focused on the pursuit of health should only study the healthy, or that the study of sick patients might reward or endorse sickness. Yet this is akin to what comparative constitutional scholars do by failing to study China. There is much to be said for focusing scholarly attention where it is most needed and can potentially do much good.[197] The appropriate course of action is neither to exclude China from the ambit of comparative constitutional scholarship on definitional grounds, nor to lower the bar by adopting stunted standards that the current regime is capable of satisfying. It is, instead, to separate the normative question from the definitional question: there is nothing contradictory about simultaneously acknowledging that China practices a form of constitutionalism and subjecting that form to vigorous critique.

To speak of Chinese constitutionalism is not to praise it, but rather to highlight its failings. Few features of Chinese constitutionalism are more salient than the government's penchant for simultaneously singing the praises of the Constitution

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196 *See, e.g.*, Martin Shapiro, *Courts in Authoritarian Regimes*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES, *supra* note 11, at 326, 329 (urging constitutional scholars to expand beyond the study of apex courts).

197 *See* ZHANG, *supra* note 39, at 69 ("In fact, the lack of judicial review and direct application of the Constitution in China make comparative studies all the more essential to delineating solutions for its own problems.").

and flouting the Constitution in practice. In doing so, the government risks being hoist with its own petard. A regime that chooses to deploy a constitution for political, instrumental, or rhetorical reasons—as the PRC has done—invites a particularly potent form of criticism: no regime can plausibly object to being held to standards of its own devising. Conversely, to insist that China has no constitution or does not practice constitutionalism is to limit scholarly awareness, discussion, and critique of constitutional argumentation in China, all of which is badly needed for the development of Chinese constitutionalism. Critical engagement, not withdrawal, is the appropriate course of action, both intellectually and normatively. It is perverse for comparative constitutional scholars to ignore countries that have far to go, when those are precisely the countries that require the greatest attention. But critical engagement cannot occur if China is, by definitional fiat, placed beyond the domain of the very scholars best equipped to hold it accountable for its failures and broken promises.

The responsibility of constitutional scholars to engage with China is all the more urgent given both the significance of Chinese development for the rest of the world and the ongoing potential—dimmed but not yet extinguished—for the rise of liberal and democratic constitutionalism in China itself. Comparative scholarly analysis is critical to highlighting this potential. Taiwan's successful transformation from party dictatorship to constitutional democracy, for example, might be invoked to estop apologists for the PRC regime from arguing that there is anything inherently antithetical to liberal democratic constitutionalism in Chinese values or history. [198] The more that the field of comparative constitutional law expands its horizons beyond the study of judicial review in a handful of European and common law countries, the more that it can play a constructive role in Chinese constitutional development—and the more that China will have to offer scholars in return.

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198 JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 4–7 (2016); Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 809–16 (2011).