

UNDERSTANDING CHINA'S SYSTEM FOR ADDRESSING LEGISLATIVE CONFLICTS: CAPACITY CHALLENGES AND THE SEARCH FOR LEGISLATIVE HARMONY

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Abstract

While the rapid adoption of legislation has played an important role in advancing China's reform agenda, it has also produced a large number of legislative conflicts. This legislative disorder has posed challenges for China's economic and legal modernization efforts. China addresses legislative conflicts primarily through a system of filing and review of legislation at different levels of government. Despite the severity of China's legislative disorder, state organs with formal authority to annul or amend conflicting lower-level legislation rarely if ever exercise this authority. Citizens enjoy the right to raise proposals for the review of legislative conflicts, but central filing and review organs never respond to these proposals. On the other hand, the people's courts, which have no formal authority to review legislation, engage in a form of limited judicial review when they choose the legislation to apply in individual cases. To explain such phenomena, we must recognize that the core problem shaping the design and operation of the filing and review system is a multidimensional problem of capacity. Legislative institutions have accommodated limited judicial review of legislation and empowered citizens to raise review proposals primarily because they lack the capacity to carry out their basic functions. These mechanisms should be understood as components of an integrated, multilayered system for supervising legislation. Understanding China's system in this way reveals both likely limitations and opportunities in future reform efforts. Reforms are more likely to succeed if they acknowledge core capacity limitations, take account of existing patterns of institutional interaction, and effectively leverage the roles of courts and citizens to improve the capacity of the system as a whole. Specifically, reformers should explore ways to strengthen communication links between filing and review organs and people's courts, encourage citizens to raise concerns about legislative conflicts during the legislation drafting stage, and focus first on addressing conflicts involving lower-level legislation rather than on the sensitive and politicized issue of constitutional review.

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I. INTRODUCTION

Since the People's Republic of China ("PRC") embarked on the path of reform and opening in 1978, it has undertaken one of the most remarkable legal construction efforts in human history. The enactment of legislation and the devolution of legislative authority to local levels have been core elements of a national effort to construct a socialist legal system and advance reform.¹ As a result, China has experienced an explosion of legislation.² At the end of 2011, 239 national laws; 714 State Council administrative regulations; 8,921 local, autonomous, and separate regulations; and approximately 12,000 departmental and provincial people's government rules were in effect.³ The number of other "normative documents" (binding official documents that do not fall into the categories of legislation above) is vastly larger and by some estimates is in the millions.⁴

While decentralization and rapid legislation advanced China's reform agenda, they also produced severe legislative disorder. The Chinese legal

¹ Information Office of the State Council of China, White Paper: China's Efforts and Achievements in Promoting the Rule of Law, § II (Feb. 28, 2008) [hereinafter *China's Efforts and Achievements*]. Decentralization of lawmaking activity was deemed essential to accommodate local conditions in a large, rapidly developing state. *China's Current Legislation Structure, The Legislative System of China*, Zhongguo Wang (中国网) [China Online], Sept. 28, 2003. NPCSC Chairman Peng Zhen was an early advocate for decentralizing legislative authority. Kevin J. O'Brien & Laura M. Luehrmann, *Institutionalizing Chinese Legislatures: Tradeoffs Between Autonomy and Capacity*, 23 *Legis. Stud. Q.* 91, 95-97 (1998).

² From 1979 to 2005, state organs adopted a total of more than 805 National People's Congress ("NPC") and National People's Congress Standing Committee ("NPCSC") laws and decisions, 4,156 State Council administrative regulations and normative documents, 58,797 department rules and normative documents, and 115,369 local regulations and rules. Zhu Jingwen (朱景文), *Zhongguo Falü Fazhan Baogao* (中国法律发展报告) [Report on China's Legal Development] 2 (2007).

³ For currently effective laws, administrative regulations, and local, autonomous, and separate regulations, see *Zhongguo Fazhi Jianshe Niandu Baogao* (2011) (中国法治建设年度报告(2011)) [CHINA RULE OF LAW CONSTRUCTION ANNUAL REPORT (2011)] § 1, July 17, 2012 [hereinafter 2011 RULE OF LAW REPORT]. For department and local rules, see Li Li (李立), *Guizhang Qingli Tuijin Fazhi Tongyi* (规章清理推进法制统一) [Clean-up of Rules Promotes Unity of the Legal System], *Fazhi Ribao* (法制日报) [LEGAL DAILY ONLINE], May 6, 2010.

⁴ Li Li (李立), *Woguo Guifanxing Wenjian Bei'an Shenchazhidu Tixi Chucheng* (我国规范性文件备案审查制度体系初成) [Preliminary Establishment of China's System for Filing and Review of Normative Documents], *Fazhi Ribao* (法制日报) [LEGAL DAILY ONLINE], Nov. 5, 2007 (citing estimates of "no fewer than two million normative documents nationwide").

system faces large numbers of legislative conflicts at all levels.⁵ The problem of local governments issuing *ultra vires* or conflicting legislation, often to protect local industries or to generate revenue through fees or license requirements, has been particularly acute.⁶ These problems are exacerbated by unclear delineations of legislative authority, vague drafting in national laws, and the need to respond to rapidly changing national or local conditions.⁷ In some cases, state organs fail to amend lower-level implementing regulations after the laws they are based on are amended or annulled.⁸ Chinese commentators express concern that legislative conflicts pose a challenge to the ideology of a unified socialist legal system, slow economic development, weaken the authority of the legal system in the eyes of China's citizens and foreign investors, create uncertainty about legal rules, and generate unnecessary disputes that undermine stability.⁹ Such concerns intensified in the 1990s, as China prepared for accession to the World Trade Organization ("WTO"), began constructing a "socialist market economy," and made new commitments to build a "socialist rule of law" state.¹⁰ In short, legislative

⁵ Cai Dingjian (蔡定剑), *Falü Chongtu Ji Qi Jiejue de Tujing* (法律冲突及其解决的途径) [*Legislative Conflicts and Channels for Resolving Them*], *Zhongguo Faxue* (中国法学) [CHINESE LEGAL SCI.], no. 3, 1999, at 53. See also Jianfu Chen, *Unanswered Questions and Unresolved Issues: Comments on the Law on Lawmaking*, in *LAWMAKING IN THE PEOPLE'S REPUBLIC OF CHINA* 246-47 (Jan Michiel Otto et. al. eds., 2000).

⁶ Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 400, 411, 423 (2002); Laura Paler, *China's Legislation Law and the Making of a More Orderly Legislative System*, 182 CHINA Q. 305 (2005).

⁷ Randall Peerenboom, *Globalization, Path Dependency, and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERK. J. INT'L L. 161, 205-07 (2001).

⁸ Jiang Bixin (江必新), *Xingzheng Susongfa Lilun yu Shiwu* (行政诉讼法理论与实务) [ADMINISTRATIVE LITIGATION LAW THEORY AND PRACTICE] 1085 (2011) (noting this as a common problem).

⁹ For the ideological importance of legislative unity, see Qiao Xiaoyang (乔晓阳), *Wanshan Woguo Lifa Tizhi, Weihu Guojia Fazhi Tongyi* (完善我国立法体制, 维护国家法制统一) [*Perfect China's Legislative System, Ensure the Unity of the State Legal System*], *Renmin Wang* (人民网) [PEOPLE'S DAILY ONLINE], June 15, 2003; *Guifanxing Wenjian Bei'an Shenchazhidu: Lilun yu Shiwu* (规范性文件备案审查制度: 理论与实务) [THE THEORY AND PRACTICE OF REGULATORY DOCUMENT FILING AND REVIEW] 21 (2011) [hereinafter 2011 FILING AND REVIEW]. The PRC Constitution provides that the state "upholds the uniformity and dignity of the socialist legal system." *Xianfa* (宪法) [Constitution] (promulgated by Nat'l People's Cong., Dec. 4, 1982, effective Dec. 4, 1982, amended Apr. 12, 1988, Mar. 29, 1993, Mar. 15, 1999, and Mar. 14, 2004) art. 5, 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 77 [hereinafter Constitution].

conflicts posed a threat to China's economic and legal modernization program."

The famous Luoyang Seed Case provides an example of the types of problems that legislative conflicts generate. The case (discussed in detail in Part IV) involved a civil dispute over a seed contract. A national law and a local regulation contained conflicting provisions on seed prices, and the potential compensation in the case differed significantly depending on the provision applied. Economic actors faced with such conflicts may reach contractual agreements on the basis of different assumptions about the prices of products and the costs of breach. They also may be less likely to reach quick settlements once disputes arise, as both parties may believe that the law is on their side. When a Luoyang court attempted to address the conflict by declaring the local regulation invalid (rather than initiating the inefficient process of seeking a ruling from the relevant legislative organs), it triggered a constitutional crisis.

Another type of legislative conflict involves legislation that establishes license requirements or administrative penalties in violation of national law or administrative regulations. Beginning in the mid-1990s, the National People's Congress ("NPC") and its Standing Committee adopted several national laws that limited the authority of ministries and local governments to impose license requirements and penalties. These laws were designed to clear the thicket of regulatory requirements and penalties at lower levels and to contain related corruption and abuse.¹² In many cases, ministries or local governments have continued to adopt such provisions in violation of national law. For example, in 2007 the Suzhou Salt Bureau seized industrial salt from a local import company and levied a fine because the company failed to obtain a local transport license. In a 2011 reply, the Supreme People's Court ("SPC") concluded that the local transport license requirement and the administrative

¹⁰ See, e.g., Lifa Fa Qicao Gongzuo Yantaohui Zongshu (立法法起草工作研讨会总述) [Summary of Roundtable on Legislation Law Drafting Work], *Zhongguo Faxue* (中国法学) [CHINESE LEGAL SCI.], no. 3, 1997, at 123 [hereinafter *Legislation Law Roundtable*]; Cai, *supra* note 5, at 49–51; 2011 FILING AND REVIEW, *supra* note 9, at 4–5, 21; Falü Chongtu Ji Qi Jiejue Tujing (法律冲突及其解决途径) [*Legislative Conflicts and Channels for Resolving Them*], *Renmin Fayuan Bao* (人民法院报) [CHINA COURT DAILY ONLINE], Oct. 29, 2001 [hereinafter *Legislative Conflict Resolution Channels*] (comments of Cai Dingjian). The Party's decision to establish a socialist market economy and construct a socialist rule of law state strengthened commitments to legal and market unity. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 56–64 (2008). For WTO commitments related to legal harmonization, see Julia Ya Qin, *Trade, Investment, and Beyond: The Impact of WTO Accession on China's Legal System*, 191 CHINA Q. 720–21 (Sept. 2007).

¹¹ Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711 (1994); Paler, *supra* note 6, at 301.

¹² The adoption of laws such as the PRC Administrative Punishment Law and Administrative Licensing Law limited local regulatory discretion and more clearly defined legislative authorities related to penalties and licensing.

penalties exceeded the scope of licenses and penalties established under national law and administrative regulations.¹³ These types of local measures create a confusing and unpredictable regulatory environment, impose significant regulatory burdens on economic actors, and force such actors to pursue unnecessary litigation to challenge the application of unlawful provisions. For central leaders focused on maintaining economic growth and social stability, such conflicts are undesirable.

Despite more than three decades of efforts to address such problems, legislative conflicts remain a core concern in the Chinese political-legal system. From 2009 to 2010, state organs at all levels engaged in a comprehensive legislative “clean-up” campaign as part of an effort to complete the construction of a unified socialist rule of law state by 2010.¹⁴ For the past six years, the National People’s Congress Standing Committee (“NPCSC”) has worked with the United Nations Development Programme (“UNDP”) and the European Union on projects related to legal harmonization.¹⁵ Scholars at the Chinese Academy of Governance (formerly known as the National School of Administration) are engaged in a multi-year research program on legislative conflicts and organized six research meetings on conflict resolution mechanisms and related issues in late 2011 and 2012.¹⁶ A 2011 government white

¹³ Sifa Panjue Dapo Gongyeyan Xingzheng Longduan (司法判决打破工业盐行政垄断) [*Judicial Decision Breaks Industrial Salt Administrative Monopoly*], Caixin Wang (财新网) [CAIXIN], June 9, 2011. For the SPC’s reply, see Guanyu Jingying Gongye Yong Yan Shifou Xuyao Banli Gongyeyan Zhunyunzheng Deng Qingshi de Dafu (关于经营工业用盐是否需要办理工业盐准运证等请示的答复) [*Reply on Whether it is Necessary to Have Transport Licenses for Engaging in Business in Industrially-Used Salt*] (promulgated by the Sup. People’s Ct., Jan. 17, 2011, effective Jan. 17, 2011) (Chinalawinfo) [hereinafter 2011 Jiangsu Salt Case Reply].

¹⁴ Info. Office of the State Council, THE SOCIALIST SYSTEM OF LAWS WITH CHINESE CHARACTERISTICS, § I (Oct. 31, 2011) [hereinafter THE SOCIALIST SYSTEM OF LAWS].

¹⁵ In March 2012, senior Chinese officials held two international conferences in connection with this program. The conferences in Anhui and Hunan provinces focused on the filing and review system and judicial review.

¹⁶ These meetings involved both senior scholars and officials. For summaries of three of the meetings, see Falü Guifan de Shenchu Biaoqun Bitan (法律规范的审查标准笔谈) [*Discussion of Review Standards for Legal Norms*], Xingzheng Guanli Gaige (行政管理改革) [ADMINISTRATIVE MANAGEMENT REFORM], Mar. 23, 2012 [hereinafter *Discussion of Review Standards*]; Xiaweifa yu Shangweifa Xiang Dichu de Jiejue Zhidao (下位法与上位法相抵触的解决之道) [*Channels for Resolving Conflicts between Upper-Level and Lower-Level Law*], Xingzheng Guanli Gaige (行政管理改革) [ADMINISTRATIVE MANAGEMENT REFORM], May 21, 2012 [hereinafter *Channels for Resolving Conflicts*]; Hengxiang Falü Guifan Chongtu Ji Qi Jiejue (横向法律规范冲突及其解决) [*Horizontal Legislative Conflicts and Their Resolution*], Xingzheng Guanli Gaige (行政管理改革) [ADMINISTRATIVE MANAGEMENT REFORM], Oct. 24, 2012 [hereinafter *Horizontal Legislative Conflicts*].

paper on the legal system also lists legislative consistency and the development of related supervision mechanisms as ongoing priorities.¹⁷ China's authoritarian leaders have emphasized the importance of enhancing their governance capacity and minimizing incompetence and corruption to ensure that the Communist Party maintains its ruling party status.¹⁸ Ongoing efforts to address legislative conflicts and related problems are consistent with these leadership objectives.

This article explores the design, evolution, and operation of China's system for supervising legislation and addressing legislative conflicts ("legislative supervision").¹⁹ As a general matter, such systems may be divided into those that operate during the legislative drafting process and those that operate after promulgation. For example, legislative drafting in China involves lengthy processes of deliberation, consensus building, and public participation.²⁰ In some cases, state organs review and approve lower-level legislation before it becomes effective.²¹ These and other processes provide

¹⁷ THE SOCIALIST SYSTEM OF LAWS, *supra* note 14, at § I.

¹⁸ For a recent statement of these objectives, see *Hu Says CPC Must Strengthen Governance Capacity*, Xinhua Wang (新华网) [XINHUA], Nov. 8, 2012.

¹⁹ In other contexts, the term "legislative supervision" can refer to people's congress supervision of a range of state and judicial activities. In this article, the term refers to the supervision of legislation. People's congresses and administrative organs that supervise legislation do so not only to address legislative conflicts (the core focus of this article) but also to correct "inappropriate" legislation. See *infra* Part II(A).

²⁰ For a discussion of the strong emphasis on consultation and deliberation in China's legislative process, see MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN CHINA* (1999); Michael Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 NYU J. INT'L L. & POL. 1, 162–82 (2002). In recent years, China has encouraged public participation in lawmaking at all levels. See generally, Jamie Horsley, *The Development of Public Participation in the People's Republic of China*, in *THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA* 289–308 (Ethan J. Leib & Baogang He eds., 2010).

²¹ Lifa Fa (立法法) [Legislation Law] (promulgated by Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), arts. 63, 66, 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 112. Difang Geji Renmin Daibiao Dahui he Difang Geji Renmin Zhengfu Zuzhifa (地方各级人民代表大会和地方各级人民政府组织法) [Organic Law of the Local People's Congresses and Local People's Governments at All Levels] (promulgated by Nat'l People's Cong., July 1, 1979, effective July 1, 1979, amended Dec. 10, 1982, Dec. 2, 1986, Feb. 28, 1995, and Oct. 27, 2004), art. 7, 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 659 [hereinafter Local Organic Law]. Many department and provincial government rules are reported to the State Council Legislative Affairs Office for approval prior to promulgation. Fan Zhongxin (范忠信), *Zhongguo Weixian Shencha yu Lifa Chongtu Jiejue Jizhi* (中国违宪审查与立法冲突解决机制) [*China's Mechanism for Constitutional Review and Resolving Legislative Conflicts*], Falü Kexue (法律科学) [LEGAL SCI.], no. 6, 2001, at 48–49.

channels for preventing some conflicts prior to the promulgation of legislation.

This article explores core elements of China's post-promulgation legislative supervision system. Specifically, the article focuses on China's system for filing and review of legislation (备案审查) (*bei'an shencha*)²² and judicial practices related to legislative conflicts that provide an important supplement to the filing and review system.²³ Although foreign scholars have explored China's lawmaking system and the problem of legislative disorder in detail, existing English-language studies present only a tentative and incomplete picture of filing and review and the important roles that both courts and citizens play in supplementing this core system.²⁴ This article

²² Filing and review refers to the practice of legislative organs filing legislation with higher-level legislative organs. The higher-level legislative organs in turn review the legislation for consistency with higher-level legislation and for other problems.

²³ Filing and review is the principal, but not the only, mechanism for post-promulgation supervision of legislation. Under the Administrative Reconsideration Law, administrative organs may assess the legality of certain normative documents that provide the basis for concrete administrative acts. Xingzheng Fuyi Fa (行政复议法) [Administrative Reconsideration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999) art. 7, 1999 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 225. Under the Administrative Supervision Law, administrative supervision organs may correct normative documents that conflict with higher-level norms. Xingzheng Jiancha Fa (行政监察法) [Administrative Supervision Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 9, 1997, amended June 25, 2010) art. 23, 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 468. For an early negative assessment of the effectiveness of these systems, see Peerenboom, *supra* note 7, at 211–12, 229–34. China is also experimenting with new systems for post-promulgation evaluation of legislation. These systems remain undeveloped. Yu Ronggen (俞荣根), Lifa Hou Pinggu: Falü Tixi Xingcheng Hou de Yixiang Zhongyao Gongzuo (立法后评估: 法律体系形成后的一项重要工作) [Post-Promulgation Evaluation: An Important Task after the System of Laws Takes Form], Xinan Zhengfa Daxue Xuebao (西南政法大学学报) [J. SW. U. POL. & L.], no. 1, 2011, at 3–10.

²⁴ Foundational English-language studies on the legislative system and related disorder include TANNER, *supra* note 20, Keller, *supra* note 11; Michael Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1 (1997); LAWMAKING IN THE PEOPLE'S REPUBLIC OF CHINA (Jan Michiel Otto, et. al. eds., 2001); Peerenboom, *supra* note 7 (focusing on administrative law); Corne, *supra* note 6; ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 123–171 (4th ed. 2012). Peerenboom's thoughtful study on administrative law discusses a range of conflict resolution mechanisms, but it provides only a preliminary assessment of the Legislation Law and judicial review. It does not address the filing and review system in detail. Peerenboom, *supra* note 7, at 209–13, 241–45. Keyuan Zou addresses conflicts between local and national legislation in a 2006 volume, but he discusses conflict resolution mechanisms only in general terms. KEYUAN ZOU, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW 87–105 (2006). Guobin Zhu provides a general introduction to the NPCSC filing and review system. Guobin Zhu,

represents a step toward filling that gap. It draws on a wide range of Chinese sources, including recently published academic articles; national and local reports on filing and review work; case judgments; abstracts of court cases; local court requests for instruction; SPC interpretations and replies; citizen review proposals; and meetings with Chinese legislators, judges, and scholars, to provide a current and comprehensive empirical account of this multilayered system.²⁵

At first glance, aspects of this system appear aberrational or even dysfunctional. State organs at all levels possess the constitutional authority to annul or revise conflicting or problematic lower-level legislation, but they rarely if ever exercise this formal authority. Conversely, while people's courts do not exercise the formal power to review legislation, courts play an important role in addressing legislative conflicts when they choose the legislation to apply in individual cases. The NPCSC, State Council, and local state organs have created citizen rights to submit proposals for the review of legislative conflicts. However, at least at the national level, these organs do not issue formal responses to such citizen proposals or publish the results of reviews. This institutional silence has generated citizen criticism and disenchantment.

Such dynamics raise many questions. If legislative conflicts are a severe problem, why are state organs reluctant to exercise their formal review authority? If, as we will see, legislators have reacted strongly even to modest court efforts to discuss the validity of legislation, why have they accommodated what in practice is a limited form of judicial review? If state organs had no intention of responding to citizen review proposals, why did they create citizen proposal mechanisms at all? Why risk the public disenchantment and legitimacy questions generated by unfulfilled expectations and raise new doubts about the leadership's commitment to genuine citizen participation?

It might be tempting to dismiss China's legislative supervision system as a dysfunctional mess. The following pages certainly highlight many problems in the system. However, as scholars of China's legal system have argued, such assessments are often grounded in misplaced assumptions about the role of legal institutions in China or China's reform trajectory.²⁶ Legal institutions

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²⁵ The observations and analysis presented in this article are informed by exchanges with more than twenty-five Chinese legislative officials, judges, scholars, and others in 2012, including senior legislative officials at the NPCSC and local people's congresses in Hunan and Shanghai; judges at the central and local level; Chinese constitutional and administrative law scholars in two major cities, and staff members at an international agency working on legislative harmonization in China.

²⁶ For discussions of this problem, see STANLEY LUBMAN, *BIRD IN A CAGE* 298–319 (1999); Donald Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in *UNDERSTANDING CHINA'S LEGAL SYSTEM* 93–121 (Stephen Hsu ed., 2003).

that outsiders dismiss as dysfunctional may in fact be operating as intended. By analyzing them from this perspective, we may achieve a better understanding of China's legal system.²⁷

This type of nuanced understanding provides a foundation for developing more pragmatic and effective legal reform proposals. International agencies promoting legal reform in developing countries have recognized the need to eschew simplistic transplants and "one size fits all" models in designing legal development programs. Instead, they have emphasized the need to take account of local cultural, institutional, and political dynamics.²⁸ In the China context, scholars such as Michael Dowdle and Randall Peerenboom have long stressed the need for pragmatic approaches to legal development that recognize the practical limitations of local institutions and legal contexts; leverage existing patterns of institutional interaction; and encourage experimentation, adaptation, and learning.²⁹ Along these lines, Dowdle has demonstrated the importance of consensus building and consultative dynamics in China's legislative process.³⁰

These perspectives provide a useful framework for understanding the institutions and procedures designed to address legislative conflicts and for thinking about how they might be improved. The key in this context is to recognize that the core problem shaping both the design and operation of these systems is a multidimensional problem of capacity. Filing and review organs are simply incapable of reviewing the large volume of legislation in China and identifying and addressing legislative conflicts on their own. The capacity of filing and review organs to carry out their basic functions is limited by human and resource constraints, power disparities, and political-legal conventions that emphasize consultation, consensus building, and unity under Party leadership.

Recognizing this multidimensional problem of capacity provides an essential foundation for understanding the filing and review system and the way in which other parts of China's legal system supplement and interact with it. As this article will demonstrate, Chinese courts regularly engage in limited review of legislation in the course of adjudicating individual cases. Although this judicial practice creates tensions in China's constitutional framework,

²⁷ Clarke, *supra* note 26.

²⁸ David Trubek, *The Rule of Law and Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 89-94 (David Trubek & Alvaro Santos eds., 2006).

²⁹ See Randall Peerenboom, What Have We Learned about Law and Development? Describing, Predicting, and Assessing Legal Reforms in China, 27 MICH. J. INT'L L. 823, 862-71 (2006); Michael Dowdle, The WTO as an Obstacle to Legal Development: The Need for A More Pragmatic Conceptualization of Development Processes, in *CHINA AND THE WTO: GOING WEST* 35-43 (David Smith & Guobin Zhu eds., 2002).

³⁰ Dowdle, *supra* note 20, at 162-82.

other legal actors have accommodated and even encouraged it because limited judicial review provides a necessary supplement to the work of overwhelmed filing and review organs. Similarly, the establishment of citizen review proposal mechanisms was a response to capacity problems. These mechanisms are designed to help review organs prioritize their work by alerting them to legislative conflicts that are difficult to detect or are generating collective concern. Filing and review organs do not formally respond to such proposals because the mechanism was intended as a one-way information channel rather than as a litigation mechanism. In addition, central filing and review organs lack the capacity to resolve many of the sensitive constitutional and political claims that citizens raise.

Each layer in this structure provides a kind of spillover capacity that compensates for capacity limitations in the layer above it. Filing and review organs receive large volumes of legislation and identify and address a small number of conflicts. However, many conflicts are never discovered, much less eliminated. Limited judicial review provides a partial remedy for conflicts in the context of individual cases. It also signals to filing and review organs that there is a conflict that requires attention. Citizen review proposal mechanisms provide a spillover channel for conflicts that courts have not or cannot effectively address, such as collective claims, claims for the repeal or amendment of legislation, constitutional claims, or claims that involve politically sensitive legislative conflicts. Both courts and citizens have leveraged the space created by responses to capacity problems. Courts have expanded their institutional authority, while citizens have used review proposal mechanisms to challenge the Party-state and advance reform agendas.

These findings have important implications for domestic and international efforts to promote legislative consistency in China. As Thomas Carothers and other scholars have argued, while international agencies have recognized the failures of past development efforts on paper, they face knowledge deficits that impede their ability to apply these lessons in practice.³¹ An integrated analysis of China's system for supervising legislation and the unwritten conventions that shape it can help to address such knowledge deficits. In the authoritarian Chinese state, there are significant gaps between authorities and procedures set out in the law and the often opaque processes through which legislation is adopted and rationalized in practice. An exploration of these dynamics reveals both likely limitations and untapped synergies in ongoing reform efforts. For example, the results of one-dimensional reform efforts focused primarily on enhancing the organizational capacity of filing and review organs and their subordinate departments are likely to be disappointing. Similarly, efforts to establish a more robust form of judicial review or to promote constitutional review are likely to have limited impact and could be counterproductive.

³¹ Thomas Carothers, *The Problem of Knowledge*, and Wade Channell, *Lessons Not Learned about Legal Reform*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 23-27, 149-59 (Thomas Carothers ed., 2006).

Reformers and international agencies working on the issue of legislative conflicts should focus on more nuanced approaches that take account of capacity limitations in the filing and review system. They should explore ways to more effectively leverage existing patterns of institutional interaction and the supplementary roles of courts and citizens to improve the capacity of the entire multilayered system. Specifically, they should strengthen communication links between filing and review organs and people's courts, encourage citizens to raise concerns about legislative conflicts during the legislation drafting stage, and focus on addressing conflicts involving lower-level legislation rather than on the sensitive and politicized issue of constitutional review. The ongoing evolution of this multilayered system demonstrates that incremental reform progress on legislative conflicts is possible even within the constraints of the authoritarian state.

After addressing several definitional issues, Part II discusses the problem of capacity and its multiple dimensions. It then explores the evolution of the filing and review system at both the central and local levels. Part III analyzes key features of the filing and review system and argues that these features can be understood as the products of core capacity challenges. Part IV examines the role of courts in policing legislative conflicts. It demonstrates that in practice, Chinese courts engage in limited judicial review of legislation. As efforts to develop the filing and review system have progressed and the limitations of the system have become apparent, these judicial practices have become embedded more firmly in Chinese political-legal practice. Part V argues that filing and review, limited judicial review, and citizen review proposals should be understood as components of a multilayered system. It argues that parties seeking to improve this multilayered system should embrace and leverage *existing* institutional roles and patterns of interaction to increase the capacity of the entire system.

II. THE PROBLEM OF CAPACITY AND THE DEVELOPMENT OF CHINA'S FILING AND REVIEW SYSTEM

A. Definitions

Before proceeding with a discussion of the filing and review system, it is necessary to define several key terms. Unless otherwise indicated, the term "legislation" will refer collectively to the categories of legislation established in the Legislation Law and to "normative documents." The Legislation Law establishes laws, administrative regulations, local regulations, autonomous and separate regulations, special economic zone ("SEZ") regulations, and ministry and provincial people's government rules as formal categories of legislation. Although there is some debate about whether rules have the status of formal legislation, they are included in the Legislation Law and are referred

to as such here.³² In this context, both people's congresses and administrative organs may enact "legislation." Unless otherwise indicated, the term "legislators" or "legislative organs" may refer to people's congresses and administrative organs.

The term "normative documents" is widely used in China, but it is not defined in national law or administrative regulation. Provincial people's congresses and people's governments generally define normative documents as documents that (1) relate to the legal rights or duties of citizens or legal persons; (2) have general binding force; (3) are public; and (4) can be applied repeatedly.³³ Chinese scholars offer similar definitions.³⁴ State organs at all levels of the system may enact normative documents. Under the broad definition provided above, both the types of legislation established in the Legislation Law and many SPC interpretations may be considered normative documents.³⁵ Examples of other normative documents include people's congress "resolutions," State Council "notices," and local government "decisions" and "orders." In analyzing the problem of legislative conflicts, there is some value in distinguishing legislation established under the Legislation Law, SPC interpretations, and other normative documents.³⁶ Unless otherwise indicated, the term "normative documents" will refer to normative documents

³² Jiang, *supra* note 8, at 1039-43.

³³ There are some minor variations at the local level. 2011 FILING AND REVIEW, *supra* note 9, at 90-91.

³⁴ See, e.g., Wang Kai (王凯), Bei'an Shenchā: Zhongguo de Weixian Shenchā? (备案审查: 中国的违宪审查?) [*Filing and Review: China's Constitutional Review?*], in Xianfa Quanli yu Xianzheng (宪法权利与宪政) [CONSTITUTIONAL RIGHTS AND CONSTITUTIONALISM] 281-82 (Fu Hualing (傅华伶) & Zhu Guobin (朱国斌) eds., 2012).

³⁵ *Id.*, at 285-86, 291-92. Guanyu Caipan Wenshu Yinyong Falü, Fagui Deng Guifanxing Falü Wenjian de Guiding (关于裁判文书引用法律、法规等规范性文件的规定) [Provisions on the Citation of Laws, Regulations, and Other Normative Legal Documents in Judicial Judgments] (promulgated by the SPC, July 13, 2009, effective Nov. 4, 2009) [hereinafter SPC Provisions on Legal Citation].

³⁶ For example, Chinese legislators have promulgated concrete measures related to the filing and review of formal legislation and other normative documents in separate stages. As noted in Part IV(C), courts are not obligated to cite to or apply normative documents. Admittedly, government "rules" occupy a middle ground. The Legislation Law provides for "rules," but courts are only obligated to consult rules for reference in deciding cases. Many judicial interpretations are legislative in both form and effect. Courts are obligated to cite to relevant interpretations in judgments. SPC Provisions on Legal Citation, *supra* note 35, arts. 3-5. However, the SPC has no formal power to promulgate legislation.

other than the formal categories of legislation established under the Legislation Law and SPC interpretations.³⁷

Chinese laws and regulations use a somewhat confusing range of terms to refer to conflicts. For example, various legal provisions refer to legislation that contravenes (违反) (*weifan*) higher-level legislation, legislation that conflicts with (相抵触) (*xiang dichu*) higher-level legislation, inconsistent (不一致) (*bu yizhi*) legislation, and legislation that violates (违背) (*weibei*) legal procedure.³⁸ There is no formal definition of the term “legislative conflict” or the specific terms above in the text of the Constitution, laws, or administrative or local regulations.³⁹ In practice, there does not appear to be a significant difference between “contravene” and “conflict with”; both terms are used to refer to conflicts involving legislation with different ranks in the legislative

³⁷ The term “guifanxing wenjian” (规范性文件) is used in the titles of numerous Chinese sources cited herein and will be translated as “normative documents.” In this context, the term “normative documents” may refer to all legislation.

³⁸ Many examples could be cited here. See, e.g., Constitution, *supra* note 9, arts. 65, 100; Legislation Law, *supra* note 21, arts. 87–92; Geji Renmin Daibiao Dahui Changweihui Jiandufa (各级人民代表大会常委会监督法) [Law on Supervision by the Standing Committees of People's Congresses at All Levels] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective Jan. 1, 2007), 2006 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., 536 [hereinafter Supervision Law].

³⁹ The NPCSC Legislative Affairs Commission (“NPCSC LAC”) and the SPC have offered definitions of the key term “conflict with” (相抵触) (*xiang dichu*). The NPCSC LAC explains that lower-level legislation “conflicts with” higher-level legislation when (1) the provisions of higher and lower-level legislation are “contrary to each other” (相反的) (*xiangfan de*); (2) provisions are not “contrary to each other,” but provisions of lower-level legislation “cancel out” (抵消) (*dixiao*) those of higher-level legislation; (3) there is no clear provision in higher-level legislation, but the provisions of lower-level legislation are “contrary to” the spirit of higher-level legislation; (4) the lower-level legislative entity “violates” provisions limiting legislative power; or (5) lower-level legislation exceeds the scope or type of penalty provided for in higher-level legislation. As discussed in Part II(D), while NPCSC LAC explanations are given considerable weight in China's political-legal system, they are not binding. In a 2004 document on administrative disputes, the SPC offered a different and more specific list of over ten circumstances in which lower-level legislation may be considered to “conflict with” higher-level legislation. Under the SPC document, if lower-level legislation “limits or deprives” rights established in higher-level legislation, expands or lessens “obligations” established in higher-level legislation, or exceeds the scope, type, or form for coercive measures provided for in higher-level legislation, there is a conflict and the lower-level legislation should not be applied. For the NPCSC LAC and SPC definitions and related discussion, see Wang Kai (王凯), Lun Difang Lifa Quan (论地方立法权) [On Local Legislative Authority], Dongwu Faxue (东吴法学) [SOOCHOW L. REV.], no. 22, 2011, at 70–72.

hierarchy.⁴⁰ The term “inconsistent” is generally used in the context of conflicts between provisions that have equal rank in the legislative hierarchy (or in situations where the Legislation Law does not provide a clear hierarchy).⁴¹ In some cases, the term “violate” is used to refer to a violation of the procedures for promulgating legislation. In other cases, it is used in the same context as the terms “contravene” or “conflict with.”⁴² Chinese scholars have criticized legislators for failing to include clear statutory definitions of such terms.⁴³

The legislative supervision process may address not only direct or explicit conflicts in legislation but also a much broader range of soft or implied conflicts, inconsistencies, and *ultra vires* legislation. The article treats all of these problems as “legislative conflicts.” The Constitution and legislation at various levels also empower certain state organs to amend or annul “inappropriate” legislation. The category “inappropriate” is broad and includes the other categories discussed above. For example, legislation may be “inappropriate” if it conflicts with higher-level legislation, improperly alters citizen rights and obligations, or is adopted in violation of statutory authority or procedures.⁴⁴

⁴⁰ SPC Justice Jiang Bixin confirms that “conflict with” is used in the context of conflicts involving legislation with different ranks. Jiang, *supra* note 8, at 1079.

⁴¹ This pattern is evident from a reading of the relevant provisions of the Legislation Law. For an example of a discussion in which a senior Chinese jurist uses the term “*bu yizhi*” (不一致) consistently in this context, see *id.*, at 1082.

⁴² Compare Legislation Law, *supra* note 21, art. 87(5) with art. 88(2). Jiang Bixin uses the terms interchangeably to describe one particular conflict involving higher and lower-level legislation. Jiang, *supra* note 8, at 1082.

⁴³ See, e.g., Cai, *supra* note 5, at 50, 52; Chen, *supra* note 5, at 247; *Legislation Law Roundtable*, *supra* note 10, at § 6(3); Wang Lei (王磊), *Faguan dui Falü Shiyong de Xuanze Quan* (法官对法律适用的选择权) [*The Power of Judges to Decide on Application of the Law*], *Faxue* (法学) [LEGAL SCI.], no. 4, 2004, at 124; Jue Huang, *Explanations on the Proposed Legislation Law of the People's Republic of China*, in CONSTITUTIONALISM AND CHINA 228 (Buyun Li et al, 2006); Wang Quansheng (汪全胜), “Shangweifa Youyu Xiaweifa” Shiyong Guize Chuyi (上位法优于下位法适用规则刍议) [*Humble Opinion on Rule of Legal Application that “Higher Law Takes Priority Over Lower Law”*], *Xingzheng Faxue Yanjiu* (行政法学研究) [ADMIN. L. STUD.], no. 4, 2005, at § 2.

⁴⁴ For definitions of “inappropriate,” see *Zhonghua Renmin Gongheguo Lifa Fa Shiyi* (中华人民共和国立法法释义) [EXPLANATION OF THE PRC LEGISLATION LAW] 249 (Zhang Chunsheng (张春生) ed., 2000) [hereinafter LEGISLATION LAW EXPLANATION]; Supervision Law, *supra* note 38, art. 30 (defining “inappropriate” normative documents broadly to include documents that are issued in violation of statutory authority; restrict or deprive citizens or legal organizations of their lawful rights; impose obligations on citizens, legal persons, or other organizations; conflict with laws or regulations; or involve “other inappropriate circumstances”).

Finally, in most cases, legislation must be filed with the state organs that exercise the authority to review and annul or amend it. However, in some cases, not all of these authorities are merged in the same entity. For example, local regulations must be filed with the State Council. While the State Council may review such regulations and identify problems, it does not exercise the authority to amend or annul them.⁴⁵ In other cases, laws provide that state organs exercise the authority to review and annul or amend legislation, but they do not mandate the *filing* of such legislation.⁴⁶ In short, the authority to amend or annul does not depend on prior filing. Despite these occasional disparities, most Chinese sources refer to state organs that exercise the authority to receive for filing, review, and annul and amend legislation as “filing and review organs.” The article adopts this terminology. Specialized filing and review offices within such organs are referred to as “filing and review offices.”

B. The Problem of Capacity as Both a Challenge and an Opportunity

Capacity problems are a core focus of the international development community. The UNDP defines capacity as “the ability of individuals, institutions, and societies to perform functions, solve problems, and set and achieve objectives in a sustainable manner.”⁴⁷ Capacity development is shaped by interrelated factors that include human and financial resources; organizational arrangements; the skills, experiences, and incentives of individuals tasked with carrying out an organization's functions; and the constraints of the socio-political environment in which organizations operate.⁴⁸ International agencies have emphasized capacity development as a

⁴⁵ For example, the State Council reviews local regulations but may not amend or annul such regulations. Legislation Law, *supra* note 21, art. 89.

⁴⁶ For example, under the Constitution and the Supervision Law, the NPCSC may annul or amend State Council “decisions” and “orders.” Constitution, *supra* note 9, art. 67(7); Supervision Law, *supra* note 38, art. 29. However, these sources of law do not mandate the filing of such decisions and orders with the NPCSC.

⁴⁷ UNITED NATIONS DEVELOPMENT PROGRAMME, CAPACITY DEVELOPMENT: MEASURING CAPACITY 2 (2010). The OECD has adopted a similar definition of capacity as “the ability of people, organizations and society as a whole to manage their affairs successfully.” ORGANIZATION FOR ECONOMIC DEVELOPMENT AND COOPERATION, THE CHALLENGE OF CAPACITY DEVELOPMENT: WORKING TOWARDS GOOD PRACTICE 12 (2006).

⁴⁸ Development agencies have slightly different formulations of the same basic set of factors. See generally ORGANIZATION FOR ECONOMIC DEVELOPMENT AND COOPERATION, *supra* note 47; THE WORLD BANK, THE CAPACITY DEVELOPMENT RESULTS FRAMEWORK 9–11 (June 2009); UNITED NATIONS DEVELOPMENT PROGRAMME, CAPACITY DEVELOPMENT PRACTICE NOTE (Aug. 2008).

key to the realization of economic development and governance goals. They have also stressed the importance of local ownership and the need to consider local socio-political contexts in designing aid programs.⁴⁹

Such priorities have shaped international legal reform initiatives. In the 1990s, the World Bank, UNDP, and other agencies began to promote “rule of law” as a core component of their development agendas.⁵⁰ These efforts have focused heavily on institution building. International agencies have worked with governments to promulgate legislation; strengthen courts and alternative dispute resolution mechanisms; train judges and administrators; and build the capacity of the legal profession and civil society organizations.⁵¹ Projects related to legislative conflicts have been no exception, with international agencies such as the UNDP stressing the need to “enhance the capacities” of courts and local filing and review organs.⁵²

Efforts to cope with capacity problems may catalyze legal innovation and prompt deviations from existing legal norms. In the United States, the capacity limitations of enforcement agencies are cited as one rationale for “private attorney general” provisions that empower citizens to bring enforcement claims in a variety of legal contexts.⁵³ The limited capacity of Congress to address the many specialized regulatory issues that arise in a complex economy has prompted legislators to delegate substantial authority to

⁴⁹ See, e.g., “Monterrey Must Be a Success,” Keynote Address of IMF Director Michael Camdessus, Conference on “Financing for Development: Regional Challenges and the Role of Regional Development Banks,” Wash. D.C., Feb. 19, 2002; THE WORLD BANK, PARIS DECLARATION ON AID EFFECTIVENESS, Mar. 2, 2005; THE WORLD BANK, *supra* note 48, at 9–11.

⁵⁰ See generally, Trubek, *supra* note 28; Thomas Carothers, *The Rule of Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3–13 (Thomas Carothers ed., 2006).

⁵¹ THE WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM 1–4 (2002); Carothers, *supra* note 50, at 7–8; Trubek, *supra* note 28, at 86–93. Of course, many of these efforts have been criticized. Common critiques include continued knowledge deficiencies; overemphasis on legal transplants and top-down institutional reforms; overemphasis on courts and judicial training; the application of “one size fits all” best practices; and the failure to cultivate local ownership of reforms. See generally, Trubek, *supra* note 28; Carothers, *supra* note 31; Channell, *supra* note 31, at 137–59; Randall Peerenboom, Michael Zurn & Andre Nollkaemper, *Conclusion: From Rule of Law Promotion to Rule of Law Dynamics* (posted to the Social Science Research Network on Oct. 15, 2011).

⁵² See, e.g., EC-UNDP Governance for Equitable Development Programme Strengthens Rule of Law in China, UNITED NATIONS DEVELOPMENT PROGRAMME, June 25, 2012.

⁵³ William B. Rubenstein, *On What a “Private Attorney General” Is and Why it Matters*, 57 VANDERBILT L. REV. 2129, 2149–52 (2004).

unelected regulators.⁵⁴ Overburdened law enforcement agencies rely on constructive community relationships for effective policing. This dynamic has been cited as one rationale for promoting diversity in law enforcement and for not inquiring about the immigration status of individuals who report crimes.⁵⁵ Outside of the United States, the complexity of enforcing constitutional socio-economic rights provisions through formal adjudication has prompted the South African Constitutional Court to order parties to reach negotiated settlements in such cases.⁵⁶ These are but a few of many examples that could be cited.

Capacity challenges shape law and governance in China in important ways. The large, complex Chinese state has long been plagued by problems of capacity and information flow in monitoring lower-level officials and implementing central legislation and policies.⁵⁷ In the Mao era, the Party-state⁵⁸ employed campaign-style mobilization to harness the energy of the masses, advance the Party's agenda, and impose ideological discipline. Although the Party-state has moved away from mass campaigns as a principal tool for controlling bureaucratism and corruption in the post-Mao era, such mobilization strategies have persisted in some contexts, as periodic "Strike Hard" anti-crime campaigns and other campaigns illustrate.⁵⁹ On a broader

⁵⁴ Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions*, 72 CORNELL L. REV. 488, 492-94 (1987).

⁵⁵ David A. Salansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. OF CRIM. L. & CRIMINOLOGY 1209, 1228 (2006); Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, § IV (2012).

⁵⁶ Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797, 834-43 (2009).

⁵⁷ For three thoughtful studies discussing principal-agent problems in China (both historical and contemporary), see generally Kevin J. O'Brien & Lianjiang Li, *Selective Policy Implementation in Rural China*, 31 COMP. POL. 167 (Jan. 1999); Murray Scot Tanner & Eric Green, *Principals and Secret Agents: Central Versus Local Control over Policing and Obstacles to "Rule of Law" in China*, 2007 CHINA Q. 644 (2007) (focusing on control of local policing); Carl Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INTL. L. 53 (2009) (discussing the role of responsibility systems in addressing principal-agent problems).

⁵⁸ The Constitution enshrines the leadership role of the Chinese Communist Party. State institutions are integrated with the Party and subject to Party control. This article uses the term "Party-state" to refer generally to China's institutions of governance.

⁵⁹ For the turn away from mass campaigns, see O'Brien, *supra* note 57. For the limited use of campaigns in the Mao era and related post-Mao mobilization strategies, see LUBMAN, *supra* note 26, at 41-43, 84-87, 131-35.

level, post-Mao reforms that decentralized governance and promoted the development of a socialist market economy were in part the product of an understanding that the central command economy could not deliver the economic growth necessary to achieve China's development goals.⁶⁰

Efforts to address capacity problems shape the operation of legal institutions in China. For example, public participation mechanisms allow lawmakers to tap into the knowledge and preferences of China's large population in drafting legislation.⁶¹ Public input supplements the work of central legislative organs with only limited capacity to understand the myriad of issues, experiences, and local conditions relevant to legislation. China's modern letters and visits system is a governance tool designed to provide a stream of information to higher-level authorities and assist them in the difficult task of monitoring lower-level officials.⁶² Similarly, the 1989 Administrative Litigation Law provided a concrete statutory framework and specific procedures through which Chinese citizens could challenge a range of administrative acts in the people's courts. The law was designed to enlist courts and citizens in the project of monitoring lower-level officials.⁶³

Some legislation, institutions, and processes designed to address capacity challenges may generate new complexities and capacity problems. For example, in the 1980s, the Party-state revived the cadre responsibility system. Under this system, the center monitors the work of lower-level officials by requiring them to meet a range of hard economic, stability, and governance targets. Promotions in the bureaucracy, as well as punishments for poor performance, are tied to these targets.⁶⁴ This system creates competition among local governments and leaders. As O'Brien and Minzner have demonstrated, cadre responsibility systems may in practice incentivize lower-level officials to engage in behavior (including the adoption of local legislation) that conflicts with or undermines some central legislation, policies, or objectives. Local officials do so in order to meet the targets that are most important in their evaluations.⁶⁵ The devolution of lawmaking authority

⁶⁰ BARRY NAUGHTON, *GROWING OUT OF THE PLAN* 74, 189, 314 (1996).

⁶¹ Horsley, *supra* note 20, at 291–92; Meng Na, *Making All Draft Laws Public, a New Step to Improve Legislation Quality*, Xinhua Wang (新华网) [XINHUA], Apr. 24, 2008.

⁶² Carl Minzner, *Xinfang: Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103, 117–18 (2006).

⁶³ Pitman B. Potter, *The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 288–89 (Pitman Potter ed., 1994).

⁶⁴ For discussions of cadre responsibility systems, see generally O'Brien, *supra* note 57; Minzner, *supra* note 57, at 56–59, 75.

⁶⁵ O'Brien, *supra* note 57, at 172–75, 180; Minzner, *supra* note 57, at 56–59, 66, 75, 90–98.

in the post-Mao era has given local officials greater leeway to protect their interests.

China's post-promulgation filing and review system is plagued by interrelated and multidimensional problems of capacity. As we will see below, filing and review organs face problems of *organizational capacity*. Specifically, they lack the financial and human resources necessary to review the large volume of legislation generated each year in an efficient and comprehensive manner. Even for the subset of legislation that can be reviewed, filing and review organs face problems of *technical capacity*. Staff members responsible for review may lack the necessary education and training to identify conflicts effectively. Moreover, many legislative conflicts are difficult to discover in the abstract and only become clear after the relevant provisions are actually implemented. Even in situations where staff members are well trained in specific fields of law and it is feasible to identify conflicts in the abstract, they may lack detailed and specialized knowledge of the many different fields of law that would be necessary to review new legislation for conflicts with all existing legislation. The *legal capacity* of filing and review organs is also limited to the review of defined categories of legislation.

Finally, while filing and review organs may in theory have the constitutional authority to annul or amend conflicting lower-level legislation, they often lack the *political capacity* to exercise this formal authority in practice. The problem of political capacity is itself multidimensional. Political capacity is limited by power relations that are inconsistent with formal filing and review authorities, the relationship between state and Party organs, and the need to maintain the appearance of unity under Party leadership. As we will see, it is also limited by conventions that place heavy emphasis on consultation and consensus building, the dependence of filing and review organs on the voluntary compliance and cooperation of organs they supervise, and the fact that many legislative conflicts involve sensitive constitutional issues.

Recognizing the problem of capacity and its multiple dimensions provides an essential foundation for understanding the structure, development, and practice of the filing and review system and the ways in which this system interacts with and empowers other legal actors. As Perry Keller observed in 1994, the operation of China's formal legislative order is defined by "pragmatic responses to political and institutional realities." These adaptations shape a system that is both "riddled with ambiguities and inconsistencies" and in which no "single institution" is capable of imposing order.⁶⁶ As the following section demonstrates, China's filing and review system has been shaped by pragmatic responses to problems of capacity.

⁶⁶ Keller, *supra* note 11, at 740.

C. The Evolution of the Filing and Review System

The filing and review system has evolved in three major stages. In the first stage, China established a constitutional infrastructure and a basic filing system for legislation. The second stage involved the adoption and implementation of the Legislation Law, a constitutional statute designed to bring order to China's legislative system. The third stage began with the adoption of the PRC Supervision Law, a statute that expanded the scope of filing and review to judicial interpretations and normative documents. During this stage, local filing and review mechanisms expanded rapidly.

i. China's Constitutional Infrastructure and Early Supervision Efforts

Although China's legislative system has been addressed in detail elsewhere, a brief overview provides a necessary foundation for this discussion. The 1982 PRC Constitution, the Organic Law of the Local People's Congresses and People's Governments ("Local Organic Law"), the Organic Law of the NPC, and the Organic Law of the State Council established a basic framework for the exercise of legislative power in China.⁶⁷ Under China's unitary system, the NPC is the supreme organ of state power and, together with its Standing Committee, adopts laws and supervises enforcement of the Constitution.⁶⁸ Within this unitary structure, other state organs, including the State Council (China's highest administrative organ), State Council ministries and commissions, and local people's congresses and people's governments (of provinces, autonomous regions, and large cities) are authorized to issue different types of legislation, provided that such legislation does not conflict with legislation at higher levels in the hierarchy.⁶⁹

The Constitution and organic laws set out a basic system for supervising this legislative hierarchy. The NPC is empowered to amend or annul "inappropriate" decisions by its Standing Committee, while the NPCSC is empowered to annul (1) State Council administrative regulations, decisions,

⁶⁷ Constitution, *supra* note 9, art. 5; Local Organic Law, *supra* note 21; Quanguo Renmin Daibiao Dahui Zuzhifa (全国人民代表大会组织法) [NPC Organic Law] (promulgated by the Nat'l People's Cong., Dec. 10, 1982, effective Dec. 10, 1982); Guowuyuan Zuzhifa (国务院组织法) [State Council Organic Law] (promulgated by Nat'l People's Cong., Dec. 10, 1982, effective Dec. 10, 1982).

⁶⁸ Constitution, *supra* note 9, art. 57; Hu Jinguang (胡锦涛) & Han Dayuan (韩大元), Zhongguo Xianfa (中国宪法) [CHINA'S CONSTITUTION] 375-76 (2007).

⁶⁹ Constitution, *supra* note 9, arts. 61, 62, 67, 89, 90, 99, 100, 107; Local Organic Law, *supra* note 21, arts. 7, 60; State Council Organic Law, *supra* note 67, art. 10. The framework for local legislation (including local regulations issued by people's congresses at the large city level and all local rules) was expanded gradually and did not take complete form until 1995. 2011 FILING AND REVIEW, *supra* note 9, at 8-9.

and orders that conflict with the Constitution or law and (2) local regulations or decisions of provincial-level people's congresses that conflict with the Constitution, laws, or administrative regulations. The State Council is empowered to amend or annul (1) inappropriate orders, directives, and rules issued by its ministries and commissions and (2) decisions and orders issued by local people's governments at various levels.⁷⁰ This basic structure is replicated at lower levels of the system.⁷¹

In the 1980s, formal reporting and review of legislation was limited. Early provisions set out only general filing requirements. The Constitution and Local Organic Law provided for the reporting of local regulations and local rules to higher-level organs.⁷² Provincial-level people's congresses began reporting local regulations to the NPCSC in 1979.⁷³ In practice, various divisions of the NPCSC General Office coordinated supervision work for the filed regulations.⁷⁴

⁷⁰ For this central-level structure, see Constitution, *supra* note 9, arts. 62(11), 67(7)–(8), 89(13)–(14). Unless otherwise indicated, references to “provincial-level” people's congresses or people's governments include people's congresses and people's governments of provinces, autonomous regions, and centrally administered municipalities.

⁷¹ Local people's congresses are empowered to alter or annul “inappropriate” decisions of their standing committees, while local people's congress standing committees are empowered to alter or annul (1) “inappropriate” decisions and orders by people's governments at the corresponding level or (2) inappropriate resolutions issued by people's congresses or their standing committees at the next lower level. Constitution, *supra* note 9, arts. 99, 104; Local Organic Law, *supra* note 21, arts. 8, 9, 44. Finally, people's governments at the local level are empowered to alter or annul “inappropriate” decisions of their subordinate departments and people's governments at the next lower level. Constitution, *supra* note 9, art. 108; Local Organic Law, *supra* note 21, art. 59. There is some inconsistency in the Constitution and the Local Organic Law here. The Local Organic Law refers to the power of local people's governments to annul or amend orders or directives of their subordinate departments and decisions and orders of people's governments at lower levels.

⁷² Constitution, *supra* note 9, art. 100 (local regulations adopted by local people's congresses shall be reported to the NPCSC); Local Organic Law, *supra* note 21, art. 60. Such legislation was reported “for the record.” On its face, these provisions suggest that legislation was filed primarily for recording purposes. However, other provisions of the Constitution and Local Organic Law provide for the annulment and amendment of conflicting lower-level legislation. Moreover, the NPC Organic Law provides that NPC special committees should examine and submit reports on lower-level legislation that violates the Constitution or law. NPC Organic Law, *supra* note 67, art. 37(3). As such, NPC organs could engage in a review of legislation filed for the record.

⁷³ 2011 FILING AND REVIEW, *supra* note 9, at 17.

⁷⁴ According to Cai Dingjian, the General Office Coordination Bureau and the General Office Secretariat coordinated filing and review work under the 7th and 8th National People's Congresses, respectively. Cai Dingjian (蔡定剑), *Fagui Bei'an Shenchu*

The NPCSC reviewed local legislation in 1982 and uncovered a small number of conflicts, the majority of which promulgating organs corrected. The NPCSC later suspended this work after the adoption of the NPC Organic Law created uncertainty about the scope of its supervision authority.⁷⁵

More systematic filing and review work began in the late 1980s. In 1987, the NPCSC and State Council issued terse notices requiring local regulations and rules to be reported within set time periods.⁷⁶ In 1993, the NPCSC resumed active review of local regulations. This work was coordinated by the NPCSC General Office and carried out by NPC special committees. NPC special committees received 6,300 local regulations for review from 1993 to mid-2000. They completed review of 3,100 regulations and identified 90 that conflicted with higher-level legislation. Such conflicts were addressed primarily through consultation with promulgating organs. Local people's congresses were not very cooperative, however, replying with feedback on only eight regulations and correcting only one. In most cases, if local people's congresses refused to amend the conflicting provisions, the NPCSC simply dropped the matter.⁷⁷

The State Council established a separate filing and review system. The State Council mandated the reporting of rules in 1987, but it did not establish detailed procedures for review work until it issued the Provisions on Filing of Regulations and Rules in 1990 ("1990 Filing Provisions").⁷⁸ The 1990 Filing Provisions set out the scope of local regulations and rules to be reported, established the State Council Legislative Affairs Bureau as the principal office

Bu Shi Weixian Shenchu (法规备案审查不是违宪审查) [*Filing and Review of Regulations Is Not Constitutional Review*], Zhongguo Mingshang Falü Wang (中国民商法律网) [CHINA CIVIL & COMMERCIAL LAW ONLINE], June 16, 2007.

⁷⁵ 2011 FILING AND REVIEW, *supra* note 9, at 17; Zhu, *supra* note 2, at 132.

⁷⁶ Guanyu Difang Zhengfu he Guowuyuan Ge Bumen Guizhang Bei'an Gongzuo de Tongzhi (关于地方政府和国务院各部门规章备案工作的通知) [Notice on Local Government and State Council Department Filing Work for Rules] (promulgated by State Council General Office, Mar. 7, 1987, effective Mar. 7, 1987) (Chinalawinfo) [hereinafter 1987 Filing Notice]; Guanyu Difangxing Fagui Bei'an Gongzuo de Tongzhi (关于地方性法规备案工作的通知) [Notice on Local Regulation Filing Work] (promulgated by NPCSC General Office, State Council General Office, May 25, 1987, effective May 25, 1987) (Chinalawinfo).

⁷⁷ For these early NPCSC efforts, see Cai, *supra* note 5, at 52-54; Zhu, *supra* note 24, at 637 (citing Cai Dingjian); and Wen Ye (文晔) & Zhang Yixuan (张意轩), Quanguo Renda Fagongwei Shenchu Bei'an Shi de Xinzhang, Bing Bu Biaozhi zhe Zhongguo Weixian Shenchu Jizhi de Qidong (全国人大法工委审查备案室的新张, 并不标志着中国违宪审查机制的启动) [NPCSC LAC Review and Filing Office Establishment Does Not Mark the Initiation of Constitutional Review in China], Xinwen Zhoukan (新闻周刊) [NEWS WEEKLY ONLINE], June 29, 2004.

⁷⁸ Cai, *supra* note 5, at 54; Fagui Guizhang Bei'an Guiding (法规规章备案规定) [Provisions on the Filing of Regulations and Rules] (promulgated by St. Council, Feb. 18, 1990, effective Feb. 18, 1990) (Chinalawinfo).

responsible for filing and review work, and set out procedures and standards for reporting and review. As of June 2002, the State Council had received a total of 29,000 local regulations, autonomous regulations, and rules for filing.⁷⁹ During this period, the State Council resolved most conflicts through consultation.⁸⁰

While establishing a rudimentary framework for filing and review, these early efforts did little to address China's growing legislative disorder. The respective legislative powers of state organs were not clearly defined, making it difficult to resolve conflicts.⁸¹ The supervision system also suffered from severe capacity problems. Some organs failed to report promulgated legislation (or to report it in a timely manner).⁸² The NPCSC and State Council did not have the organizational capacity to review the flood of legislation that lower-level organs filed annually, much less discipline organs that failed to report legislation or resolve difficult conflicts under the existing framework.⁸³ The State Council office responsible for filing and review had only twenty staff members and was forced to abandon active review of all filed legislation. Instead, it decided to review legislation only when other state organs or citizens complained about conflicts.⁸⁴ NPC special committees, which faced heavy legislative drafting burdens, could not conduct review work in a systematic manner.⁸⁵ Despite early efforts to address such deficiencies, the problem of legislative conflicts only grew worse. As of 1997, the NPCSC had yet to complete its review of local regulations reported in 1994!⁸⁶ In a speech several years later, NPCSC Chairman Li Peng acknowledged that special committees lacked the capacity to handle all filed legislation.⁸⁷ Moreover, as indicated above, promulgating organs sometimes refused to amend or annul even the small number of conflicts that were discovered.

⁷⁹ Zhu, *supra* note 2, at 161.

⁸⁰ Cai, *supra* note 5, at 54.

⁸¹ Jihong Mo, *The Constitutional Law of the People's Republic of China*, 23 COLUM. J. ASIAN L. 139, 181-82 (2008).

⁸² Zhu, *supra* note 2, at 167; *Legislative Conflict Resolution Channels*, *supra* note 10 (comments of Xu Zhiqun).

⁸³ Keller, *supra* note 11, at 18; Yahong Li, *The Law-making Law: A Solution to the Problems of the Chinese Legislative System?*, 30 H.K. L. J. 120, 124-25 (2000).

⁸⁴ Zhu, *supra* note 2, at 167; Cai, *supra* note 5, at 54.

⁸⁵ Huang, *supra* note 43, at 225-26.

⁸⁶ Cai, *supra* note 5, at 53-54.

⁸⁷ ZOU, *supra* note 24, at 100 (citing Li Peng speech published in the *People's Daily*).

ii. The PRC Legislation Law

As China's legislative disorder intensified in the 1990s, the NPC began work on a comprehensive law on legislation. The principal objectives for the law were to delineate legislative powers more clearly, establish a detailed legislative procedure, clarify the hierarchy of legislation and rules of application in the event of conflicts, and strengthen the filing and review system.⁸⁸ At their core, all of these elements were designed to deal with legislative disorder and promote administration in accordance with law.⁸⁹ Initiated in 1993, the drafting of the Legislation Law took seven years and was delayed by fierce intrastate bargaining and debate.⁹⁰ Although weakened by compromise and limited in scope, this constitutional statute was promulgated in 2000 and catalyzed new development in the filing and review system.

The Legislation Law clarifies the categories of formal legislation and corresponding legislative authorities in China. Under the Legislation Law framework, the NPC (meeting in its annual plenary session) adopts "basic laws" (基本法律) (*jiben falü*) (laws governing "criminal offenses, civil affairs, state organs, and other matters") and "laws" (法律) (*falü*); the NPCSC adopts laws (法律) (*falü*) and may supplement or amend laws adopted by the NPC; the State Council adopts administrative regulations (行政法规) (*xingzheng fagui*); provincial-level people's congresses, the people's congresses of comparatively large cities, and the standing committees of these people's congresses adopt local regulations (地方性法规) (*difangxing fagui*); autonomous regions adopt autonomous regulations (自治条例) (*zizhi tiaoli*) or separate regulations (单行条例) (*danxing tiaoli*); special economic zones (SEZs) adopt regulations (法规) (*fagui*); and State Council ministries and commissions, as well as provincial-level people's governments, issue rules (规章) (*guizhang*).⁹¹ The Legislation Law reserved exclusive legislative authority

⁸⁸ 2011 FILING AND REVIEW, *supra* note 9, at 4; Zhiding "Lifa Fa" Quebao Lifa Huodong Gengjia Guifan (制定“立法法”确保立法更加规范) [Promulgate the Legislation Law, Ensure that Legislative Activities Are More Standardized], Renmin Wang (人民网) [PEOPLE'S DAILY ONLINE], Mar. 9, 2000.

⁸⁹ Lianghui Zhuanti: "Lifa Fa" Jiejue Fa yu Fa de Chongtu (两会专题: “立法法”解决法与法的冲突) [*Two Meetings Special Topic: the “Legislation Law” Resolves Conflicts of Law*], Beijing Chenbao (北京晨报) [BEIJING MORNING NEWS ONLINE], Mar. 12, 2000; Li, *supra* note 83.

⁹⁰ The drafting process was marked by debates between the NPC and State Council and between central and local state organs. For excellent accounts of the difficult drafting process, see generally Paler, *supra* note 6, and Li, *supra* note 83.

⁹¹ Legislation Law, *supra* note 21, arts. 2, 7, 56, 63, 65, 66, 71, 73. With regard to the legislative authority of the NPC, the Legislation Law refers only to the authority to promulgate "basic laws" in Article 7. However, as the NPCSC Legislative Affairs Commission explains, this provision does not imply that the full NPC cannot adopt laws other than basic laws. LEGISLATION LAW EXPLANATION, *supra* note 44, at 25.

for the NPC and NPCSC on a range of matters. It delineated the respective legislative powers of the NPC and State Council and the central and local governments more clearly.⁹² It also expanded the scope of entities authorized to enact rules.⁹³ With minor modifications and clarifications, the Legislation Law largely confirmed the existing structure of legislative authority established under the Constitution and the organic laws. The Legislation Law applied only to the categories of legislation above and did not address the broader range of normative documents that were contributing to China's legislative disorder.⁹⁴

Chapter Five of the Legislation Law establishes three related but distinct mechanisms for resolving legislative conflicts. First, it clarifies China's legislative hierarchy and lays down rules for applying legislation in the event two effective legislative provisions conflict ("conflicts rules"). Under these rules, the legal effect of the Constitution is highest; the legal effect of laws is higher than that of administrative regulations, local regulations, and rules; the legal effect of local regulations is higher than that of provincial-level people's government rules; and the legal effect of provincial-level people's government rules is higher than that of rules issued by the people's governments of comparatively large cities.⁹⁵ The law also sets out rules for determining the

⁹² Legislation Law, *supra* note 21, arts. 8, 9, 10, 63–67, 77; Paler, *supra* note 6, at 306–10.

⁹³ The Constitution provides only that ministries and commissions may enact rules. The Legislation Law expanded rulemaking authority to "State Council ministries and commissions, the People's Bank of China, the National Audit Office, and other organs directly under the State Council that are endowed with administrative functions." *The Legislative System of China*, *supra* note 1 ("Regulation Making by Departments of the State Council"); Legislation Law, *supra* note 21, art. 71.

⁹⁴ Chen, *supra* note 5, at 245–46; Huang, *supra* note 43, at 208. An early draft of the Legislation Law addressed normative documents. *Legislation Law Roundtable*, *supra* note 10, at 124.

⁹⁵ Legislation Law, *supra* note 21, arts. 78–80. According to the Legislation Law, "comparatively large cities" include provincial capitals, SEZs, and cities designated as such by the State Council. Presently, there are 49 comparatively large cities in China. For a list and related discussion, see "Jiao Da de Shi" Lifa Youguan Qingguang Zongshu ("较大的市"立法有关情况综述) [Summary of the Relevant Legislative Status of "Comparatively Large Cities"], Zhongguo Renda Wang (中国人大网) [THE NAT'L PEOPLE'S CONG. ONLINE], Apr. 14, 2009. It should be noted here that while the NPC exercises the authority to amend or annul laws adopted by the NPCSC, basic laws (adopted by the NPC meeting in its plenary session) and other laws (adopted by the NPCSC) have equal status in the legislative hierarchy. Conflicts between basic laws and other laws are considered horizontal conflicts. *Horizontal Legislative Conflicts*, *supra* note 16 (statements of Fang Jun, Vice Head of the State Council Legal Affairs Office Administrative Reconsideration Department; Li Guangyu, Vice Head of the SPC Administrative Tribunal; Huang Haihua, Vice Head of the Administrative Law Office of the NPCSC LAC).

legal effectiveness of conflicting provisions enacted by the same entity. For example, if two such provisions are inconsistent, special provisions take priority over general provisions and new provisions take priority over old provisions.⁹⁶ There are some limited exceptions to these general conflicts rules.⁹⁷

Second, Chapter Five establishes a procedure and delineates the related authorities for *adjudicating* conflicts when the conflicts rules are difficult to apply or do not establish a clear priority. For example, the relative status of local regulations and the rules of State Council ministries is not clearly set out. In the event of a conflict or inconsistency, the State Council makes a recommendation. In the event the State Council recommends prioritizing the ministry rule, the NPCSC ultimately determines the provision that should apply. In the event of an inconsistency between rules governing the same matter, the State Council determines the rule that applies. Other procedures address inconsistencies between new general and old specific laws and other difficult conflicts.⁹⁸

The final part of Chapter Five (Articles 87–92) provides concrete rules and procedures for (1) the filing and review of legislation and (2) the annulment or amendment of conflicting or inappropriate legislation. Article 89 sets out the filing requirements for each type of legislation. Article 87 sets out the circumstances in which filing and review organs may amend or annul lower-level legislation. These include situations in which promulgating organs exceed their legislative powers; legislation at a lower level contravenes that at higher levels; there are inconsistent provisions or rules and it is determined that one rule should be amended or annulled; rules are “inappropriate”; or promulgating organs violate legal procedures. Article 88 sets out the authorities for amending or annulling such problematic legislation.⁹⁹ This

⁹⁶ Legislation Law, *supra* note 21, art. 83.

⁹⁷ For example, autonomous regions and prefectures may enact autonomous and separate regulations. Such regulations may contain “flexible” (变通) (*biantong*) provisions that alter the effect of laws and administrative regulations to take account of the characteristics of local nationalities. However, such provisions may not contravene the basic principles of higher-level legislation. Such regulations must be submitted to the NPCSC for approval. *Id.* at arts. 66–67, 81. If a provincial-level people’s government rule is authorized by law or administrative regulation and it is inconsistent with a local regulation, the local regulation does not automatically have higher legal effect. If the local regulation conflicts with the authorizing law or administrative regulation, it should not be applied. LEGISLATION LAW EXPLANATION, *supra* note 44, at 233. The Legislation Law also allows for some inconsistency between rules if application of the rule in question can be confined to the specific jurisdiction of the ministry or local government that issued it. Legislation Law, *supra* note 21, art. 82.

⁹⁸ *Id.* at arts. 83, 85, 86.

⁹⁹ Under Article 88, the NPC is empowered to amend or annul “inappropriate” NPCSC laws and autonomous or separate regulations approved by the NPCSC that contravene the Constitution or Article 66(2) of the Legislation Law; the NPCSC is

provision largely confirms the basic division of legislative supervision authority set out in the Constitution.¹⁰⁰ Although scholars pressed for the establishment of a constitutional supervision committee to carry out these supervisory functions, such efforts ultimately failed.¹⁰¹

Articles 90 and 91 establish a basic procedure for the review of legislation. Article 90(1) provides that certain state organs at the central and local level may submit *requests* to the NPCSC for the review of administrative regulations, local regulations, or autonomous or separate regulations if they believe such legislation conflicts with the Constitution or law. Article 90(2) provides that other state organs, public organizations, enterprises, or citizens may submit *proposals* to the NPCSC for review of the same legislation. Formal review of Article 90(1) requests is mandatory, while formal review of Article 90(2) proposals is discretionary. Article 91 lays out a basic procedure for the NPCSC and NPC special committees to review lower-level legislation. It also provides that other state organs with review authority shall formulate their own procedures.

These sections contain some inconsistencies and ambiguities. For example, the NPCSC is empowered to "amend or annul" local regulations of provincial-level people's congresses or their standing committees that "conflict with" higher-level legislation, but it is only empowered to "annul" autonomous regulations or separate regulations that "violate" the Constitution or Article 66 of the Law. As noted in Part II(A), the law does not include definitions of these terms. Confusingly, Article 87 provides that organs authorized to amend or annul legislation under Article 88 may do so "in accordance with the limits of their power." However, the provisions in Article 88 that define the limits of supervisory power are not entirely consistent with the standards for

empowered to annul administrative regulations that conflict with the Constitution and laws, local regulations that conflict with the Constitution, laws, or administrative regulations, and autonomous or separate regulations approved by standing committees of provincial-level people's congresses that contravene the Constitution or Article 66(2); the State Council is empowered to alter or annul "inappropriate" rules issued by its ministries and commissions and "inappropriate" local government rules; provincial-level people's congresses are empowered to alter or annul "inappropriate" local regulations issued by their standing committees; standing committees of local people's congresses are empowered to alter or annul "inappropriate" rules issued by local governments at the same level; provincial-level people's governments are empowered to alter or annul "inappropriate" rules issued by people's governments at the next lower level; and authorizing organs are empowered to alter or annul regulations promulgated by the authorized organ. Legislation Law, *supra* note 21, art. 88.

¹⁰⁰ There are some disparities in language and scope. For example, the Legislation Law empowers the NPC to alter or annul "laws" rather than "decisions" adopted by its Standing Committee. The State Council is empowered to alter or annul local government rules rather than "orders" or "decisions."

¹⁰¹ Li, *supra* note 83, at 134–36.

amendment or annulment set out in Article 87.¹⁰² To an outside observer, such internal inconsistency and ambiguity is puzzling given the core purpose of the Legislation Law.¹⁰³

Although observers sometimes conflate the various conflict resolution mechanisms set out in Chapter Five, it is important to recognize that these mechanisms are distinct. As the NPCSC Legislative Affairs Commission explains, the conflicts rules are designed to provide a framework for choosing and applying legislative provisions according to their relative rank.¹⁰⁴ The adjudication provisions establish a mechanism for determining the legislation that controls when the conflicts rules do not establish a clear priority or are difficult to apply.¹⁰⁵ Finally, provisions on filing, review, and correction (amendment or annulment) establish authorities and procedures for the systematic tracking, evaluation, and elimination of legislative conflicts. Chinese officials refer to these as distinct conflict resolution mechanisms.¹⁰⁶

iii. The PRC Supervision Law

In 2006, the NPC promulgated the PRC Law on Supervision by the Standing Committees of People's Congress at All Levels.¹⁰⁷ The Supervision Law is one part of a long-term effort to strengthen the people's congress system.¹⁰⁸ Vague constitutional and legal provisions on people's congress supervision had undermined the ability of people's congresses to fulfill their

¹⁰² For example, Articles 87(3) and 88 use different terms to refer to conflicts. Moreover, in Article 88, no supervisory organ is given the explicit power to annul legislation for the procedural violations set out in Article 87(5).

¹⁰³ Although Chinese scholars criticized the Legislation Law for failing to provide statutory definitions for terms such as "conflict with," it is unclear whether they share concerns about the other inconsistencies noted here.

¹⁰⁴ LEGISLATION LAW EXPLANATION, *supra* note 44, at 231.

¹⁰⁵ *Id.* See also Wang, *supra* note 34, at 293.

¹⁰⁶ See, e.g., Lun Faguan Zai Falü Guifan Chongtu Zhong de Xuanze Shiyong Quan (论法官在法律规定冲突中的选择实用权) [*Discussion of Authority of Judges to Choose the Application (of Legislation) When Facing Legislative Conflicts*], Dec. 19, 2006 (citing NPCSC LAC Director Gu Angran) [hereinafter *Discussion of Authority*].

¹⁰⁷ Supervision Law, *supra* note 38, art. 30.

¹⁰⁸ Jiandu Fa: Maixiang Minzhu Zhengzhi de Zhongyao Yibu (监督法: 迈向民主政治的重要一步) [*Supervision Law: An Important Step Towards Democratic Politics*], Renmin Wang (人民网) [PEOPLE'S DAILY ONLINE], Sep. 6, 2006; Baozhang Renda Jiandu Gongzuo de Zhongyao Jucuo (保障人大监督工作的重要举措) [*Guarantee the Important Role of People's Congress Supervision Work*], Renmin Wang (人民网) [PEOPLE'S DAILY ONLINE], Sep. 15, 2006.

formal constitutional duties in practice.¹⁰⁹ Although people's congress representatives had pressed for the adoption of a detailed Supervision Law for more than two decades, drafting of the statute did not begin until 2002.¹¹⁰ The Supervision Law addresses a broad range of issues, including deliberation over government and judicial work reports, budgetary supervision and auditing, and the formation of committees of special inquiry. It also expands the filing and review system.

The Supervision Law expands the scope of filing and review in two significant respects. First, it mandates the review of a limited range of normative documents such as "resolutions" and "orders." Scholars had criticized the Legislation Law for its failure to address normative documents. The Supervision Law provides that people's congress standing committees at the county level and above shall establish procedures for reviewing and annulling (1) inappropriate resolutions (决议) (*jueyi*) issued by people's congresses and their standing committees at the next lower level and (2) inappropriate decisions (决定) (*jueding*) and orders (命令) (*mingling*) issued by people's governments at the corresponding level. The Supervision Law also provides the first statutory definition of "inappropriate," a term that had generated controversy.¹¹¹

Second, the Supervision Law provides a statutory basis and procedures for the review of SPC and Supreme People's Procuratorate ("SPP") judicial interpretations. The NPC Chairmen's Council issued internal procedures for the filing and review of judicial interpretations in 2005.¹¹² The Supervision Law incorporates requirements for the filing and review of such judicial interpretations into national law. Article 31 requires judicial interpretations to be filed with the NPCSC within thirty days of issuance. Article 32 provides that key state organs may request, and other state organs, citizens, and enterprises may propose the review of judicial interpretations. Article 33 provides for consultation with the SPC and SPP and the amendment or annulment of judicial interpretations that are found to conflict with laws. In establishing

¹⁰⁹ Young Nam Cho, From "Rubber Stamps" to "Iron Stamps": The Emergence of Chinese Local People's Congresses as Supervisory Powerhouses, 171 CHINA Q. 724, 731 (2002).

¹¹⁰ Redian Jujiao: Zhongguo Lifa Baozhang Guojia Quanli Jiguan Xingshi Jiandu Quan (热点聚焦: 中国立法保障国家权力机关行使监督权) [*Special Focus: China's Legislation Guarantees that State Power Organs Exercise Supervision Authority*], Xinhua Wang (新华网) [XINHUA], Aug. 27, 2006.

¹¹¹ Hu Yuhong (胡玉鸿), Jiandu Fa Dui Guifanxing Wenjian Bei'an Shenchajizhi de Wanshan yu Buzu (《监督法》对规范性文件备案审查机制的完善与不足) [*Improvements and Deficiencies of the Supervision Law with Respect to the Mechanism for Filing and Review of Normative Documents*], Xuexi Luntan (学习论坛) [STUDY FORUM], no. 23, 2007, at 79.

¹¹² See *infra*, Part II(D).

these procedures, the Supervision Law treats judicial interpretations as a type of normative document.¹¹³ Although the term “judicial interpretations” is not defined in the law, Chinese scholars argue that the requirements in the Supervision Law apply to only a subset of judicial interpretations.¹¹⁴

The Supervision Law represented a significant step in the evolution of the filing and review system. As discussed below in Part II(E), the law catalyzed the development of filing and review systems at the local level. However, it also left key issues unaddressed. Oddly, while bringing certain normative documents within the scope of review, the Supervision Law contained no mandates for the filing of such documents. The six provisions related to filing and review are quite general, do not provide specific time limits or other requirements for review, and do not address conflicts or inconsistencies between decisions and orders at the same level.¹¹⁵ The Supervision Law also opened the door to inconsistent local filing and review systems by providing only a general mandate to establish procedures for such systems “with reference to” the Legislation Law.¹¹⁶ Finally, Chinese scholars viewed the creation of a specialized constitutional supervision committee as a necessary step to address persistent capacity problems in the filing and review process. However, the NPC once again refused to provide for such a committee in the Supervision Law.¹¹⁷ In grappling with capacity limitations in the filing and review system, the drafters of the Supervision Law left gaps and created the potential for some new conflicts and questions.

¹¹³ Wang, *supra* note 34, at 286.

¹¹⁴ As discussed in Part IV(A), the SPC issues several different types of “judicial interpretations.” Wang Kai argues that while “interpretations” have universal application and are thus normative documents subject to filing and review, “provisions” are “internal” in nature and “replies” are formally binding only in individual cases. As such, they should not fall within the scope of the filing and review system. Wang Kai, Lun Guifanxing Wenjian de Bei'an Shenchu (论规范性文件的备案审查) [*On Filing and Review of Normative Documents*], Zhejiang Shehui Kexue (浙江社会科学) [ZHEJIANG SOC. SCI.], no. 11, 2010, at 13–14. Part II(D) presents statistics on judicial interpretations filed for review. The limited number of judicial interpretations filed supports Wang Kai's argument.

¹¹⁵ Yuan Bingxi (袁兵喜), Jiandu Fa de Banbu yu Woguo Lifa Shenchu Zhidu de Wanshan (监督法的颁布与我国立法审查制度的完善) [*Promulgation of the Supervision Law and Improvement of China's Legislative Review System*], Wenshi Bolan (文史博览) [HUMANITIES DIGEST], no. 24, 2006, at 73; Hu, *supra* note 111, at 79.

¹¹⁶ Hu, *supra* note 111, at 77; Wang, *supra* note 114, at 15.

¹¹⁷ NPC officials objected to these proposals. Jiandu Fa: Minzhu Zhengzhi Shengzhang Dian (监督法: 民主政治生长点) [*Supervision Law: Growing Point for Democratic Politics*], Nanfang Zhoumo (南方周末) [SOUTHERN WEEKEND ONLINE], Sept. 6, 2002.

D. Supervision Organs, Work Procedures, and Practice at the Central Level

Under current practices, the NPCSC Legislative Affairs Commission (法制工作委员会) (*fazhi gongzuo weiyuanhui*) ("NPCSC LAC") and the State Council Legislative Affairs Office (法制办公室) (*fazhi bangongshi*) ("State Council LAO") play central roles in the filing and review process. The NPCSC LAC is a work organ that consists of ten specialized offices (室) (*shi*) and has a staff of approximately 200 full-time professionals.¹¹⁸ Similarly, the State Council LAO is an administrative office specializing in legal affairs and staffed by full-time professionals.¹¹⁹ Both entities provide legal research and opinions and are heavily involved in legislative drafting.¹²⁰

In practice, both the NPCSC LAC and the State Council LAO exercise considerable authority in China's legislative order. For example, the NPCSC forwards most requests for interpretations of national law to the LAC.¹²¹ The LAC publishes answers to questions on legal issues and explanations of statutes that are respected as authoritative in practice.¹²² It also drafts formal legal interpretations that are vetted and issued by the NPCSC.¹²³ Neither entity possesses any formal constitutional authority to order the annulment or amendment of conflicting lower-level legislation or to issue binding rulings on legislative conflicts. However, the SPC solicits the opinions of the LAC and

¹¹⁸ CHEN, *supra* note 24, at 83–84; Dowdle, *supra* note 24, at 41. Specialized offices include the General Office, the Legislative Planning Office, the Research Department, the Office for Filing and Review of Regulations, and six offices responsible for drafting legislation in specific fields of law, including State Law, Administrative Law, Civil Law, Criminal Law, Economic Law, and Social Law. For the size of the NPCSC LAC staff, see TANNER, *supra* note 20, at 102. NPCSC LAC officials confirmed to me that staffing remains at about this level.

¹¹⁹ The LAO has nine subordinate departments. Zhonghua Renmin Gongheguo Guowuyuan Fazhi Bangongshi Jigou Zhineng (中华人民共和国国务院法制办公室机构职能) [PRC State Council Legislative Affairs Office Structure and Function], Zhongguo Zhengfu Fazhi Xinx Wang (中国政府法制信息网) [PRC GOV'T LEGIS. AFF. INFO. ONLINE] (last visited Apr. 23, 2013).

¹²⁰ CHEN, *supra* note 24, at 83–84, 127–28, 133, 136.

¹²¹ CHEN, *supra* note 10, at 200.

¹²² Wang Guisong (王贵松), *Fayuan Dui Falü Chongtu Wenti de Yingdui: Xianzhuang yu Qianzhan* (法院对法律冲突问题的应对: 现状与前瞻) [*Court Responses to the Problem of Legislative Conflicts: The Present Situation and a Look Forward*], *Fashang Yanjiu* (法商研究) [L. & BUS. STUD.], no. 2, 2010, at § 2(1); Dowdle, *supra* note 24, at 84–85. The Legislation Law specifically provides for the practice. Legislation Law, *supra* note 21, art. 55. Similarly, when the State Council interprets regulations and rules, it consults with the State Council LAO. CHEN, *supra* note 24, at 160–61.

¹²³ Legislation Law, *supra* note 21, art. 44.

LAO, rather than the full NPCSC and State Council, on some legislative conflicts.¹²⁴ These organs also play important roles in managing the filing and review process and coordinating with promulgating organs to resolve conflicts.

The adoption of the Legislation Law catalyzed the development of filing and review procedures. At the NPC level, the NPCSC Chairmen's Council issued detailed work procedures for legislative review in 2000 and amended them in 2003.¹²⁵ In 2005, the NPC Chairmen's Council revised the Work Procedures again and also adopted a work procedure for the filing and review of SPC and SPP judicial interpretations ("Judicial Interpretation Filing and Review Procedures"). Strangely, while Chinese media described the procedures in detail, the full texts of the 2005 Work Procedures and Judicial Interpretation Filing and Review Procedures were never made widely available to the public.¹²⁶ Nonetheless, copies of the full text of the 2005 Work Procedures appeared on several obscure websites.¹²⁷

In 2004, the NPCSC LAC established a special administrative office called the Filing and Review Office for Regulations (法规备案审查室) (*fagui bei'an shencha shi*) ("Filing and Review Office"). This specialized administrative office maintains a small staff of thirteen individuals and is divided into two departments (处) (*chu*), one responsible for "active" review of select filed legislation and the other for "passive" review (review in response to a request from another state organ or a citizen).¹²⁸ Despite its name, the Filing and

¹²⁴ Wang, *supra* note 122, at § 2(1).

¹²⁵ Xingzheng Fagui, Difangxing Fagui, Zizhi Tiaoli he Danxing Tiaoli, Jingji Tequ Fagui Bei'an Shencha Gongzuo Chengxu (行政法规、地方性法规、自治条例和单行条例、经济特区法规备案审查工作程序) [Work Procedures for Filing and Review of Administrative Regulations, Local Regulations, Autonomous and Separate Regulations, and Special Economic Zone Regulations] (issued by the NPCSC Chairmen's Council, Oct. 16, 2000) [hereinafter 2000 Work Procedures]; Quanguo Renda Changweihui Jinyibu Jiaqiang Fagui Bei'an Shencha Gongzuo (全国人大常委会进一步加强法规备案审查工作) [NPCSC Progressively Strengthens Regulation Filing and Review Work], Xinhua Wang (新华网) [XINHUA], Aug. 15, 2003.

¹²⁶ For detailed media discussion of the two procedures, see Quanguo Renda Changweihui Mingque Weixian Shencha Chengxu (全国人大常委会明确违宪审查程序) [NPCSC Clarifies Constitutional Review Procedure], Xijing Bao (新京报) [BEIJING NEWS ONLINE], Dec. 20, 2010. In extensive searching, I have not been able to locate copies of the full texts in any official source or mainstream Chinese legal database.

¹²⁷ Xingzheng Fagui, Difangxing Fagui, Zizhi Tiaoli he Danxing Tiaoli, Jingji Tequ Fagui Bei'an Shencha Gongzuo Chengxu (行政法规、地方法规、自治条例和单行条例、经济特区法规备案审查工作程序) [Work Procedures for Filing and Review of Administrative Regulations, Local Regulations, Autonomous and Separate Regulations, and Special Economic Zone Regulations] (issued by the NPCSC Chairmen's Council, Oct. 16, 2000, amended Aug. 15, 2003 & Dec. 16, 2005) [hereinafter 2005 Work Procedures].

¹²⁸ Meeting with Filing and Review Office Officials, June 2012 (on file with author).

Review Office is not responsible for accepting and registering filed legislation. The NPCSC General Office performs this function. However, the Filing and Review Office does take the lead in reviewing filed legislation.¹²⁹ The work of the Filing and Review Office lacks transparency, and Chinese experts have criticized it as an inadequate body that cannot be considered a constitutional review organ.¹³⁰ Like the NPCSC LAC, the Filing and Review Office does not have the formal authority to annul or amend legislation. Prior to the establishment of the Filing and Review Office, the NPCSC General Office Secretariat coordinated filing and review work.¹³¹

Chinese sources discuss different motivations for the establishment of the Filing and Review Office. In a 2003 case that attracted national attention, three legal scholars filed a proposal to review the constitutionality and legality of a State Council administrative regulation on custody and repatriation for vagrants and beggars. This event led to public calls for a more robust constitutional review mechanism. Some Chinese sources suggest that the creation of the Filing and Review Office was a response to such citizen demands.¹³² Other sources argue that the office was established primarily because the NPCSC, NPCSC LAC, and NPC special committees lack the capacity to handle active review of even a portion of the legislation reported to

¹²⁹ *Id.* For additional discussion of the office, see Cai, *supra* note 74.

¹³⁰ Wang, *supra* note 34, at 277 (noting scholarly criticism and stating that while the office has enhanced the professionalism of the review process, it exercises no formal power and has been silent since its establishment); Jiu Fagui Shenchu Bei'an Shi de Sheli Fangtan: Lin Laifan Jiaoshou (就法规审查备案室的设立访谈: 林来梵教授) [Forum on the Establishment of the Filing and Review Office: Professor Lin Laifan], Qingnian Shibao (青年时报) [YOUTH TIMES], June 25, 2004 (the office is an early step toward constitutional review but faces many constraints and limitations) [hereinafter *Establishment of the Filing and Review Office*]; Wen & Zhang, *supra* note 77 (limited staff cannot review thousands of regulations effectively and the office is not a meaningful substitute for a constitutional supervision committee); Cai, *supra* note 74 (filing and review is not constitutional review; work of this office is not new; the office lacks transparency and the capacity to review all regulations).

¹³¹ Meeting with Filing and Review Office Officials, June 2012 (on file with author).

¹³² Keith Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TNT'L L. 115, 149–53 (2006) (citing official Chinese news sources that connected the establishment of the office to the Sun Zhigang case and subsequent calls for constitutional supervision); Dingjian Cai, *Social Transformation and the Development of Constitutionalism*, in CHINA'S JOURNEY TOWARD THE RULE OF LAW: LEGAL REFORM 1978–2008, 64 (Dingjian Cai & Chenguang Wang eds., 2010) (NPCSC LAC established the office in response to “social pressure”).

the NPCSC each year.¹³³ Filing and Review Office officials indicate the office had been under consideration since 2000 and that no particular event catalyzed its establishment.¹³⁴ Regardless of the underlying motivation, it was promoted as an example of government responsiveness to citizen demands.

The 2005 Work Procedures provide for both active and passive review of administrative regulations, local regulations, autonomous and separate regulations, and SEZ regulations. The First Secretariat of the NPCSC General Office receives regulations for filing and processes requests for review from key state organs. It then sends the legislation to one of the nine specialized committees of the NPC and to the NPCSC LAC for study and review.¹³⁵ The Filing and Review Office receives and evaluates citizen review proposals and only forwards them to the NPCSC General Office and specialized NPC committees for review "if necessary."¹³⁶ In practice, the Filing and Review Office carries out all preliminary review work and attempts to resolve conflicts through informal consultation with the promulgating organ. If these efforts are unsuccessful, the conflict is addressed through a complex, multi-stage process of consultation and progressively higher levels of review. These procedures are addressed in detail in Part III(D). According to Chinese sources, the Judicial Interpretation Filing and Review Procedures are nearly identical to the 2005 Work Procedures.¹³⁷

As indicated above, the State Council has established its own filing and review system separate from that of the NPCSC. Following the adoption of the Legislation Law, the State Council adopted a new Regulation on Filing of Regulations and Rules ("2001 Filing Regulation") to replace the 1990 Filing Provisions.¹³⁸ The 2001 Filing Regulation was more detailed and conformed the State Council's filing and review process to the types of legislation and review standards established in the Legislation Law.¹³⁹ However, while the 1990 Filing Provisions applied to all local and departmental normative documents, the 2001 Filing Regulation applies only to local regulations issued by the people's

¹³³ Wang, *supra* note 34, at 277; Wen & Zhang, *supra* note 77 (citing Filing and Review Office employees who claim that the 2003 amendment of the Work Procedures was the turning point for establishment of the office).

¹³⁴ Meeting with Filing and Review Office Officials, June 2012 (on file with author).

¹³⁵ 2005 Work Procedures, *supra* note 127, arts. 5, 6.

¹³⁶ *Id.*, art. 7.

¹³⁷ Wang, *supra* note 34, at 301, n. 45; 2011 FILING AND REVIEW, *supra* note 9, at 18, 39.

¹³⁸ Fagui Guizhang Bei'an Tiaoli (法规规章备案条例) [Regulation on the Filing of Regulations and Rules] (promulgated by St. Council, Dec. 14, 2001, effective Jan. 1, 2002) [hereinafter 2001 Filing Regulation].

¹³⁹ Article 10 of the 2001 Filing Regulation amended the review standards in Article 6 of the 1990 Provisions. The revised provision established standards identical to those in Article 88 of the Legislation Law.

congresses of provinces, large cities, and SEZs and to ministry and local government rules.¹⁴⁰ In place of the earlier provisions on normative documents, the Regulation directs local people's governments to strengthen supervision over rules and other "universally binding decisions and orders" and to establish corresponding filing and review systems. This change narrows the scope of State Council filing and review. In an indication of problems with compliance at lower levels, the Regulation also includes more expansive language on compliance and supervision.¹⁴¹

The State Council process for filing and review resembles that of the NPCSC. The 2001 Filing Regulation provides that the State Council LAO manages the review process.¹⁴² In practice, this task is one of many carried out by the LAO's Legislative Coordination Office (法制协调司) (*fazhi xietiao si*).¹⁴³ The Legislative Coordination Office, which has around ten staff members, undertakes an initial assessment to categorize filed legislation. It then sends rules to the specialized LAO office that supervises the work of the issuing ministry or commission, and that specialized office conducts the review. If there is no appropriate LAO office, or if the item to be reviewed is a local rule or regulation, the Legislative Coordination Office conducts the review itself.¹⁴⁴ Similar to the Legislation Law, the 2001 Filing Regulation establishes a mechanism for passive review. State organs, enterprises, public organizations, and citizens may submit proposals to the State Council for the review of rules or local regulations.¹⁴⁵

Due to a general lack of transparency, it is difficult to construct a comprehensive picture of the operation of the filing and review system in practice. The *China Law Yearbook* and annual reports on rule of law development provide annual overviews of State Council filing and review work. However, neither the NPCSC nor the State Council publicly posts requests or proposals for review of legislative conflicts or provides formal public rulings in response to such proposals. The NPCSC is even more guarded

¹⁴⁰ Compare Article 2 of the 1990 Filing Provisions with Article 2 of the 2001 Filing Regulation.

¹⁴¹ 2001 Filing Regulation, *supra* note 138, arts. 4, 7, 20, 21.

¹⁴² *Id.*, art. 10.

¹⁴³ Fazhi Xietiao Si (Fagui Guizhang Bei'an Shenchu Si, Fagui Bianzuan Si) (法制协调司 (法规规章备案审查司、法规编纂司)) [Legislative Coordination Office (Office for Filing and Review of Regulations and Rules, Office for Compiling Regulations)], Zhongguo Zhengfu Fazhi Xinxi Wang (中国政府法制信息网) [PRC GOV'T LEGIS. AFF. INFO. ONLINE], Nov. 8, 2007.

¹⁴⁴ Meeting with Legal Scholars A and B, June 2012 (on file with author). These scholars emphasized that the Legislative Coordination Office is not the equivalent of the Filing and Review Office.

¹⁴⁵ 2001 Filing Regulation, *supra* note 138, art. 9.

than the State Council in revealing the details of its filing and review work. It only occasionally publishes fragmentary statistics. Nonetheless, through relatively complete State Council statistics, fragmentary NPCSC statistics, and interviews and other materials, we can construct a general picture of filing and review practices.¹⁴⁶

The State Council maintains a heavy filing burden. As Table 1 shows, the State Council receives from 1,200 to 2,300 regulations and rules annually.¹⁴⁷ References to late or incomplete filings suggest that compliance with filing and review requirements is uneven at best.¹⁴⁸ Unlike the NPCSC, the State Council reports the number (but not the content) of external review proposals (from state organs, public organizations, and citizens) that it receives each year. As Table 1 indicates, the State Council received 648 external review proposals from 2002 to 2011. Other authoritative sources report similar figures and indicate that individual citizens filed the overwhelming majority of these review proposals.¹⁴⁹

¹⁴⁶ The limited statistics on filing and review that are available are sometimes inconsistent and are not always reported in the same form from year to year. The statistics presented here provide only a rough measure of filing and review practice.

¹⁴⁷ Statistics for 2002 to 2008 are compiled from the CHINA LAW YEARBOOKS for 2003 to 2009. See *Zhongguo Falü Nianjian* (中国法律年鉴) [CHINA LAW YEARBOOK] 124–25 (2003); 98–99 (2004); 120–21 (2005); 94–95 (2006); 130–31 (2007); 137–38 (2008); 127–28 (2009). Statistics for the years 2009 to 2010 are compiled from the China Law Society's Annual Reports on China's Rule of Law Construction. *Zhongguo Fazhi Jianshe Niandu Baogao* (中国法治建设年度报告) [Annual Report on China's Rule of Law Construction 2009] (dated June 2010); 2010 (dated June 2011). *Xinhua* publishes the reports annually. Statistics for 2011 are taken from the Guowuyuan 2011 Nian Falü Gongzuo Zongshu (国务院 2011 年度法制工作综述) [State Council, Summary of Legal Work in 2011], Renmin Wang (人民网) [PEOPLE'S DAILY ONLINE], Dec. 29, 2011. For 2009 and 2010, the Annual Reports document only the total number of "local regulations" that were promulgated by "local people's congresses and their standing committees" and reported to the NPCSC and State Council for filing. These reports do not specifically state that the figure includes autonomous, separate, and SEZ regulations. The 2010 CHINA LAW YEARBOOK states that a total of 637 local, autonomous, separate, and SEZ regulations were reported to the State Council for filing in 2009. See 2010 CHINA LAW YEARBOOK, at 111. Based on this comparison, it is my judgment that the "local regulation" figure reported in the Annual Report on Rule of Law Construction includes autonomous, separate, and SEZ regulations. There is a discrepancy between the number of local regulations reported to the NPCSC in the Annual Report on Rule of Law Construction for 2011 (Section 1–917 local regulations) and the number of local regulations reported to the State Council for filing in its *Summary of Legal Work in 2011* (666 local regulations). The reason for the discrepancy is not clear.

¹⁴⁸ For example, the State Council reported that seven provincial people's congresses, six provincial governments, and 13 State Council ministries and commissions filed less than half of their legislation on time in 2008, while 30 local governments and State Council ministries and commissions failed to file items properly. *Zhongguo Falü Nianjian* (中国法律年鉴) [CHINA LAW YEARBOOK] 128 (2009).

Table 1: Regulations, Rules, and External Review Proposals Filed with the State Council, 2002-2011

Year	Local / Other Regulations*	Ministry and Commission Rules	Provincial Government Rules	Total Items Filed	External Proposals Received
2002	951	230	736	1917	47
2003	611	201	644	1456	53
2004	1145	302	801	2248	57
2005	796	285	649	1730	61
2006	723	252	570	1545	63
2007	662	206	678	1546	101
2008	437	154	603	1194	72
2009	637	161	537	1335	82
2010	737	161	570	1468	59
2011	666	154	579	1399	53
Total	7365	2106	6367	15838	648

*Includes local, autonomous, separate, and SEZ regulations.

The NPCSC has a lighter filing burden than the State Council. While the NPCSC mandated the filing of local regulations in the 1980s and 1990s, the State Council did not begin systematic filing of its administrative regulations with the NPCSC until 2000.¹⁵⁰ Although the NPCSC has not consistently reported the number of regulations and judicial interpretations it receives for filing each year, local, autonomous, separate, and SEZ regulations are filed concurrently with the State Council, which does report such statistics. By adding the State Council's statistics for regulations filed and the number of administrative regulations and judicial interpretations issued each year, we can estimate the total number of annual filings with the NPCSC (Table 2).¹⁵¹ In recent years, fragmentary NPCSC filing statistics have been published in a variety of sources. These statistics are presented in the final column of Table 2.¹⁵² With the exception of 2010, these NPCSC filing statistics are consistent with estimates obtained using the methodology above.¹⁵³

¹⁴⁹ See Yuan Shuhong (袁曙宏), Jiaru Shimao Zuzhi Shinian Woguo Fazhi Jianshe Huigu he Qianzhan (加入世贸组织十年我国法治建设回顾和前瞻) [*Reflection on and Prospects for China's Rule of Law Construction Ten Years after Entering the WTO*], 2 Zhongguo Dangzheng Ganbu Luntan (中国党政干部论坛) [CHINESE CADRES TRIBUNE] 4 (2012) (reporting 653 external review proposals from December 2001 to November 2011, including 625 filed by individual citizens).

¹⁵⁰ Zhu, *supra* note 2, at 131.

¹⁵¹ Statistics for 2002 to 2008 are taken from the CHINA LAW YEARBOOK, while statistics for 2009 to 2011 are taken from the Annual Reports on Rule of Law Construction. *Supra* note 147.

¹⁵² The 2009 NPCSC Work Report states that the NPCSC received a total of 475 State Council administrative regulations, local regulations, judicial interpretations, and other normative legal documents for filing in 2008. 2009 Quanguo Renda Changweihui Gongzuo Baogao (2009 全国人大常委会工作报告) [2009 NPCSC Work Report], Renmin Wang (人民网) [PEOPLE'S DAILY ONLINE], Mar. 9, 2009. The Annual Reports on Rule of Law Construction for 2009, 2010, and 2011 reported the total number of items the NPCSC received for filing and review in those years.

¹⁵³ The Annual Report on Rule of Law Construction for 2010 is internally inconsistent. Section 1 reports that the State Council promulgated 17 administrative regulations and that the NPCSC and State Council received a total of 737 local regulations for filing. Section 3(3) reports that the SPC and SPP issued a total of 21 judicial interpretations that year. However, Section 6(4) reports that the NPCSC received a total of 1,743 administrative regulations, local regulations, and judicial interpretations for filing in 2010. In 2010, the NPCSC began a systematic review of all State Council administrative regulations. 2011 FILING AND REVIEW, *supra* note 9, at 19. The systematic review and legislative clean-up campaigns that took place in 2009 and 2010 (see *infra*, Part III(B)) may have resulted in the filing of some previously unreported items.

Table 2: Estimated and Reported Regulations and Judicial Interpretations Filed with the NPC Standing Committee, 2002-2011

Year	Local/Other Regulations Filed*	State Council Administrative Regulations Promulgated	Judicial Interpretations Promulgated (SPC/SPP/Joint)	Estimated Total Items Filed	Reported Total Items Filed
2002	951	27	--	978	--
2003	611	46	--	657	--
2004	1145	24	--	1169	--
2005	796	28	--	824	--
2006	733	29	11/2/1	766	--
2007	662	30	12/1/5	710	--
2008	437	30	15/1/3	486	475
2009	637	22	18/1/3	681	"600+"
2010	737	17	16/1/4	775	1,743
2011	917	26	19/1/4	967	967
Total	7616	279	118	8013	--

*Includes local, autonomous, separate, and SEZ regulations.

The NPCSC does not consistently report the number of requests and proposals for legislative review that state organs, public organizations, and citizens file each year. Fragmentary official reports indicate that the NPCSC received 86 citizen review proposals in 2008 and 98 proposals in 2009.¹⁵⁴ A 2011 NPCSC LAC volume states that no state organ has ever filed a formal review request with the NPCSC. It also states that after the establishment of the Filing and Review Office in 2004, the NPCSC received a total of "more than 900" citizen review proposals.¹⁵⁵ A 2012 article in the Party journal *Seeking Truth* reinforces this figure. It states that the NPCSC LAC received 1,004 citizen review proposals from May 2004 to November 2011.¹⁵⁶ Taken together, public reports indicate that from 2000 to the end of 2011, the NPCSC received a total of about 1,030 citizen review proposals.¹⁵⁷

NPCSC work on citizen review proposals is problematic in numerous respects. According to Filing and Review Office officials, only about one-third of citizen review proposals fall within the scope of the NPCSC's review authority. Many proposals call for the review of rules and are transferred to the State Council for handling. Many others relate to concrete disputes and do not involve actual legislative conflicts. These proposals are transferred to letters and visits offices for handling.¹⁵⁸ As discussed in Part III(E), citizens have criticized the lack of official feedback on review proposals and lack of transparency in the review process.

¹⁵⁴ 2009 NPCSC Work Report, *supra* note 152; 2009 Annual Report on Rule of Law Construction, *supra* note 147, § 5(4).

¹⁵⁵ 2011 FILING AND REVIEW, *supra* note 9, at 19.

¹⁵⁶ Yuan, *supra* note 149, § 1(4).

¹⁵⁷ Han Dayuan (韩大元), currently Dean of Renmin University Law School and one of China's most prominent constitutional law scholars, stated in mid-2004 that the NPCSC had received "more than 20" citizen review proposals. Xie Yuandong (谢远东), Shi Yuequan Haishi Hufa: Zhongzi Guansi de Yiwai Zhanfang (是越权还是护法: 种子官司的意外绽放) [*Exceeding Authority or Protecting Law: The Unexpected Blossoming of the Seed Lawsuit*], Fazhi Ribao (法制日报) [LEGAL DAILY ONLINE], Nov. 26, 2003. Thus, the total number of citizen review proposals for the period from 2000 to the end of 2011 is approximately 1,030.

¹⁵⁸ Meeting with Filing and Review Officials, June 2012 (on file with author).

E. Rapid Expansion of Local Filing and Review Systems

The English-language literature on Chinese law has largely overlooked local filing and review systems. China's thirty-one provincial-level governments and many city, prefecture, and county-level governments have established filing and review systems. As at the national level, local filing and review work involves separate systems and procedures in the people's congresses and people's governments. This section provides a general overview of local efforts. It provides additional detail on the large interior province of Hunan as a case study.¹⁵⁹

The development of local filing and review infrastructure has evolved in two principal stages. Provincial-level people's governments began to establish filing and review systems in the late 1980s. Following the promulgation of the State Council's 1990 Filing Provisions, people's governments in Hubei, Liaoning, Hunan, and other provinces enacted simple filing rules and procedures.¹⁶⁰ Provincial-level people's government efforts accelerated following the promulgation of the 2001 Filing Regulation, which explicitly directed provincial-level governments to establish filing and review systems.¹⁶¹

¹⁵⁹ For detailed surveys of filing and review practices at the provincial level, see Shen Haixing (沈海星), *Woguo Guifanxing Wenjian Bei'an Zhidu Yanjiu* (我国规范性文件备案制度研究) [*Research on China's Filing System for Normative Documents*], in *Woguo Lifa Zhidu Shijian Guancha* (我国立法制度实践观察) [EMPIRICAL OBSERVATIONS OF CHINA'S LEGISLATIVE SYSTEM] 260–98 (Xu Xianghua (徐向华) ed., 2011); 2011 FILING AND REVIEW, *supra* note 9. Hunan province provides an interesting case study. Under Provincial Governor and later Party Secretary Zhou Qiang, Hunan adopted China's first provincial administrative procedure regulation and complementary measures on the creation, management, and review of normative documents. A discussion of these reforms and Zhou Qiang's role in them is available in Peter Witherington, *Analyzing the Impact of the Hunan Provincial Administrative Procedure Provisions* (forthcoming 2013, manuscript on file with author). For the administrative procedure provisions, see Hunan Sheng Xingzheng Chengxu Guiding (湖南省行政程序规定) [Hunan Administrative Procedure Provisions] (promulgated by the Hunan Province People's Gov't, Apr. 17, 2008, effective Oct. 1, 2008) (Chinalawinfo).

¹⁶⁰ See, e.g., Liaoning Sheng Guizhang he Guifanxing Wenjian Bei'an Shenchu Banfa (辽宁省规章和规范性文件备案审查办法) [Liaoning Province Measures on Filing and Review of Rules and Normative Documents] (promulgated by the Liaoning Province People's Gov't, Jan. 3, 1991, effective Jan. 3, 1991) (Chinalawinfo). The emphasis of the Hunan measure was on filing and not on review. Hunan Sheng Renmin Zhengfu Guanyu Jianli Guizhang yu Guifanxing Wenjian Bei'an Zhidu de Tongzhi (湖南省人民政府关于建立规章与规范性文件备案制度的通知) [Hunan Province People's Government, Notice Regarding the Establishment of a Filing System for Rules and Normative Documents] (promulgated by the Hunan Province People's Gov't, Sept. 28, 1992, effective Oct. 1, 1992) (Chinalawinfo).

¹⁶¹ 2001 Filing Regulation, *supra* note 138, art. 31.

As part of this second wave, the Hunan Provincial People's Government replaced its skeletal 1992 provisions with the Hunan Province Measures on Filing and Review of Rules and Normative Documents ("2004 Hunan Government Review Measures") in 2004.¹⁶² As of August 2012, all provincial-level people's governments had enacted detailed measures on filing and review of administrative rules and normative documents.¹⁶³ Additional provisions, notices, and work procedures often supplement these filing and review rules.¹⁶⁴

Comprehensive filing and review systems in provincial-level people's congresses developed more slowly. Several provincial-level people's congresses enacted filing and review regulations prior to 2006. Other provincial-level people's congresses engaged in limited filing and review pursuant to internal work procedures.¹⁶⁵ The majority of provincial-level people's congresses did not enact comprehensive local regulations until after the promulgation of the

¹⁶² Hunan Sheng Guizhang Guifanxing Wenjian Bei'an Shenchu Banfa (湖南省规章规范性文件备案审查办法) [Hunan Province Measures on Filing and Review of Rules and Normative Documents] (promulgated by the Hunan Province People's Gov't, May 23, 2004, effective July 1, 2004) [hereinafter 2004 Hunan Government Review Measures].

¹⁶³ 2011 FILING AND REVIEW, *supra* note 9, at 16.

¹⁶⁴ For example, see Hunan Sheng Guifanxing Wenjian Guanli Banfa (湖南省规范性文件管理办法) [Hunan Province Measures on Management of Normative Documents] (promulgated by the Hunan Province People's Gov't, July 9, 2009, effective July 9, 2009), Hunan Sheng Renmin Zhengfu Wang (湖南省人民政府网) [HUNAN PROVINCE PEOPLE'S GOV'T ONLINE] [hereinafter Hunan Normative Document Management Measures]; Hunan Sheng Renmin Zhengfu Fazhi Bangongshi Guanyu Jin Yibu Mingque Guifanxing Wenjian Bei'an Shenchu Gongzuo Youguan Juti Wenti de Tongzhi (湖南省人民政府法制办公室关于进一步明确规范性文件备案审查工作有关具体问题的通知) [Hunan Province People's Government Legislative Affairs Office, Notice on Relevant Concrete Problems in Progressively Clarifying the Work of Normative Document Filing and Review] (promulgated by the Hunan Province People's Gov't Legis. Affairs Office, Jan. 1, 2006, effective Jan. 1, 2006) [hereinafter Hunan Notice on Filing and Review Problems]; Hunan Sheng Renmin Zhengfu Fazhi Bangongshi, Guizhang Guifanxing Wenjian Bei'an Shenchu Gongzuo Chengxu Guiding (湖南省人民政府法制办公室规章规范性文件备案审查工作程序规定) [Hunan Province People's Government Legislative Affairs Office, Provisions on Work Procedures for Filing and Review of Rules and Normative Documents] (promulgated by the Hunan Province People's Gov't Legis. Affairs Office, Nov. 14, 2005, effective Nov. 14, 2005) (State Council Website) [hereinafter Hunan Government Review Work Procedures].

¹⁶⁵ Examples of early people's congress filing and review regulations include Fujian (1991), Shaanxi (1997), Henan (2003), and Anhui (2003). 2011 FILING AND REVIEW, *supra* note 9, at 285-89, 294. The Shanghai People's Congress is an example of a provincial-level people's congress that carried out review work under an internal procedure prior to adopting a formal filing and review regulation in 2012. Interview with Senior Shanghai Legislative Official, July 2012 (on file with author).

Supervision Law.¹⁶⁶ Hunan followed this general pattern, with the provincial people's congress adopting the Hunan Province Regulation on Filing and Review ("Hunan People's Congress Review Regulation") in 2007.¹⁶⁷ The Chairmen's Council of the Hunan People's Congress Standing Committee issued a filing and review work procedure the following year.¹⁶⁸ As of August 2012, thirty of China's thirty-one provincial-level people's congresses had enacted local regulations on filing and review, implementing regulations for the Supervision Law that address local filing and review issues, or both.¹⁶⁹

Many basic elements of local filing and review systems mirror those at the national level. For example, provincial-level people's congress standing committees review the rules and normative documents of people's governments at the same level and of local people's congresses and their standing committees at the next lower level, while provincial people's governments review normative documents issued by their departments and by people's governments at the next lower level.¹⁷⁰ At the provincial level, people's government legislative affairs offices (法制办) (*fazhiban*) and people's congress legislative affairs commissions (法工委) (*fagongwei*) typically oversee

¹⁶⁶ 2011 FILING AND REVIEW, *supra* note 9, at 137.

¹⁶⁷ Hunan Sheng Guifanxing Wenjian Bei'an Shenchu Tiaoli (湖南省规范性文件备案审查条例) [Hunan Province Regulation on Filing and Review of Normative Documents] (promulgated by the Hunan Province People's Cong. Standing Comm., Nov. 30, 2007, effective Mar. 1, 2008) (State Council Legislative Affairs Office Website) [hereinafter Hunan People's Congress Review Regulation].

¹⁶⁸ Hunan Sheng Renda Changweihui Guifanxing Wenjian Bei'an Shenchu Gongzuo Chengxu (湖南省人大常委会规范性文件备案审查工作程序) [Hunan Province People's Congress Standing Committee Work Procedures on Normative Document Filing and Review] (promulgated by the Hunan Province People's Cong. Standing Comm. Chairmen's Council, Dec. 4, 2009) (on file with author) [hereinafter Hunan People's Congress Review Work Procedures].

¹⁶⁹ For a summary of local regulations on filing and review and related work in each province, see 2011 FILING AND REVIEW, *supra* note 9, at 104, 279–96. The Shanghai Municipal People's Congress did not promulgate a comprehensive local regulation on filing and review until April 2012. In March 2012, the Beijing Municipal People's Congress deliberated on a draft filing and review regulation. Beijing Shi Chushen Guifanxing Wenjian Bei'an Shenchu Tiaoli Cao'an Jiang Youxiao Luoshi Gongmin de Shenchu Jianyi Quan (北京市初审规范性文件备案审查条例草案将有效落实公民的审查建议权) [*Beijing Municipality Undertakes Preliminary Deliberation on the Regulation for Filing and Review of Normative Documents, Draft Will Effectively Implement Citizen Proposal Rights*], *Fazhi Ribao* (法制日报) [LEGAL DAILY ONLINE], Mar. 31, 2012.

¹⁷⁰ Legislation Law, *supra* note 21, art. 88; Local Organic Law, *supra* note 21, arts. 44, 59; Hunan People's Congress Review Regulation, *supra* note 167, arts. 3, 4.

filing and review work. Many of these provincial-level work organs have established specialized filing and review offices.¹⁷¹

Hunan province has adopted this basic structure. The Hunan People's Government Legislative Affairs Office oversees filing and review work and established a Filing and Review and Translation Examination and Approval Department (备案审查和译审处) (*bei'an shencha he yishen chu*) in August 2005. This department has three staff members and carries out most filing and review functions.¹⁷² On the legislative side, the Hunan People's Congress Standing Committee Legislative Affairs Commission manages filing and review work and established a Filing and Review Department (备案审查处) (*bei'an shencha chu*). This department is staffed with three to five employees at any given time.¹⁷³ Unlike its provincial government counterpart, the Filing and Review Department only reviews normative documents to confirm that they fall within the scope of the Regulation and conducts preliminary examinations of citizen review proposals. Hunan People's Congress special committees

¹⁷¹ 2011 FILING AND REVIEW, *supra* note 9, at 51, 137; Qin Peihua (秦佩华), *Bei'an Shenchu Cong Yuantou Baguan "Hongtou Wenjian"* (备案审查从源头把关“红头文件”) [*Filing and Review Controls "Red Hatted Documents" at the Source*], *Renmin Ribao* (人民日报) [PEOPLE'S DAILY], Nov. 4, 2009 [hereinafter *Filing and Review Controls Documents*] (as of October 2008, twenty provincial-level people's governments had established filing and review organs).

¹⁷² 2004 Hunan Government Review Measures, *supra* note 162, art. 3; Hunan Geji Zhengfu Dui Benji Guifanxing Wenjian Shixian "San Tongyi" (湖南各级政府对本级规范性文件实现“三统一”) [*Hunan Governments at All Levels Implement the "Three Unifications" for Normative Documents*], Hunan Sheng Renmin Zhengfu Wang (湖南省人民政府网) [HUNAN PROVINCE PEOPLE'S GOV'T ONLINE], Dec. 30, 2008 [hereinafter *Hunan Implements "Three Unifications"*]; Hunan Sheng Renmin Zhengfu Fazhi Bangongshi Caiqu Deli Cuoshi Jiaqiang Guifanxing Wenjian Bei'an Shenchu Gongzuo (湖南省人民政府法制办公室采取得力措施加强规章规范性文件备案审查工作) [Hunan Province People's Government Legislative Affairs Office Adopts Beneficial Measures to Strengthen Rule and Normative Document Filing and Review Work], Guowuyuan Fazhi Bangongshi Wang (国务院法制办公室网) [THE STATE COUNCIL LEGISLATIVE AFFAIRS OFFICE ONLINE], June 29, 2006, at § 2 [hereinafter *Hunan Adopts Beneficial Measures*]. Among other review-related tasks, this department is responsible for (1) reporting provincial government rules to the State Council and Hunan People's Congress for review; (2) registering and reviewing all normative documents filed with the provincial people's government; (3) handling all citizen review proposals; (4) issuing opinions on conflicts; and (5) coordinating with promulgating organs to resolve conflicts. The department is also responsible for legislative clean-up and translation work. Hunan Sheng Renmin Zhengfu Fazhi Bangongshi Zhineng Peizhi, Neishe Jigou he Renyuan Bianzhi Guiding (湖南省人民政府法制办公室职能配置、内设机构和人员编制规定) [Hunan Province People's Government Provisions on Legislative Affairs Office Organization, Internal Organs, and Personnel Allocations] (promulgated by the Hunan Province People's Gov't, July 14, 2004, effective July 14, 2004).

¹⁷³ Meeting with Senior Hunan Legislative Officials, June 2012 (on file with author).

actually review rules and normative documents and raise opinions for correction.¹⁷⁴

The scope and standards for local filing and review systems are broader than those at the national level. For example, the 2004 Hunan Government Review Measures apply to normative documents of people's governments and their departments at the county level and above that (1) affect the rights or duties of citizens, legal persons, or other organizations; (2) are applied repeatedly within set time periods; and (3) have universal binding affect.¹⁷⁵ Government review organs may take action to correct normative documents that violate higher-level legislation or WTO rules, are inappropriate, are inconsistent and require "coordination," exceed the lawful authority of the promulgating organ, or are issued in violation of relevant procedure. The scope of review in the Hunan People's Congress filing and review system is similar to that in the provincial people's government system. In contrast to the central level, however, the provincial people's congress standing committee reviews some normative documents issued by the subordinate departments of the people's government at the same level and by the people's governments of autonomous prefectures and counties.¹⁷⁶ Terms such as "inappropriate," "violate," and "inconsistent" are not defined, an omission that leaves review organs with some discretion. Interestingly, although people's courts other than the SPC are prohibited from issuing "judicial interpretations," some provincial people's congresses require local courts and procuratorates to report their

¹⁷⁴ *Id.*; Hunan People's Congress Review Work Procedure, *supra* note 168, arts. 3, 4. A Shanghai official described a similar procedure and allocation of responsibilities within the Shanghai Municipal People's Congress. Interview with Senior Shanghai Legislative Official, July 2012 (on file with author).

¹⁷⁵ Some internal working documents and notices are excluded from the system. 2004 Hunan Government Review Measures, *supra* note 162, art. 2.

¹⁷⁶ Under the Regulation, the following documents are reported to the local people's congresses at the corresponding level: provincial people's government and Changsha city people's government rules; normative documents of the provincial-level people's government and its subordinate departments, the Changsha city people's government and its subordinate departments, and the people's governments of autonomous prefectures and counties that are issued pursuant to a grant of authority in local, separate, or autonomous regulations; and decisions or orders of people's governments or documents of people's government general offices at the county level or above that touch on the rights or obligations of citizens and are universally applied. Resolutions or decisions of local people's congresses and standing committees at the county level and above are reported to the people's congress at the next higher level. Review organs may take action to correct normative documents that are issued in violation of lawful authority; restrict citizen rights or increase obligations; are in conflict with laws or regulations; or are "inappropriate." Hunan People's Congress Review Regulation, *supra* note 167, arts. 3, 4, 7.

"normative documents" for filing.¹⁷⁷ Such provisions are a tacit acknowledgement that local courts and procuratorates are issuing binding documents that alter citizen rights and duties in practice.

Some provincial-level organs have developed filing and review innovations. For example, some local filing and review provisions mandate electronic filing and review systems or establish procedures through which promulgating organs may formally appeal an adverse ruling on their normative documents.¹⁷⁸ Others provide for solicitation of opinions from outside experts or the general public during the review process.¹⁷⁹ Many local

¹⁷⁷ See, e.g., Anhui Sheng Geji Renmin Daibiao Dahui Changwu Weiyuanhui Shixing Guifanxing Wenjian Bei'an Shenchu de Guiding (安徽省各级人民代表大会常务委员会实行规范性文件备案审查的规定) [Anhui Province Provisions on People's Congress Standing Committees at All Levels Implementing Filing and Review of Normative Documents] (promulgated by the Anhui Province People's Cong. Standing Comm., Apr. 27, 2007, effective July 1, 2007) (State Council Legislative Affairs Office Website), art. 2(4); Heilongjiang Sheng Shishi "Zhonghua Renmin Gongheguo Geji Renmin Daibiao Dahui Changwu Weiyuanhui Jiandu Fa" Banfa (黑龙江省实施《中华人民共和国各级人民代表大会常务委员会监督法》办法) [Heilongjiang Province Implementing Measures for the PRC Law on Supervision by the People's Congress Standing Committees at All Levels] (promulgated by the Heilongjiang Province People's Cong. Standing Comm., Apr. 13, 2007, effective June 1, 2007) (State Council Legislative Affairs Office Website), art. 51.

¹⁷⁸ For examples of Internet systems, see Hainan Sheng Guifanxing Wenjian Zhiding yu Bei'an Dengji Guiding (海南省规范性文件制定与备案登记规定) [Hainan Province Provisions on Promulgating, Filing, and Registering Normative Documents] (promulgated by the Hainan Province People's Gov't, May 23, 2005, effective Sept. 1, 2005) (State Council Legislative Affairs Office Website), art. 24; Shanghai Shi Xingzheng Guifanxing Wenjian Zhiding he Bei'an Guiding (上海市行政规范性文件制定和备案规定) [Shanghai Municipality Provisions on Promulgating and Filing Administrative Normative Documents] (promulgated by the Shanghai Municipal People's Gov't, Jan. 19, 2010, effective May 1, 2010), art. 30. For appeals procedures in people's government filing and review work, see Shen, *supra* note 159, at 287–88.

¹⁷⁹ Zhejiang Sheng Geji Renmin Daibiao Dahui Changwu Weiyuanhui Guifanxing Wenjian Bei'an Shenchu Guiding (浙江省各级人民代表大会常务委员会规范性文件备案审查规定) [Zhejiang Province Provisions on Filing and Review of Normative Documents by People's Congress Standing Committees at All Levels] (promulgated by the Zhejiang Province People's Cong. Standing Comm., Nov. 23, 2007, effective Jan. 1, 2008) (State Council Legislative Affairs Office Website), art. 14 [hereinafter Zhejiang Filing and Review Provisions]; Yunnan Sheng Geji Renmin Daibiao Dahui Changwu Weiyuanhui Guifanxing Wenjian Bei'an Shenchu Guiding (云南省各级人民代表大会常务委员会规范性文件备案审查规定) [Yunnan Province Provisions on Filing and Review of Normative Documents by People's Congress Standing Committees at All Levels] (promulgated by the Yunnan Province People's Cong. Standing Comm., July 30, 2010, effective July 30, 2010) (Dayang Net), art. 9; Shanghai Shi Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Guifanxing Wenjian Bei'an Shenchu de Guiding (上海市人大常委会关于规范性文件备案审查的规定) [Shanghai Municipality Provisions on People's Congress Standing Committee Filing and Review of Normative Documents]

systems also establish robust provisions that set out legal responsibility for violations of filing and review requirements.¹⁸⁰

Nearly all provincial-level filing and review systems establish citizen review proposal mechanisms. People's government rules in 27 provinces contain provisions that empower citizens to raise proposals for the review of normative documents. Similarly, 29 provincial-level people's congress regulations establish citizen proposal mechanisms.¹⁸¹ Unlike the NPCSC and State Council provisions, however, some provincial-level systems mandate that review organs provide citizens with written notice of the review result within a set time period or issue public reports on review work.¹⁸² People's government rules in 17 provinces and people's congress regulations in 21 provinces require filing and review organs to provide some form of feedback on citizen review proposals.¹⁸³ In Hunan, both the people's government and people's congress

(promulgated by the Shanghai Municipal People's Cong. Standing Comm., Apr. 19, 2012, effective July 1, 2012) (Eastday), art. 7.

¹⁸⁰ For more robust responsibility systems, see generally Shen, *supra* note 159, at 288–98; 2011 FILING AND REVIEW, *supra* note 9, at 104; 2004 Hunan Government Review Measures, *supra* note 162, arts. 14, 18–19.

¹⁸¹ I have consulted citizen review proposal provisions in the current provincial-level people's government and people's congress rules and regulations on filing and review. On the people's government side, Chongqing, Guangxi, and Inner Mongolia do not provide for citizen proposals. On the people's congress side, Shanghai does not provide for such proposals in its filing and review regulations. Beijing's draft people's congress regulation on filing and review provides for citizen proposals, but as of August 2012, the regulation had not yet been promulgated. Some provincial-level units may provide for citizen proposals in internal working procedures. For an extensive but incomplete survey of citizen review proposal mechanisms in current legislation, see Wang Chunye (王春业), Falü Wenjian Shenchá de Gongmín Qidòng Yánjiú (法律文件审查的公民启动研究) [STUDIES ON CITIZEN INITIATION OF REVIEW OF LEGAL DOCUMENTS] 67–76 (2012).

¹⁸² See, e.g., Zhejiang Filing and Review Provisions, *supra* note 179, arts. 18–20 (requiring the relevant organs to inform citizens of the review result within 15 days of concluding the review process and mandating the publication of annual reports on review work); Fujian Sheng Geji Renmin Daibiao Dahui Changwu Weiyuanhui Guifanxing Wenjian Bei'an Shenchá Guiding (福建省各级人民代表大会常务委员会规范性文件备案审查规定) [Fujian Province Provisions on Filing and Review of Normative Documents by People's Congress Standing Committee at All Levels] (promulgated by the Fujian Province People's Cong. Standing Comm., Dec. 3, 2007, effective Jan. 1, 2008) (State Council Legislative Affairs Office Website), arts. 10, 21 (requiring the relevant organs to inform citizens of the review result within ten days of concluding the review process).

¹⁸³ Feedback is not required in the people's government review process in Beijing, Hainan, Hubei, Jiangsu, Jiangxi, Qinghai, Shandong, Shanghai, Sichuan, Xinjiang, and Tibet, and in the people's congress review process in Guangdong, Hainan, Hebei, Henan, Hubei, Jiangsu, Shanxi, and Tianjin. Where feedback is required in some form,

filing and review systems allow citizens and state organs to submit review proposals. The Hunan systems require filing and review offices to confirm acceptance of such proposals, review them within set time periods, and inform citizens of the result of the review in writing.¹⁸⁴ Despite such provisions, the number of citizen proposals in Hunan is relatively small. The Hunan People's Congress has received only about twenty citizen review proposals since 2008, while the Hunan People's Government received sixteen per year in 2010 and 2011.¹⁸⁵

Hunan provides an example of a local filing and review system that must be considered in the context of broader administrative law reforms. Hunan requires the LAOs of administrative organs to review all normative documents for legality *prior to publication*. People's governments must review and approve all departmental normative documents that touch on the "basic interests of the masses," "matters that have attracted great interest in society," and other sensitive issues prior to publication.¹⁸⁶ Hunan has also decreed that

the type of feedback varies. In Heilongjiang, for example, a reply is required only if the people's congress declines to conduct a full review of the proposal. In some provinces, review itself is discretionary. In others, provisions on time periods appear to leave room for delay.

¹⁸⁴ 2004 Hunan Government Review Measures, *supra* note 162, art. 14; Hunan Government Review Work Procedures, *supra* note 164, art. 9; Hunan Notice on Filing and Review Problems, *supra* note 164, art. 5; Hunan Normative Document Management Measures, *supra* note 164, art. 22(2). For the relevant provisions on the legislative side, see Hunan People's Congress Review Regulation, *supra* note 167, arts. 9, 17; Hunan People's Congress Review Work Procedures, *supra* note 168, arts. 4, 12 (requiring review opinions to be raised within twenty days of receipt and citizens to be informed *in writing* within ten days of completion of the entire review process).

¹⁸⁵ Meeting with Senior Hunan Legislative Officials, July 2012 (on file with author). For proposals filed with the provincial government in 2010 and 2011, see Hunan Sheng Zhengfu Fazhi Bangongshi 2010 Nian Gongzuo Zongjie he 2011 Nian Gongzuo Anpai (湖南省人民政府法制办公室 2010 年工作总结和 2011 年工作安排) [Hunan Province People's Government Legislative Affairs Office, Work Summary for 2010 and Work Arrangements for 2011], Hunan Sheng Renmin Zhengfu Fazhi Wang (湖南省人民政府法制网) [HUNAN PROVINCE PEOPLE'S GOV'T LEGISLATIVE AFFAIRS OFFICE ONLINE], Jan. 27, 2011; Hunan Sheng Renmin Zhengfu Fazhi Bangongshi 2011 Nian Gongzuo Zongjie he 2012 Nian Gongzuo Anpai (湖南省人民政府法制办公室 2011 年工作总结和 2012 年工作安排) [Hunan Province People's Government Legislative Affairs Office Work Summary for 2011 and Work Arrangements for 2012], Hunan Sheng Renmin Zhengfu Wang (湖南省人民政府网) [HUNAN PROVINCE PEOPLE'S GOV'T ONLINE], Feb. 6, 2012.

¹⁸⁶ Hunan Normative Document Management Measures, *supra* note 164, arts. 13, 19. Similarly, Hunan People's Congress officials noted that many lower-level organs report rules or normative documents to the relevant local people's congress prior to issuance, allowing problems to be identified before such rules and normative documents become effective. Meeting with Senior Hunan Legislative Officials, June 2012 (on file with author).

all normative documents automatically expire after five years and must be reissued, a requirement that ensures that pre- and post-promulgation review processes are repeated periodically.¹⁸⁷ Government reports note that these and other measures are designed to address some of the deficiencies of a "pure" filing and review system and boast that Hunan has significantly decreased both the number of normative documents issued and the number of conflicts.¹⁸⁸

Local statistics are neither comprehensive nor consistent, and individual provinces vary in their level of reporting. Based on the scattered statistics available, we can construct a partial picture of filing burdens and conflicts uncovered at the provincial level. State Council documents report that China's thirty-one provincial-level people's governments received a total of 11,124 items for filing and found 269 problems in 2009.¹⁸⁹ Statistics in documents on provincial people's government filing and review work in 2010 and 2011 report from 125 (Qinghai, 2011) to 431 (Sichuan, 2011) normative documents received for filing and review.¹⁹⁰ In recent years, the Hunan People's Government has received more than 1,000 documents for filing and review annually.¹⁹¹ Despite this heavy filing burden, the Hunan People's Government requires review of all filed documents, multiple levels of review within the Filing and Review and Translation and Examination Department, and the timely correction of all problems identified.¹⁹² With only three staff members, it seems doubtful that

¹⁸⁷ "Temporary" or "trial" normative documents expire after two years. Hunan Administrative Procedure Provisions, *supra* note 159, art. 51; Hunan Normative Document Management Measures, *supra* note 164, art. 26.

¹⁸⁸ Hunan Implements "Three Unifications," *supra* note 172; Zhengfu Fazhi Gongzuo (政府法制工作) [Administrative Legal Affairs], Hunan Sheng Renmin Zhengfu Fazhi Wang (湖南省人民政府法制网) [HUNAN PROVINCE PEOPLE'S GOV'T LEGISLATIVE AFFAIRS OFFICE ONLINE], Sept. 24, 2009.

¹⁸⁹ Annual Report on Rule of Law Construction (2009), *supra* note 147, at § 5(4). The *People's Daily Online* reported that from 2004 to mid-2008, provincial-level people's governments received a total of 38,892 normative documents for filing and corrected problems in 1,971 of them. *Filing and Review Controls Documents*, *supra* note 171.

¹⁹⁰ Other examples include Gansu 2011 (234); Guizhou 2011 (288); Qinghai 2011 (125); Shaanxi 2010 (201); Shandong 2010 and 2011 (261 and 305); Sichuan 2011 (421); Shanghai 2010 and 2011 (209 and 259).

¹⁹¹ From August 2005 to December 2008, the provincial government reportedly received 3,096 normative documents for filing, identified 210 problems, and corrected 176 of the problems. Hunan Implements "Three Unifications," *supra* note 172. It received a total of 1,874 and 1,136 documents for filing in 2009 and 2011, respectively.

¹⁹² Hunan Implements "Three Unifications," *supra* note 172; Yin Pingsheng (尹平生), Sheng Zhengfu Fazhiban Bei'an Shenchu he Yishen Chu (省政府法制办备案审查和译审处) [Provincial Government Legislative Affairs Office Filing and Review and

the Filing and Review and Translation and Examination Department reviews and corrects all normative documents in practice.

Data obtained from local legislative officials and 2012 provincial people's congress work reports suggest that filing burdens are more modest on the people's congress side. These sources report filing burdens ranging from 15 or 16 items (Shanghai, Qinghai) to 221 items (Anhui) annually.¹⁹³ The Hunan People's Congress receives about 120 rules and normative documents for review annually. It currently reviews all filed rules and normative documents (although it is not required to do so) and finds only a small number of problems.¹⁹⁴ According to one local legislative official in Shanghai, the number of government rules received for filing decreased significantly after the NPCSC adopted the Administrative Licensing Law (which restricted the power of local people's governments to create license and fee requirements).¹⁹⁵ When statistics on legislative conflicts identified or citizen review proposals are reported in provincial people's congress documents, the numbers are generally small.¹⁹⁶

Information on filing and review infrastructure at the sub-provincial (city, prefecture, and county) level is limited. A 2011 volume reports that local

Translation and Examination Department], Hunan Sheng Renmin Zhengfu Fazhi Wang (湖南省人民政府法制网) [HUNAN PROVINCE PEOPLE'S GOV'T LEGISLATIVE AFFAIRS OFFICE ONLINE], June 9, 2008.

¹⁹³ The Shanghai Municipal People's Congress received 50 to 60 government rules for filing and review prior to 2007. Since 2007, the number has dropped to 15 or 16 rules annually (a total of 88). Interview with Senior Shanghai Legislative Official, July 2012 (on file with author). The Gansu Province People's Congress received 591 items for filing and review from the end of 2008 to May 2011 (roughly 240 items per year). Quan Sheng Shi Zhou Renda Guifanxing Wenjian Bei'an Shenchu Gongzuo Huiyi Zhaokai (全省市州人大规范性文件备案审查工作会议召开) [Meeting on Normative Document Filing and Review Work in Province, City, and County People's Congresses Opens], Gansu Sheng Zhengfu Fazhi Xinxin Wang (甘肃省人民政府法制信息网) [GANSU PROVINCE PEOPLE'S GOV'T. LEGISLATIVE AFFAIRS OFFICE INFO. ONLINE], Aug. 26, 2011. Provincial-level People's Congress Standing Committee Work Reports from the following provinces reported the number of items received for filing and review in 2011: Anhui (221); Guizhou (67); Jiangsu (33); Shanxi (103); Qinghai (16); Yunnan (56). These reports may be located using a simple Internet search for "Sheng Renda Changweihui Gongzuo Baogao 2012."

¹⁹⁴ Officials responsible for filing and review noted that the provincial people's congress reviews all documents because the number filed is relatively small. They also stated that the people's congress could shift to passive review if the number were to increase. Meeting with Senior Hunan Legislative Officials, June 2012 (on file with author).

¹⁹⁵ Interview with Senior Shanghai Legislative Official, July 2012 (on file with author).

¹⁹⁶ This is apparent from a review of the reports cited above. Wang Kai makes a similar observation. Wang, *supra* note 34, at 309-13.

people's congresses in about 20% of the 300 cities and prefectures with districts in China have established filing and review offices, while an additional 66% have assigned filing and review work to an existing organ. Some major cities with authority to issue legislation have issued their own filing and review regulations.¹⁹⁷ Of 2,800 county-level people's congresses, only about 2% have established filing and review offices, while 60% have designated an existing organ to carry out review work. Many sub-provincial governments lack specialized organs, and filing and review offices at local levels are often shells with only one or two employees and minimal budgets. As such, filing and review work at the local level is problematic.¹⁹⁸ The capacity limitations of sub-provincial units pose a significant challenge for the system because the number of normative documents reviewed at the sub-provincial level is significantly larger than that at the provincial level.¹⁹⁹

Consistent with reform in China generally, the filing and review system has evolved in a piecemeal manner. While this complex, multi-level system has addressed some deficiencies, it is still a work in progress. Local filing and review systems remain undeveloped, and key legislative issues remain unresolved. In the words of Professor Wang Kai, the system's "complexity is a kind of disordered complexity full of vagueness, chaos, and uncertainty . . . an 'excessive complexity' that leads to unsatisfying implementation results."²⁰⁰ Part III examines key features of this system as products of capacity challenges.

III. KEY FEATURES OF THE FILING AND REVIEW SYSTEM AS PRODUCTS OF CAPACITY CHALLENGES

Part III analyzes five features of the filing and review system in greater detail, including its bifurcated, multi-level structure; the limited capacity of the filing and review system to address constitutional conflicts and normative documents; the emphasis on consultative practices, consensus building and self-correction; and the creation of citizen review proposal mechanisms. This Part also analyzes China's large-scale legislative "clean-up" campaigns as a core supplement to the filing and review process. Most of these features have either been ignored or have generated confusion in the English-language literature on Chinese law. While these features are not the product of any single factor,

¹⁹⁷ 2011 FILING AND REVIEW, *supra* note 9, at 15.

¹⁹⁸ *Id.* at 138–40. See, e.g., Hunan Adopts Beneficial Measures, *supra* note 172.

¹⁹⁹ In Hunan, for example, sub-provincial governments received around 20,000 normative documents for filing and review from August 2005 to the end of 2008. Hunan Implements "Three Unifications," *supra* note 172.

²⁰⁰ Wang, *supra* note 34, at 313.

the problem of capacity shapes all of them. By exploring them through the lens of capacity, we can explain what appear to be aberrations in the day-to-day operation of the filing and review system, identify important limitations in this formal system, and better understand the ways in which the roles of courts and citizens have expanded to help the system cope with these limitations.

A. Fragmented Filing and Review Structure

In theory, the NPC and its Standing Committee exercise final authority to supervise all lower-level legislation. Under China's constitutional structure, the NPC is the supreme organ of state power. The NPC and NPCSC are charged with supervising the enforcement of and interpreting the Constitution and law. The Constitution and Legislation Law provide that the NPCSC exercises the power to amend or annul administrative regulations, decisions, and orders and local, autonomous, and separate regulations. However, Chinese scholars confirm that as the supreme organ of state power with general supervisory authority, the NPC theoretically has the authority to review, annul, and amend all legislation in the Chinese political-legal system, including ministry and local rules.²⁰¹

In both structure and practice, however, legislative power is fragmented. At the national level, the bifurcation of legislative power between the NPC and State Council is readily apparent.²⁰² The Constitution and Legislation Law establish a very general framework for administrative lawmaking.²⁰³ Within this general framework, the State Council issues its own detailed procedures and guidelines for the classification of legislation within the administrative system, the promulgation of administrative regulations and rules, and the implementation of campaigns to "clean up" outdated or conflicting

²⁰¹ Fan, *supra* note 21, at 40, 43; E-mail from Shen Kui to Keith Hand and Neysun Mahboubi, posted to the China Law List, June 21, 2011 (on file with author). Article 37 of the NPC Organic Law provides that the work of special committees includes examination and reporting of items that conflict with the Constitution and national law. The list of items includes the normative documents of State Council ministries and commissions and provincial-level people's governments. NPC Organic Law, *supra* note 67, art. 37.

²⁰² An argument could be made that legislative power at the central level is actually *trifurcated*, as the Supreme People's Court legislates in all but name when it issues some judicial interpretations. See *infra*, Part IV(A).

²⁰³ For example, while the Legislation Law provides detailed procedures on the promulgation of laws, it merely directs the State Council to issue its own procedures for promulgating rules "with reference to the provisions of Chapter III of this Law." Legislation Law, *supra* note 21, art. 74.

legislation.²⁰⁴ The State Council and its subordinate ministries and commissions also exercise the authority to interpret administrative regulations and rules.²⁰⁵ Senior legislators emphasize that people's congresses and their standing committees should not interfere unduly in the work of administrative organs.²⁰⁶

Legislative supervision authority is consistent with this bifurcated structure. Thus, the NPC exercises supervision over NPCSC laws. The NPCSC exercises supervision over State Council administrative regulations, local regulations, and SPP or SPC judicial interpretations. The State Council issues procedures on the filing and review of ministry and provincial rules and exercises the authority to resolve conflicts between rules. The bifurcated supervision structure is embedded to such an extent that even NPCSC LAC sources indicate that it is "not suitable" for people's congresses to directly

²⁰⁴ Guowuyuan Guanyu Fabu "Guojia Xingzheng Jiguan Gongwen Chuli Banfa" de Tongzhi (国务院关于发布《国家行政机关公文处理办法》的通知) [State Council Notice on Issuance of Measures for Handling State Administrative Documents] (promulgated by the St. Council, Aug. 24, 2000, effective Jan. 1, 2001), *Zhonghua Renmin Gongheguo Zhongyang Renmin Zhengfu* (中华人民共和国中央人民政府) [THE CENTRAL PEOPLE'S GOV'T ONLINE]; Guowuyuan Guizhang Zhiding Chengxu Tiaoli (国务院规章制定程序条例) [State Council Regulation on Procedures for Formulating Rules] (promulgated by the St. Council, Nov. 16, 2001, effective Jan. 1, 2002), *Zhonghua Renmin Gongheguo Zhongyang Renmin Zhengfu* (中华人民共和国中央人民政府) [THE CENTRAL PEOPLE'S GOV'T ONLINE]; Guowuyuan Xingzheng Fagui Zhiding Chengxu Tiaoli (国务院行政法规制定程序条例) [State Council Regulation on Procedures for Formulating Administrative Regulations] (promulgated by the St. Council, Nov. 16, 2001, effective Jan. 1, 2002), *Zhonghua Renmin Gongheguo Zhongyang Renmin Zhengfu* (中华人民共和国中央人民政府) [THE CENTRAL PEOPLE'S GOV'T ONLINE].

²⁰⁵ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falü Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the NPCSC on Strengthening Legal Interpretation Work] (promulgated by the Nat'l People's Cong. Standing Comm., June 10, 1981, effective June 10, 1981) (Chinalawinfo) [hereinafter 1981 Resolution on Interpreting Law], art. 3; Guowuyuan Bangongting Guanyu Xingzheng Fagui Jieshi Quanxian he Chengxu Wenti de Tongzhi (国务院办公厅关于行政法规解释权限和程序问题的通知) [State Council General Office, Notice on Problems Related to the Limits of Authority and Procedure for Interpreting Administrative Regulations] (promulgated by the St. Council Gen. Office, May 10, 1999, effective May 10, 1999) (Chinalawinfo) [hereinafter State Council General Office Interpretation Notice].

²⁰⁶ As Wang Hanbin has noted, "with respect to the daily work of the government, the people's congress and their standing committees do not intervene and do not exceed their functions by meddling in the affairs of others in order to avoid interfering in the government's exercise of its official power as provided in the Constitution." Song Wei (宋伟), *Difang Guojia Zhengquan Tizhi de Zhongda Gaige* (地方国家政权体制的重大改革) [Major Reform in the System of State Political Authority at the Local Level], *Renmin Wang* (人民网) [PEOPLE'S DAILY ONLINE], July 29, 2006.

supervise government departments and review their rules and normative documents.²⁰⁷ As discussed in Part III(D), the ability of the NPCSC to exercise its basic constitutional authority to amend or annul problematic State Council administrative regulations is limited in practice.

There is one partial exception to the flow of supervision authority at the national level. Provincial-level people's congresses file local regulations with both the NPCSC and the State Council. Both entities may review these regulations for consistency with other legislation.²⁰⁸ However, the State Council has no power to amend or annul local regulations. In the event it finds a conflict between a local regulation and a ministry rule and determines that the rule should be applied, the conflict must be submitted to the NPCSC for a final decision.²⁰⁹ Similarly, if the State Council finds that a local regulation conflicts with an administrative regulation, it may only report the finding to the NPCSC for a final decision.²¹⁰ At least on paper, this mixed supervision authority preserves the formal constitutional supremacy of the people's congresses. As the exception demonstrates, the authority to amend or annul legislation is related to but distinct from the authority to accept legislation for filing and review it.

Legislative supervision authority is also multi-level in nature. As discussed in Part II(E), the bifurcated structure above is replicated, with minor variations, at progressively lower levels of the system. Chinese sources refer to this as a system with "four levels of government and three levels of supervision."²¹¹ The resulting system establishes a kind of belt and suspenders structure in which people's governments at lower levels of the system are subject to both vertical and horizontal lines of supervision authority.

This supervision structure makes sense in a system in which the political capacity of the NPCSC and lower-level people's congresses is limited. While formally subject to the supervision of the NPC and NPCSC, the State Council exercises considerable political power and sometimes disregards its constitutionally inferior position in practice.²¹² Similar disparities between the

²⁰⁷ 2011 FILING AND REVIEW, *supra* note 9, at 94–95. See also Wang, *supra* note 34, at 287.

²⁰⁸ 1987 Filing Notice *supra* note 76; Local Organic Law, *supra* note 21, art. 7; 2001 Filing Regulation, *supra* note 138, arts. 2, 10.

²⁰⁹ Legislation Law, *supra* note 21, art. 86(2); 2001 Filing Regulation, *supra* note 138, art. 13.

²¹⁰ Legislation Law, *supra* note 21, arts. 88(2) and (3); 2001 Filing Regulation, *supra* note 138, art. 12.

²¹¹ See, e.g., Guowuyuan 2007 Nian Fazhi Gongzuo Zongshu (国务院 2007 年法制工作综述) [SUMMARY OF STATE COUNCIL LEGAL WORK IN 2007]; Renmin Ribao (人民日报) [PEOPLE'S DAILY], Dec. 29, 2007, at § 4.

²¹² JINSONG JIANG, THE NATIONAL PEOPLE'S CONGRESS OF CHINA 216–17 (2003); Perry Keller, *The National People's Congress and the Making of National Law*, in LAW-MAKING

formal constitutional authority of people's congresses and the actual political power exercised by administrative organs exist at lower levels of the system.²¹³ Moreover, the State Council exercises direct "leadership relations" (领导关系) (*lingdao guanxi*) over its ministries and commissions and over provincial people's governments.²¹⁴ Identifying "leadership relations" is important in understanding the exercise of power in China's political-legal system.²¹⁵ People's governments that exercise direct leadership relations over subordinate departments or lower-level people's governments may be more effective in implementing the law and ensuring compliance on issues related to conflicts. In this context, the State Council is granted wide latitude to review legislation issued by administrative organs.

Perhaps more importantly, filing and review organs lack the organizational capacity to review all legislation in China's multi-level system. A weak and organizationally constrained NPCSC cannot even review all of the local regulations that provincial-level people's congresses file annually. It simply lacks the capacity to review an additional 700 to 1,000 ministry and provincial-level rules and the even larger number of normative documents that administrative organs issue each year. Similarly, the State Council does not have the capacity to monitor all local normative documents. The only practical solution to these capacity issues is to divide responsibility for supervising this large body of legislation.

While this multi-level structure helps central organs manage some capacity challenges, it also creates new ones. As discussed in Part II(E), many documents are found at the sub-provincial level. Although this filing and review burden is spread over thousands of jurisdictions, the capacity problems that central or provincial-level filing and review organs face are also magnified at the sub-provincial level. Many sub-provincial jurisdictions lack specialized

IN THE PEOPLE'S REPUBLIC OF CHINA 75, 79–81 (2000); Wang, *supra* note 34, at 291, note 33; TANNER, *supra* note 20, at 47–49, 121, 129.

²¹³ Paler, *supra* note 6, at 310; Young Nam Cho, Local People's Congresses in China: Development and Transition 44–45, 158, 164 (2009).

²¹⁴ Similarly, local people's governments exercise leadership relations over their subordinate departments.

²¹⁵ Constitution, *supra* note 9, art. 89(3)–(4), 108. For the importance of leadership relations, see KENNETH LIEBERTHAL, GOVERNING CHINA 186–88 (2004). It should be noted here that people's congresses and their standing committees enjoy "supervision" and "guidance" relations, not direct "leadership" relations, with lower-level people's congresses. This status implies that people's congresses exercise more limited control over lower-level people's congresses than people's governments exercise over their subordinate ministries and departments. For a discussion of these different types of relationships, see Song, *supra* note 206; Shenme Shi Renmin Daibiao Dahui Zhidu? (什么是人民代表大会制度?) [*What Is the People's Congress System?*], Zhongguo Renda Wang (中国人大网) [THE NAT'L PEOPLE'S CONG. ONLINE], Dec. 7, 2000.

filing and review offices, offices responsible for filing and review tend to be weak and understaffed, and the technical capacity of officials responsible for this work is limited. In addition, central and provincial legislative organs must work to build the capacity of local filing and review organs and monitor their work, a significant task that adds to their existing burdens.

B. Legislative "Clean-Up" Campaigns

Campaign-style legislative clean-up (清理) (*qingli*) work is an important supplement to the filing and review process. In a legislative clean-up campaign, state organs and their subunits undertake systematic and comprehensive review of *their own* legislation and amend or annul provisions that conflict with higher-level legislation, are out of date, or are inconsistent.²¹⁶ The goal of clean-up work is to preserve the unity of the legal system and to facilitate the codification of Chinese legislation.²¹⁷ Although legislative clean-up work is similar to filing and review in some respects, the two processes are distinct.²¹⁸

China has engaged in periodic legislative clean-up campaigns throughout the reform era. Central organs initiated a comprehensive campaign in 1987 to clean up laws and administrative regulations issued prior to the reform era.²¹⁹ Beginning in 2008, the NPCSC launched a system-wide legislative clean-up campaign as a core component of the effort to establish a "socialist legal system with Chinese characteristics" by 2010. This campaign was

²¹⁶ Cai, *supra* note 5, at 56; Zhao Xibin (赵惜兵), Guanyu Fa de Qingli de Jige Wenti (关于法的清理的几个问题) [On Several Problems in Cleaning-up Law], Zhongguo Renda Wang (中国人大网) [THE NAT'L PEOPLE'S CONG. ONLINE], Aug. 24, 2009. With regard to out-of-date legislation, the State Council recently deleted all references to "speculation and profiteering" and the "planned economy" in its administrative regulations. Zhang Yang (张洋), Wei Jianshe Zhongguo Tese Shehuizhuyi Fazhi Zhengfu Nuli Fendou (为建设中国特色社会主义法治政府努力奋斗) [Earnestly Struggle to Build a Socialist Rule of Law Government with Chinese Characteristics], Zhongguo Renda Wang (中国人大网) [THE NAT'L PEOPLE'S CONG. ONLINE], Dec. 29, 2011.

²¹⁷ Cai, *supra* note 5, at 56; Zhongguo Shouci Da Guimo Falü Qingli Qidong: Fadianhua Shi Lifa Mubiao (中国首次大规模法律清理启动法典化是立法目标) [China Engages in Large Scale Clean-up of Legislation for the First Time: The Goal is Codification of the Law], Zhongguo Renda Wang (中国人大网) [THE NAT'L PEOPLE'S CONG. ONLINE], June 17, 2008 [hereinafter *China Engages in Large Scale Clean-up*].

²¹⁸ See, e.g., Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui 2011 Gongzuo Baogao (全国人民代表大会常务委员会 2011 工作报告) [2011 NPCSC WORK REPORT], Xinhua Wang (新华网) [XINHUA], Mar. 10, 2011 (stating that the NPCSC would "launch concentrated clean-up work for laws and regulations and strengthen filing and review for normative documents").

²¹⁹ Zhao, *supra* note 216.

unprecedented in its scale.²²⁰ Subsequently, the State Council, local people's congresses, and the SPC undertook a comprehensive review and clean-up of their own normative documents and those of their departments.²²¹ This effort reportedly resulted in the annulment or amendment of over 2,000 items.²²² China has undertaken periodic targeted clean-up campaigns following the adoption of important legislation such as the Administrative Punishment Law or to implement new treaty obligations such as its WTO commitments.²²³ Provincial governments have also undertaken their own clean-up campaigns.²²⁴

²²⁰ Kaizhan Falü Qingli Gongzuo, Quebao Lifa Mubiao Shixian (开展法律清理工作 确保立法目标实现) [*Develop the Work of Cleaning-up Law, Ensure that Legislative Goals Are Realized*], Zhongguo Renda Wang (中国人大网) [THE NAT'L PEOPLE'S CONG. ONLINE], Aug. 27, 2009 [hereinafter *Develop the Work of Cleaning-up Law*]; *China Engages in Large Scale Clean-up*, *supra* note 217.

²²¹ Guowuyuan Bangongting, Guanyu Zuohao Guizhang Qingli Gongzuo Youguan Wenti de Tongzhi (国务院办公厅关于做好规章清理工作有关问题的通知) [State Council General Office, Notice on Relevant Issues in Doing the Work of Cleaning Up Rules Well] (promulgated by the St. Council Gen. Office, Apr. 29, 2010, effective Apr. 29, 2010) (State Council Legislative Affairs Office Website) [hereinafter 2010 Notice on Clean-up of Rules]; Guanyu Zuohao Difangxing Fagui Qingli Gongzuo de Yijian (关于做好地方性法规清理工作的意见) [Opinion on Doing the Work of Cleaning up Local Regulations Well] (promulgated by the Nat'l People's Cong., Apr. 15, 2010, effective Apr. 15, 2010) (JIANGXI PEOPLE'S CONG. ONLINE) [hereinafter Local Regulation Clean-up Opinion]; Sifa Jieshi Jizhong Qingli Renwu Mingnian 8 Yuedi Qian Wancheng (司法解释集中清理任务明年 8 月底前完成) [*The Task of Concentrated Clean-up of Judicial Interpretations Will be Completed Before the End of Next August*], Renmin Fayuan Bao (人民法院报) [PEOPLE'S COURT DAILY ONLINE], Dec. 24, 2011.

²²² THE SOCIALIST SYSTEM OF LAWS, *supra* note 14, at § 1.

²²³ For example, specialized clean-up campaigns were initiated in 1996 to examine legislation for conformity with the Administrative Punishment Law; in 2000 to review legislation for conformity with WTO commitments; in 2003 to review legislation for conflicts with the Administrative Licensing Law; after 2006 to implement the Supervision Law; and in 2011 to ensure conformity with the 2011 Administrative Coercion Law. See Zhu, *supra* note 2, at 162-63; Linian Lai An Guowuyuan Youguan Bushu Shici Jizhong Qingli Fagui Guizhang (历年来按国务院有关部署十次集中清理法规规章) [*Over the Years We Have Engaged in Concentrated Clean-up Of Regulations and Rules Ten Times, According to the Relevant State Council Deployments*], Renmin Ribao (人民日报) [PEOPLE'S DAILY], Mar. 28, 2007; Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongzuo Baogao 2012 Nian (全国人民代表大会常务委员会工作报告 2012 年) [2012 NPCSC Work Report], Zhonghua Renmin Gongheguo Zhongyang Renmin Zhengfu (中华人民共和国中央人民政府) [THE CENTRAL PEOPLE'S GOV'T ONLINE], Mar. 19, 2012, at § 1(3).

²²⁴ See, e.g., Hunan Implements "Three Unifications," *supra* note 172.

Legislative clean-up campaigns focus on mobilizing state organs at progressively lower levels of the system to identify and root out legislative conflicts. Higher-level organs issue general instructions for state organs under their supervision to clean up conflicting legislation and report results by set deadlines.²²⁵ In some cases, supervision organs may enlist lower-level organs in their own clean-up efforts. In 2008, for example, the NPCSC directed state organs such as the State Council and the SPC to assist it in reviewing more than 200 national laws.²²⁶

The number of items reviewed in the course of comprehensive clean-up campaigns may be significantly larger than the number of documents filed for review in a given year. For example, in the 2007 clean-up campaign, State Council ministries and commissions reportedly reviewed 12,695 central government rules and amended or annulled 1,898 of them.²²⁷ In October 2008, Hunan government entities engaged in a massive campaign to clean up more than 76,600 effective normative documents, a campaign that reportedly resulted in the annulment of more than 35,600 documents.²²⁸ While it is doubtful that all of these documents were reviewed in detail, it is clear that the scale of some of these campaigns is quite large.

The continued implementation of legislative clean-up campaigns highlights capacity limitations in the filing and review system. If filing and review were an effective method of supervising legislation, clean-up campaigns would be largely redundant. Even after two decades of development, review organs cannot detect and correct most of the conflicts in the legislation they receive for filing. To address these gaps, the central government has little choice but to initiate periodic campaigns to mobilize lower-level organs to police their own legislation. Notices initiating clean-up campaigns refer to

²²⁵ See, e.g., Guowuyuan Bangongting Guanyu Kaizhan Xingzheng Fagui Guizhang Qingli Gongzuo de Tongzhi (国务院办公厅关于开展行政法规规章清理工作的通知) [State Council General Office, Notice on Launching Clean-up Work for Administrative Regulations and Rules] (promulgated by the St. Council Gen. Office, Feb. 25, 2007, effective Feb. 25, 2007), Zhonghua Renmin Gongheguo Zhongyang Renmin Zhengfu (中华人民共和国中央人民政府) [THE CENTRAL PEOPLE'S GOV'T ONLINE] [hereinafter 2007 State Council Clean-up Notice]; 2010 Notice on Clean-up of Rules, *supra* note 221, § 3; Local Regulation Clean-up Opinion, *supra* note 221.

²²⁶ *Develop the Work of Cleaning-up Law*, *supra* note 220. The State Council in turn mobilized its own departments to assist with the NPCSC request. Guowuyuan Bangongting Guanyu Zuohao Falü Qingli Gongzuo de Tongzhi (国务院办公厅关于做好法律清理工作的通知) [State Council General Office, Notice on Doing the Work of Clean-up of Laws Well] (promulgated by the St. Council Gen. Office, Aug. 8, 2008, effective Aug. 8, 2008) (Chinalawinfo); Local Regulation Clean-up Opinion, *supra* note 221, § 4.

²²⁷ Li, *supra* note 3.

²²⁸ Hunan Implements "Three Unifications," *supra* note 172.

such work as “urgent” or of “great importance.”²²⁹ Similarly, Chinese scholars and officials emphasize that frequent, systematic legislative clean-up work must be undertaken to maintain the unity of the legal system.²³⁰ Legislative clean-up campaigns provide an important supplement to a filing and review system plagued by capacity problems.

C. Gaps at the Highest and Lowest Levels of the Legislative Hierarchy

The filing and review system contains gaps at both the highest and lowest levels of the legislative hierarchy. On paper, the Constitution is “fundamental law” and has “supreme legal effect.” The Legislation Law confirms this status and provides for review of legislation for consistency with the Constitution.²³¹ Interestingly, the NPCSC LAC’s explanation of the Legislation Law indicates that early drafts of the law did not include the Constitution in the provisions on legislative hierarchy. The Constitution was added after participants in the drafting process argued that it would be improper to exclude it.²³² As this source suggests, the Constitution was included largely for theoretical and political reasons.

The filing and review system was not intended as an embryonic form of constitutional review. Some commentators have characterized it as such, and Chinese citizens filed a series of early review proposals with the NPCSC in the hopes of establishing constitutional review precedents. However, NPC laws are not subject to review by any state organ.²³³ In theory, the NPC supervises NPCSC laws, but it has not carried out this function in practice. The Legislation Law makes no provision for citizens or other state entities to request review of NPCSC laws.²³⁴ Moreover, only the NPCSC exercises the power to interpret the Constitution. NPC work organs and special committees are responsible for managing filing and conducting initial reviews, but they

²²⁹ See, e.g., 2007 State Council Clean-up Notice, *supra* note 225, art. 3; 2010 Notice on Clean-up of Rules, *supra* note 221, § 1.

²³⁰ Cai, *supra* note 5, at 56; *China Engages in Large Scale Clean-up*, *supra* note 217.

²³¹ Constitution, *supra* note 9, Preamble, art. 5; Legislation Law, *supra* note 21, arts. 78, 88.

²³² LEGISLATION LAW EXPLANATION, *supra* note 44, at 230–31.

²³³ Wang Xiuzhe (王秀哲), Gongmin Qidong Weixian Shencha de Falü Kunjing yu Zhidu Wanshan (公民启动违宪审查的法律困境与制度完善) [*Legal Predicament and System Reform of Citizens Initiating Constitutional Review*], Beifang Faxue (北方法学) [N. LEGAL SCI.], Feb. 2, 2010, at § 2.

²³⁴ Legislation Law, *supra* note 21, arts. 89, 90. In the case of administrative regulations, the Legislation Law empowers the NPCSC to annul them if they conflict with the Constitution and laws. Legislation Law, *supra* note 21, art. 88.

have no formal power to annul or amend conflicting legislation or interpret the Constitution. Their work cannot be considered “constitutional review” of legislation.²³⁵ As noted above, legislators rejected proposals to include provisions for a constitutional supervision committee in the Legislation Law and the Supervision Law.

The NPCSC lacks the political capacity to resolve sensitive constitutional conflicts through the filing and review process. As I have argued elsewhere, there are tensions between constitutional provisions on Party leadership and those on citizen rights and the legal supremacy of the Constitution. These tensions are the subject of ongoing contention in China’s political-legal system. In this context, every act of interpreting and applying the Constitution implicates fundamental and unresolved political questions. The NPCSC is poorly positioned to resolve such constitutional conflicts through an adjudicative process. In the current political-legal environment, constitutional conflicts are more likely to be resolved through the political process.²³⁶

Gaps also exist at the bottom of the hierarchy. Some normative documents do not fall within the scope of the filing and review system. The Supervision Law’s major contribution was to expand filing and review to include a *limited* range of normative documents. The law does not address certain normative documents.²³⁷ For example, the law does not mandate the filing and review of administrative department “orders” and “decisions.” In some cases, provincial-level filing and review provisions cover a broader range of normative documents.²³⁸ However, many normative documents with general binding legal effect have been excluded from the process.

²³⁵ Wen & Zhang, *supra* note 77; Cai, *supra* note 74; Wang, *supra* note 34, at 295, 299.

²³⁶ For a discussion of these dynamics, see Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 E. ASIA L. REV. 53, 79–87 (2012). Chinese scholars have also identified the political nature of such claims as an obstacle to handling them in the filing and review process. See, e.g., *Channels for Resolving Conflicts*, *supra* note 16 (statements of senior scholars Jiao Hongchang and Hu Jinguang on obstacles to formal constitutional review); Huang Jinrong (黄金荣), “Gongyi Shangshu” de Xingdong Luoji (“公益上书”的行动逻辑) [*The Logic of Action in Petitioning for the Public Interest*], Fazhi yu Shehui Fazhan (法制与社会发展) [DEVELOPMENT OF THE LEGAL SYSTEM AND SOCIETY], no. 4, 2010, at 135–37; Wang, *supra* note 233, at § 4.

²³⁷ Administrative entities issue a range of official documents, including announcements, publications, notices, and circulars. Guojia Xingzheng Jiguan Gongwen Chuli Banfa (国家行政机关公文处理办法) [Procedures for Handling Official Documents in State Administrative Organs] (promulgated by the St. Council, Aug. 24, 2000, effective Jan. 1, 2001) [THE CENTRAL PEOPLE’S GOV’T ONLINE], arts. 1, 2, 9. These are not within the scope of normative documents subject to filing and review.

²³⁸ For example, Hunan requires the filing of people’s governments “decisions, orders, and other documents with universal binding effect that relate to the rights or obligations of citizens, legal persons, or other organizations” and “documents of people’s government general offices with universal binding effect that relate to the

Administrative organs may also manipulate the system to evade review. For example, some administrative organs fail to issue normative documents according to standard State Council classifications. In practice, administrative organs have the flexibility to shield some normative documents from review.²³⁹ Chinese administrative agencies also enforce laws or regulations pursuant to internal guidance documents that can alter the effect of the legislation they purport to enforce.²⁴⁰ These documents do not fall within the scope of the State Council's 2001 Filing Regulation and thus are not subject to the filing and review process.²⁴¹

The exclusion of many normative documents from the filing and review process is in part the product of capacity issues. Given the vast quantity of such documents, incorporating all of them into the filing and review process is not feasible. As Chinese scholars acknowledge, lower-level filing and review organs would quickly be overwhelmed.²⁴²

A third and final unresolved issue is review of Party normative documents. Senior legal scholar Ying Songnian has noted that the lack of a system for review of Party normative documents is a significant shortcoming.²⁴³ In some cases, courts have grappled with Party documents that conflict with formal legislation.²⁴⁴ There are signs of tentative steps to address this issue. Several

rights or obligations of citizens, legal persons, or other organizations." Hunan People's Congress Review Regulation, *supra* note 167, art. 3.

²³⁹ For the classifications, see Procedures for Handling Official Documents in State Administrative Organs, *supra* note 237, art. 9. For manipulation of the system, see Wang, *supra* note 114, at 14; Hu, *supra* note 111, at 78; 2011 FILING AND REVIEW, *supra* note 9, at 93.

²⁴⁰ Nicholas Calcina Howson, Enforcement Without Foundation? Insider Trading and China's Administrative Law Crisis, 60 AM. J. OF COMP. L. 955 (2012).

²⁴¹ The 2001 Filing Regulation applies only to local regulations and government rules enacted in accordance with the Regulation on Procedures for Promulgating Rules. 2001 Filing Regulation, *supra* note 138, art. 2.

²⁴² Wang, *supra* note 34, at 291. For the large number of normative documents, see *supra* note 4 and accompanying text.

²⁴³ Shen Xinwang (申欣旺) et al., Hunan Chutai Fazhi Jianshe Gangyao, Dangwei Hongtou Wenjian Xu Bei'an Shenchu (湖南出台法治建设纲要党委红头文件需备案审查) [Hunan Reveals Rule of Law Outline, Party Committee Red-Hatted Documents Must be Filed and Reviewed], Zhongguo Xinwen Wang (中国新闻网) [CHINA NEWS ONLINE], Aug. 19, 2011.

²⁴⁴ See, e.g., Foshan Shi Zhongji Renmin Fayuan Huang Yaochi yu Foshan Shi Shundequ Renmin Zhengfu Tudi Xingzheng Queren Jiufen Shangsu An (佛山市中级人民法院黄耀池与佛山市顺德区人民政府土地行政确认纠纷上诉案) [Foshan City Intermediate People's Court Appellate Case Involving a Land Administration Confirmation Dispute between Huang Yaochi and the Foshan City Shunde District People's Government], Foshan City Interim. People's Ct., July 14, 2005 (Chinalawinfo)

locales in China have reportedly experimented with limited review of Party documents.²⁴⁵ More significantly, the Hunan Province Party Committee issued a document in 2011 that called for the establishment of a filing and review system *within* the Party structure.²⁴⁶ Articles published on the NPC website have also noted the need for local people's congresses to review normative documents jointly issued by local governments and Party committees.²⁴⁷ Although it is too early to assess the impact of such efforts, review of Party normative documents is clearly a subject of discussion and an ongoing gap in the filing and review system.

D. Emphasis on Consultation, Consensus Building, and Self-Correction

Both central and local filing and review practices place heavy emphasis on consultation, consensus building, and self-correction by promulgating organs. The NPCSC's 2005 Work Procedures establish a complex, multi-stage review and consultation process.²⁴⁸ In practice, the Filing and Review Office conducts an initial review of filed legislation. If it detects a problem, it drafts a report that is submitted to NPCSC officials. Upon approval of this report, the Filing and Review Office consults with the promulgating organ on the problem and encourages self-correction. If the organ refuses to self-correct, the NPCSC LAC or NPC special committees may invite the promulgating organ to present its views and discuss disagreements.²⁴⁹ The goal of these consultations is to persuade the promulgating organ to amend or annul the conflicting legislation

(declining to uphold a local administrative decision because it was based on a 1962 Party document that conflicted with a 1995 State Council department rule).

²⁴⁵ Shen, *supra* note 243 (discussing early efforts in the Guangxi Autonomous Region; Yongnian county, Hebei province; and Yancheng city, Jiangsu province).

²⁴⁶ Fazhi Hunan Jianshe Gangyao (法制湖南建设纲要) [OUTLINE FOR BUILDING A RULE OF LAW HUNAN] (promulgated by Hunan Provincial Committee of the Communist Party of China, July 26, 2011), art. 10.

²⁴⁷ Li Kaiwen (李开文), Difang Renda Changweihui Guifanxing Wenjian Bei'an Shenchu Fanwei de Chuyi (地方人大常委会规范性文件备案审查的刍议) [*Preliminary Opinion on the Scope of Local People's Congress Filing and Review of Normative Documents*], Zhongguo Renda Wang (中国人大网) [THE NAT'L PEOPLE'S CONG. ONLINE], art § 2.

²⁴⁸ The initial handling procedures vary depending on whether review is active or passive (and, if passive, whether the review request comes from another state organ or from a citizen). 2005 Work Procedures, *supra* note 127, arts. 1-7.

²⁴⁹ Meeting with Filing and Review Office Officials, June 2012 (on file with author); 2005 Work Procedures, *supra* note 127, arts. 5-9.

on its own.²⁵⁰ In many cases, promulgating organs correct problems after these early stage consultations.²⁵¹ The amendment or repeal of some legislation after the filing of external review proposals provides indirect evidence of such practices.²⁵²

If this process is unsuccessful, the NPC special committee charged with review may issue a written opinion on the conflict to the NPCSC General Secretary. The conflict is then elevated in multiple stages to progressively higher-level NPC subunits, including the Law Committee, the NPCSC Chairmen's Council, and the full NPCSC. Throughout this complex process, the promulgating organ has numerous opportunities to engage NPC decision makers in consultations, provide feedback, work to suspend further consideration of a conflict, or engage in self-correction.²⁵³ A decision by any of the various committees or officials *not* to advance the matter effectively ends the review process and leaves the challenged legislation standing.²⁵⁴

NPC organs have exhibited a reluctance to exercise their coercive powers. As indicated in one authoritative Chinese source, no NPC special committee has ever issued a written review opinion on a legislative conflict (an early stage in the review process).²⁵⁵ Numerous Chinese sources confirm that the NPCSC has never exercised its authority to forcibly amend or annul lower-level

²⁵⁰ Numerous sources confirm this practice. See e.g., Fan, *supra* note 21, at 44; Wang Zhenmin (王振民), *Zhongguo Weixian Shenchā Zhidu* (中国违宪审查制度) [CHINA'S CONSTITUTIONAL REVIEW SYSTEM] 114–15 (2002); 2011 FILING AND REVIEW, *supra* note 9, at 19, 55, 65; Woguo Shouci Chengli Zhuanmen Jigou Jinxing Fagui Weixian Shenchā (我国首次成立专门机构进行法规违宪审查) [*China for the First Time Establishes a Special Organ to Engage in Constitutional Review of Regulations*], *Xinjing Bao* (新京报) [BEIJING NEWS ONLINE], June 19, 2004 (comments of Jiang Ming'an) [hereinafter *China Establishes Special Organ*].

²⁵¹ 2011 FILING AND REVIEW, *supra* note 9, at 55, 65.

²⁵² One Hebei People's Congress decision provides documentary confirmation of such communications and related self-correction. Guanyu "Hebei Sheng Tudi Guanli Tiaoli" Xiuzheng An (Cao'an) Shuoming (关于“河北省土地管理条例”修正案(草案)说明) [*Explanation on the (Draft) Amendment of the Hebei Province Land Administration Regulation*], Sept. 9, 2005 (noting an NPCSC letter on a conflict between the Hebei regulation and national law and requesting that the regulation be amended).

²⁵³ These units include the NPCSC LAC, NPC Special Committees, the NPC Law Committee, the NPC General Office, the NPCSC General Secretary, the Chairmen's Council, and the full NPCSC. 2005 Work Procedures, *supra* note 127, arts. 8–15.

²⁵⁴ Wang, *supra* note 250, at 121–22; Wang, *supra* note 34, at 303–04. As Wang Kai notes, the NPCSC General Secretary and the heads of specialized NPC committees control this complex process. *Id.* at 277.

²⁵⁵ 2011 FILING AND REVIEW, *supra* note 9, at 55. Filing and Review Office officials confirmed that the formal procedure involving consultation with special committees is rarely initiated. Meeting with Filing and Review Office Officials, June 2012.

legislation.²⁵⁶ The preference for consultation and self-correction is so strong that if, after consultations, the promulgating organ refuses to amend or annul conflicting provisions, the NPCSC sometimes drops the matter.²⁵⁷ As such practices suggest, the emphasis of the central filing and review system is still on “filing” and has only shifted to “review” in a limited sense. Although commentators agree that consultation is necessary, some complain about the inefficiency of this process and argue that the NPCSC should do more to establish its authority.²⁵⁸

The State Council typically identifies only a few dozen problematic pieces of legislation each year. For example, from March 2003 to the end of 2007, the State Council reportedly identified a total of 323 problems among the more than 8,000 pieces of legislation filed.²⁵⁹ The 2001 Filing Regulation emphasizes LAO consultation and coordination with promulgating organs to resolve conflicts.²⁶⁰ In the event a conflict is not resolved through coordination, the LAO submits its opinion to the State Council for a formal ruling. Although the emphasis on consultation is similar to that in the NPCSC process, the State Council review process has fewer steps. In most cases, promulgating organs amend offending legislation after coordination with the LAO. References to formal State Council rulings on conflicts are rare, and it is unclear whether the State Council has ever forcibly annulled or amended any legislation.²⁶¹ Local

²⁵⁶ 2011 FILING AND REVIEW, *supra* note 9, at 55; CHEN, *supra* note 10, at 195; Pan Aiguo (潘爱国), Lun Woguo Sifa Jiguan Fagui Shencha Biaozhun zhi Chonggou (论我国司法机关法规审查标准之重构) [*On Restructuring the Standard for Judicial Review of Regulations in China*], Beifang Faxue (北方法学) [N. LEGAL SCI.], no. 2, 2011, at 133.

²⁵⁷ Zhu, *supra* note 24, at 637–38. See also Wang, *supra* note 250, at 126; Cai, *supra* note 74 (noting that lower-level organs are not obligated to follow LAC opinions).

²⁵⁸ Cai Dingjian (蔡定剑) and Li Honglei (李洪雷), *Falü Chongtu Ji Qi Jiejue Tujing* (法律冲突及其解决途径) [*Legal Conflicts and Channels for Their Resolution*], Renmin Fayuan Bao (人民法院报) [PEOPLE'S COURT DAILY ONLINE], Jan. 31, 2003 (comments of Cai Dingjian, Wu Gaosheng); *Channels for Resolving Conflicts*, *supra* note 16 (comments of Ren Jin).

²⁵⁹ CHINA'S EFFORTS AND ACHIEVEMENTS, *supra* note 1, at § 5.

²⁶⁰ 2001 Filing Regulation, *supra* note 138, arts. 11, 14, 15.

²⁶¹ In detailed discussions of State Council filing and review work published in the *China Law Yearbook*, there are no explicit references to forced amendments or annulments. Other Chinese sources indicate that the State Council annuls a few items annually. Fan, *supra* note 21, at 47 (citing two examples where the State Council issued a formal decision on a conflict). However, these examples appear to involve formal findings of conflict rather than forced annulments. Pan Aiguo claims that neither the NPCSC nor the State Council has ever initiated the process of formally annulling legislation. Pan, *supra* note 256, at 133.

filing and review organs also establish multi-stage procedures that emphasize consultation and self-correction.²⁶²

A constellation of mutually reinforcing factors contributes to these dynamics. Chinese political culture places strong emphasis on consultation, bargaining, and consensus building.²⁶³ Chinese sources acknowledge that filing and review organs avoid exercising their formal powers to annul legislation because doing so would damage the face and authority of the promulgating organ and because China's tradition is to resolve conflicts through political channels.²⁶⁴ Even formal communications between internal working organs can raise such concerns.²⁶⁵ As such, it is not surprising that informal consultative practices are prominent in the filing and review process. Many legislative conflicts are not clear and instead involve value judgments, evaluations of legislative intent, and issues of interpretation.²⁶⁶ These softer conflicts may give promulgating organs room to argue that conflicts do not exist or to resist correction. In discussions on review procedures, NPCSC LAC, Hunan, and Shanghai legislative officials with knowledge of filing and review practices all placed heavy emphasis on such consultations. None of these officials could recall a specific instance in which legislation had been forcibly

²⁶² 2011 FILING AND REVIEW, *supra* note 9, at 21, 56, 66. For examples, see 2004 Hunan Government Review Measures, *supra* note 162, arts. 10–14; Hunan People's Congress Review Regulation, *supra* note 167, arts. 11–15. Local organs find only a handful of conflicts per year and rarely exercise formal powers to annul or amend such legislation. Wang, *supra* note 34, at 309–12.

²⁶³ For an excellent Chinese statement on this issue, see Liu Songshan (刘松山), Difang Renda Ji Qi Changweihui Baozhang Xianfa Shishi de Diwei he Zuoyong (地方人大及其常委会保障宪法实施的地位和作用) [*The Status and Functions of Local People's Congresses and their Standing Committees in Ensuring Implementation of the Constitution*], Faxue Luntan (法学论坛) [LEGAL FORUM], no. 3, 2009, at 89.

²⁶⁴ See, e.g., Wang, *supra* note 34, at 313; Wang, *supra* note 250, at 114–15, 120, 126; Huang Li (黄利), Gongmin Weiquan Ke Bu Keyi Yuanyin Xianfa (公民维权可不可以援引宪法) [*Can the Constitution Be Cited in Citizen Rights Defense?*], Nanfang Zhoumo (南方周末) [SOUTHERN WEEKEND ONLINE], Jan. 15, 2009; Interview with Senior Shanghai Legislative Official, July 2012.

²⁶⁵ A Shanghai legislative official recalled one case in which the Shanghai Municipal People's Congress Filing and Review Department identified a conflict and consulted with the people's government LAO to resolve it. After the LAO resisted, the Filing and Review Department sent a letter to the People's Congress Standing Committee Chairmen's Council, which in turn sent a letter to the Shanghai People's Government General Office. The General Office addressed the problem with the LAO immediately. However, it then requested that the Chairmen's Council handle such matters in a less formal manner in the future. Interview with Senior Shanghai Legislative Official, July 2012.

²⁶⁶ Cai & Li, *supra* note 258, at 2 and 3 (comments of Cai Dingjian, Wu Gaosheng).

annulled.²⁶⁷ In a published statement, the Director of the NPCSC Filing and Review Office noted that the NPCSC is “solemn” and “careful” in exercising its formal authority to annul, emphasized the effectiveness of consultative approaches, and provided several examples of the successful resolution of conflicts through consultation.²⁶⁸

Consultative conventions are intertwined with Party ideology and interests. Consultation upholds the image of state institutions working harmoniously under the leadership of the Party.²⁶⁹ As Chinese legal scholar Jiang Shigong has argued, the settlement of intrastate disputes through consultation (rather than through formal review) is a manifestation of the principle of democratic centralism and a convention that must be recognized to understand China’s constitutional framework.²⁷⁰ In contrast to most other statutes, both the Legislation Law and the Supervision Law incorporate explicit language emphasizing Party leadership. Such language reinforces the Party’s central role in the processes addressed therein.²⁷¹ Moreover, since 2004, senior Party leaders have prioritized Party loyalty, ideological training, and Party leadership over formal constitutional and legal processes.²⁷² The public exercise of formal powers to annul or amend legislation undermines the narrative of unity under Party leadership. In addition, if state institutions

²⁶⁷ Meeting with Senior Hunan Legislative Officials, June 2012; Meeting with Filing and Review Office Officials, June 2012; Interview with Senior Shanghai Legislative Official, July 2012.

²⁶⁸ See, e.g., Yang Jingyu (杨景宇), Renzhen Xuexi, Shenke Linghui, Yange Zhixing Jiandu Fa (认真学习、深刻领会、严格执行监督法) [*Resolutely Study, Deeply Comprehend, and Strictly Enforce the Supervision Law*], Renmin Wang (人民网) [PEOPLE’S DAILY ONLINE], Nov. 24, 2006 (report of NPCSC Filing and Review Office Director Yang Jingyu).

²⁶⁹ Cai, *supra* note 132, at 63. The Party’s Charter provides that the Party must “ensure that legislative, judicial, and administrative organs . . . work with initiative, with independent responsibility, and in harmony.” Charter of the Communist Party of China, § 10(5). I am indebted to Professor Xin He for his reference to this provision.

²⁷⁰ Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 MODERN CHINA 12, 31–37 (2010). For an excellent discussion of the Party’s leadership role and the concept of democratic centralism, see Xin He, *The Party’s Leadership as a Living Constitution in China*, 42 H.K. L. J. 73 (2012).

²⁷¹ Legislation Law, *supra* note 21, art. 3; Supervision Law, *supra* note 38, art. 3. In a report on the Supervision Law, Yang Jingyu, Director of the NPCSC Filing and Review Office, emphasized Party leadership as the first principle that must be respected in the exercise of supervision powers. Yang, *supra* note 268.

²⁷² See generally Willy Lam, *The Politicisation of China’s Law-Enforcement and Judicial Apparatus*, CHINA PERSPECTIVES, no. 2, 2009 [hereinafter Lam, *Politicization*], at 42–51; Carl Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935, 938–39 (2011).

began exercising such powers frequently and effectively, the Party's role in mediating and resolving intrastate disputes might gradually be marginalized.

Power relationships reinforce these dynamics. The post-Mao political-legal system has been characterized by a fragmentation of political authority. Competition among different bureaucracies and power centers generates intense bargaining and reinforces consultative dynamics.²⁷³ As Tanner demonstrates in his classic study of the PRC lawmaking process, the Party sometimes fails to signal clear intentions on legislative drafting issues because Party leaders themselves cannot reach consensus, lack the expertise or capacity to understand and resolve the issues, or are preoccupied with other matters. In this context, competing state organs (and their leaders) bargain to defend their interests. State organs or leaders dissatisfied with legislative compromises may engage in a "second campaign" over content when implementing regulations and rules are enacted. Such post-promulgation battles may generate new conflicts between higher-level legislation and lower-level implementing legislation.²⁷⁴ Similar to conflicts that arise in the drafting stage, these post-promulgation conflicts must be resolved through consultation, bargaining, and consensus building.

In some cases, state organs may have formal authority to annul legislation, but the actual balance of political power among institutions or particular leaders of institutions may make it difficult to exercise this authority in practice. In the past, people's congresses had difficulty exercising supervision over people's governments at the corresponding level because people's government leaders outranked their people's congress counterparts in the Party hierarchy. Even when both people's congress chairmen and people's government leaders sit on Party Committees, formal rankings may not reflect the actual balance of political power. For example, one official Chinese source acknowledges the NPCSC's "impotency" in exercising its legislative supervision powers over the State Council.²⁷⁵ Organizational capacity deficiencies within

²⁷³ For discussions of fragmentation, consultative norms, and bargaining dynamics, see David Lampton, *A Plum for a Peach: Bargaining, Interest, and Bureaucratic Politics in China*, in *BUREAUCRACY, POLITICS, AND DECISIONMAKING IN POST-MAO CHINA* 33–58 (Kenneth Lieberthal and David M. Lampton eds., 1992); TANNER, *supra* note 20, at 24–25, 50–54, 132, 220–25. Ironically, NPC delegates hoped that the Legislation Law would help to "terminate the endless cycles of bureaucratic bargaining and democratic consultation" in the lawmaking process. Paller, *supra* note 6, at 308.

²⁷⁴ See, e.g., TANNER, *supra* note 20, at 24–25, 50–54, 132, 220–25.

²⁷⁵ *The Legislative System of China*, *supra* note 1 ("Legislative Procedures of the NPC Standing Committee" - "The thinking of the 'NPC is merely a rubber stamp' dies hard. Under such thinking, it is difficult for the NPCSC to nullify any documents of law enacted by the central and local governments.") See also Wang, *supra* note 34, at 291 ("In China, the NPC and NPCSC are the 'highest organ of state power' in name, but their 'weak position relative to administrative organs' in reality determines that the NPCSC is only able to point its supervision spear at judicial organs with an even weaker

the people's congresses contribute to these disparities. Concerns related to face and authority may be heightened in such situations. To navigate these political obstacles, people's congresses avoid confrontation and emphasize strategies of communication, consultation, and consensus building with people's governments to secure their cooperation.²⁷⁶ Kevin O'Brien and Yong Nam Cho have found that local people's congresses are also careful to cultivate Party support in exercising their supervisory powers.²⁷⁷

Some of these power dynamics have evolved in recent years. For example, the Legislation Law and Supervision Law bolstered the authority of people's congresses. Recent studies conclude that local people's congresses have become more assertive in carrying out their lawmaking and supervisory functions.²⁷⁸ In many jurisdictions, the chairman of the local people's congress standing committee now serves concurrently as chairman or vice-chairman of the Party Committee at the corresponding level. This structure may resolve issues related to rank (at least on paper), but it generates other complexities. Local people's governments often vet major decisions and legislation with Party Committees. In some cases, they may issue legislation in order to implement Party policies. As such, the local people's congress chairman may already have reviewed and approved legislation in his capacity as a Party leader at the corresponding level. In this context, it would be awkward for the same people's congress leader to later approve the forced annulment or

position.") Even formal Party ranking may not reflect the actual balance of political power. At the central level, former NPCSC Chairman Wu Bangguo and former Premier Wen Jiabao both held the "full state" bureaucratic rank, and both sat on the Politburo Standing Committee (PBSC). Although NPCSC Chairman Wu technically outranked Wen on the PBSC, it is questionable whether Wu exercised greater political power in practice. In the new Party leadership announced in late 2012 and early 2013, Premier Li Keqiang ranks second in the Party hierarchy, behind only General Secretary and President Xi Jinping. In the past, many local people's congress chairmen did not serve as voting members of the powerful Party Committees that supervised the work of all state institutions at the corresponding level. For a discussion of these power dynamics at the local level, see CHO, *supra* note 213, at 44-45, 158, 164.

²⁷⁶ Kevin O'Brien, *Chinese People's Congresses and Legislative Embeddedness: Understanding Early Organizational Development*, 27 COMP. POL. STUD., 80, 87-90; CHO, *supra* note 213, at 43, 164. As noted below, people's congresses have become more assertive since the early 1990s. While Cho highlights this trend, he also concludes that local people's congresses "have been strongly influenced by their earlier legislative institutions and experiences." *Id.* at 164.

²⁷⁷ It should be noted that both O'Brien and Cho discuss people's congress supervisory authorities generally. O'Brien, *supra* note 276, at 92-95; CHO, *supra* note 213, at 43-45, 62-63, 164. Liu Songshan emphasizes the importance of people's congress communication with the Party. Liu, *supra* note 263, at 89.

²⁷⁸ See, e.g., CHO, *supra* note 213.

amendment of such legislation.²⁷⁹ Reaching negotiated resolutions may be the best way to mitigate this awkwardness. In sum, official ranks, power dynamics, and Party roles and interests all reinforce entrenched preferences for bargaining, consultation, and consensus building in the filing and review system.

Several authoritative statements on legislative supervision capture these complex dynamics. NPCSC Chairman Li Peng made one statement during deliberations over the Supervision Law in 2002. Li first emphasized that state organs should divide responsibilities and cooperate under the leadership of the Party, and that the NPC is not in an adversarial relationship with other state organs. He then addressed the annulment of conflicting legislation.

The NPC exercises the authority to annul administrative regulations (regulations and decisions) of the State Council, but in reality annulment would produce [(造成) (zaocheng)] major impacts. The NPC has never annulled [such legislation]. Therefore, engaging in advance consultation is very important. With regard to State Council administrative regulations, we can't possibly pay close attention to each one. We are only able to pay close attention to the focal, central, and major problems that the masses care about. The NPCSC can also raise requests on its own initiative and require that the State Council consult with the NPC before it promulgates administrative regulations, thereby avoiding the need for annulment after promulgation.²⁸⁰

Li's use of the Chinese word "zaocheng" suggests that the consequence of formal annulment would be undesirable. He also acknowledges that the NPCSC lacks the capacity to review all State Council legislation. Li's statement could be interpreted as an admission that the NPCSC will refrain from exercising its formal power to annul State Council legislation and instead will work to address concerns during pre-promulgation consultations.

The second statement appeared in a 2011 NPCSC LAC volume on the filing and review system. It explained the emphasis on consultation and self-correction as follows:

²⁷⁹ For one discussion of these dynamics, see Yin Guoan (殷国安), Buyi Gaogu Renda "Chexiao Quan" (不宜高估人大“撤销权”) [*It is Inappropriate to Overstate the "Annulment Power" of the People's Congress*], *Zhongguo Baoxian Bao* (中国保险报) [CHINA INSURANCE NEWS ONLINE], Aug. 30, 2006, at 2. A Chinese legal scholar also noted these dynamics. Correspondence with Legal Scholar D, Sept. 2012 (on file with author).

²⁸⁰ Li Peng (李鹏), Lifa yu Jiandu: Li Peng Renda Riji (立法与监督: 李鹏人大日记) [LEGISLATION AND SUPERVISION: LI PENG'S NPC DIARY] 560 (2006).

Party Politburo member and Vice Chairman of the NPCSC Comrade Wang Zhaoguo, in a speech before the Tenth National Conference on Local Lawmaking, clearly specified, "With regard to problems discovered during the work of filing and review, there must be timely communication, consultation, and appropriate resolution with the relevant organs. I think that a common opinion should be reached through consultation and that the relevant department or locale should make corrections on its own initiative. Normally, we need not adopt the method of the NPCSC declaring annulments." The reason is that China's state organs, including organs that promulgate normative documents and those that engage in filing and review, are all under the leadership of the Chinese Communist Party, cooperate closely, and carry out their work through coordination and consensus. When problems exist in normative documents, the vast majority of them can be resolved through communication and consultation. *At the same time, the technique of communication and consultation in resolving problems in normative documents is advantageous for ensuring the promulgating organ's initiative, mutual cooperation between filing and review organs and organs that promulgate normative documents, and the effectiveness of carrying out work together.* Therefore, communication and consultation is a kind of important work technique in the mechanism for filing, review, and correction of normative documents. It is an important method for resolving the problems of illegality and inappropriateness in normative documents (*emphasis added*).²⁸¹

In a subsequent passage, the NPCSC LAC volume expanded on the preference for this approach:

With regard to the problem of filing and review organs using the method of annulment to correct normative documents, although [this method] is simple and direct, it produces relatively large social and political impacts and even social shocks. Whether it is annulling the normative document of a promulgating organ at the same level or at a lower lever, whether it is annulling a particular provision in a normative document or the entire normative document, [such action] will impact the authority and public credibility of the

²⁸¹ 2011 FILING AND REVIEW, *supra* note 9, at 64–65. The term "normative documents" here refers to all legislation.

promulgating organ. As the number of annulments increases, the impact also increases. Therefore, positive cooperation has always been a principle upheld in filing and review work.²⁸²

As these passages indicate, consultative review practices are the product of both political conventions and capacity problems. In a system in which Party leadership is paramount and formal constitutional-legal authorities may not reflect the actual balance of political power, filing and review organs may lack the political capacity to exercise their formal powers. Moreover, overwhelmed filing and review organs depend on promulgating organs under their supervision to comply voluntarily with filing requirements, address conflicts, and self-police conflicts during legislative “clean-up” campaigns. In this context, while exercising formal powers to annul or amend lower-level legislation may resolve conflicts when a recalcitrant organ refuses to self-correct, there may be a high price for achieving this result. A legislative organ that loses face because its legislation was forcibly annulled may be less willing to engage in the self-reporting and policing that is essential to the operation of the legislative system as a whole. It may also adopt a more confrontational stance when future conflicts are identified. By emphasizing consultative approaches to maintain the “initiative” and “cooperation” of lower-level organs and setting aside some intractable disputes, filing and review organs may ultimately ensure that many other conflicts are identified and corrected.

E. Priority Review of Selected Legislative Conflicts and Citizen Review Proposals

The Legislation Law was intended to establish a system of “passive” review of legislation. Specifically, the NPCSC and its subunits would respond to state organ requests or citizen proposals for the review of legislative conflicts. The 2000 Work Procedures established an entirely passive review process.²⁸³ However, in the initial years after the Legislation Law was promulgated, the NPCSC did not receive a single review request from another state organ and received only a handful of citizen review proposals.²⁸⁴ To address such

²⁸² *Id.* at 72.

²⁸³ The Work Procedures did not explicitly *exclude* active review, but they provided only that rules and regulations filed with the NPCSC should be *sent to* the relevant special committees. Article 7 provided that upon (1) receipt of a state organ request or a citizen proposal for review and (2) approval by the Secretary of the NPCSC General Office, the matter should be forwarded to NPC special committees *to engage in review* (*jinxing shencha*). 2000 Work Procedures, *supra* note 125, arts. 5, 7.

²⁸⁴ Wen & Zhang, *supra* note 77; Cai and Li, *supra* note 258 (comments of Chen Jianwen).

problems, the Chairmen's Council amended the Work Procedures in 2003 to provide for a combination of passive and active review. This approach allowed NPC special committees to engage in modest active review and was preserved in the 2005 Work Procedures.²⁸⁵

Given the large volume of legislation filed annually, neither the State Council nor the NPCSC has the capacity to conduct a comprehensive review of all filed legislation. Both organs prioritize review of external review requests (passive review) and select a few key areas for active review on their own initiative.²⁸⁶ In 2008, for example, the NPCSC focused on reviewing local regulations related to supervision work. In 2010, it began progressively reviewing all effective State Council administrative regulations.²⁸⁷ The State Council focused its active review efforts on local custody and repatriation regulations in 2003 (following a decision to repeal a related national regulation). In 2004 and 2005, following the adoption of the Administrative Licensing Law, it focused on regulations and rules that established administrative licenses and fees.²⁸⁸ Local people's governments and people's congresses take different approaches depending on their capacity, with some engaging in active review of all filed documents, some emphasizing passive review, and some adopting a mix of approaches.²⁸⁹

This coping mechanism is not surprising given the capacity limitations of these organs. The State Council LAO and the NPCSC LAC each has only a small staff to conduct review work. These offices must process incoming legislation, and personnel must be familiar with a vast field of effective legislation in order to identify conflicts. Filing and review offices are too small to carry out this complex task for all legislation.²⁹⁰ As an NPCSC LAC volume on filing and review acknowledges:

Filing is not only creating a file, but also providing review. All [legislation] should be actively reviewed. But presently, because the number of filed documents is too large, review

²⁸⁵ NPCSC Progressively Strengthens Regulation Filing and Review Work, *supra* note 125.

²⁸⁶ 2011 FILING AND REVIEW, *supra* note 9, at 19. The State Council practice is evident from the annual overviews of State Council filing and review work in the CHINA LAW YEARBOOK (2003–2010).

²⁸⁷ 2011 FILING AND REVIEW, *supra* note 9, at 19.

²⁸⁸ 2004 CHINA LAW YEARBOOK, at 98–99; 2005 CHINA LAW YEARBOOK, at 121; 2006 CHINA LAW YEARBOOK, at 131.

²⁸⁹ For a discussion of examples, see 2011 FILING AND REVIEW, *supra* note 9, at 20. While the Hunan Provincial People's Congress reviews all filed legislation, the Shanghai Municipal People's Congress emphasizes passive review in part due to capacity problems.

²⁹⁰ 2011 FILING AND REVIEW, *supra* note 9, at 139, 141–42.

structures are imperfect, and personnel allocations are insufficient, it is impossible to engage in mandatory review of all documents.²⁹¹

Even if filing and review offices were to expand their capacity, it would still be difficult for them to identify many conflicts through abstract review. Some conflicts simply do not become clear until legislation is implemented. As Cai Dingjian concluded, abstract review is like “fishing for a needle in the ocean.”²⁹² The solution to these capacity problems is to rely heavily on passive review.

The creation of citizen review proposal mechanisms should be understood in this context. State organs rarely raise review requests. By contrast, over the past decade, citizens have sent more than 1,000 review proposals to the NPCSC and more than 650 review proposals to the State Council. Review proposals allow filing and review offices to leverage the eyes, experience, and expertise of China's enormous population and in turn help them address their capacity deficiencies. “1.3 billion people participating in supervision is of greater use than adding organs or increasing personnel allocations,” concludes Filing and Review Office Vice Director Xu Anbiao, “[i]t creates a comprehensive, multi-level supervision effect.”²⁹³ The NPCSC LAC volume on filing and review expresses a similar sentiment. “Experience proves that it is difficult to discover problems only through active review. Only by mustering the enthusiasm of the masses . . . can we discover unlawful normative documents and take measures to correct them in a timely manner.”²⁹⁴ By relying on citizen review proposals to identify most conflicts and then prioritizing a few key areas for active review each year, filing and review offices are able to focus their work at a more manageable level.

Despite the importance of citizen review proposal mechanisms, central filing and review organs and their subordinate offices never formally respond to such proposals. In some cases, central government organs have responded *indirectly* by amending regulations and rules challenged in such proposals,

²⁹¹ *Id.* at 117.

²⁹² Wen & Zhang, *supra* note 77 (see comments of both Cai Dingjian and Jiang Ming'an). See also 2011 FILING AND REVIEW, *supra* note 9, at 142 (discovering problems and analyzing them effectively is difficult); Xu Anbiao (许安标), Lifa Fa Dui Lifa Jiandu de Zhidu Chuangxin (立法法对立法监督的制度创新) [Legislation Law's Institutional Innovations in Legislative Supervision], Fazhi Ribao (法制日报) [LEGAL DAILY ONLINE], Jan. 15, 2004 (it is extremely difficult to find all conflicting provisions through ordinary abstract review because with the strengthening of legal consciousness, there are rarely situations where upper and lower level law conflict on their face”).

²⁹³ Xu Anbiao, *supra* note 292.

²⁹⁴ 2011 FILING AND REVIEW, *supra* note 9, at 130.

making statements in the media that acknowledge receipt of proposals or validate concerns raised, or inviting citizens who have raised proposals to consultations on possible legal reforms.²⁹⁵ However, neither the NPCSC nor the State Council has ever issued a formal public response to or ruling on a citizen review proposal. Citizens have criticized the failure to respond and a general lack of transparency in the handling of review proposals.²⁹⁶ Legislative sources suggest that such problems may be weakening citizen confidence in the review system.²⁹⁷ If citizen review proposals are such a crucial resource, why do central filing and review organs refuse to respond to them in a formal way?

Three factors closely intertwined with capacity issues explain this institutional silence. First, the citizen review proposal mechanism was designed primarily as a one-way information channel and governance tool, rather than as an enforceable citizen right to constitutional and legislative review. The NPCSC LAC's explanation of the Legislation Law indicates that the review proposal provision was designed to increase the efficiency of review work and to "broaden the channels for NPCSC supervision of legislation."²⁹⁸

²⁹⁵ See generally Keith Hand, *Citizens Engage the Constitution: The Sun Zhigang Incident and Constitutional Review Proposals in the People's Republic of China*, in *BUILDING CONSTITUTIONALISM IN CHINA* 221–42 (Michael Dowdle & Stephanie Balme eds., 2009) (discussing indirect responses to some citizen review proposals); Keith Hand, *Can Citizens Vitalize China's Constitution?* *FAR E. ECON. REV.*, May 2007, at 15–19 (discussing NPCSC validation and discussion of proposals on unlawful road maintenance fees); Huang, *supra* note 236, at 133–35 (discussing indirect responses and the amendment of a Hebei land regulation after multiple review proposals). After five legal scholars filed a review proposal challenging the constitutionality and legality of China's regulation on property demolitions and relocations, NPCSC and State Council organs invited them for consultations. The State Council eventually amended the regulation to address some of the concerns raised. For a detailed discussion with citations to Chinese sources, see Hand, *supra* note 236, at 121–24.

²⁹⁶ Observations and critiques to this effect are too numerous to list. For examples, see Zhang Zhuoming (张卓明), *Lun Fagui Hefaxing Shencha Jianyiquan* (论法规合法性审查建议权) [*On the Right to Propose Legality Review of Regulations*], available at BEIJING DONGFANG PUBLIC INTEREST LAW FIRM WEBSITE (北京市东方公益法律援助律师事务所) (last visited Apr. 21, 2013); Hu Jianmiao & Jin Chengdong (胡建淼 & 金承东), *Fagui Weixian Shencha Jianyiquan de Kunjing* (法规违宪审查建议权的困境) [*Predicament of the Right to Propose Review of the Constitutionality of Regulations*], *Fazhi Ribao* (法制日报) [LEGAL DAILY ONLINE], May 14, 2003; Wang, *supra* note 233; Huang, *supra* note 236, at 134–37.

²⁹⁷ 2011 FILING AND REVIEW, *supra* note 9, at 132–34. This and other sources suggest that the failure to respond has discouraged citizen claimants. *Id.* at 134 (citizen enthusiasm low, fewer than 100 proposals received in 2008); *Channels for Resolving Conflicts*, *supra* note 16 (Jiao Hongchang arguing that enthusiasm is waning and that the number of citizen proposals has decreased since 2005).

²⁹⁸ LEGISLATION LAW EXPLANATION, *supra* note 44, at 258.

Such characterizations are consistent with the discussion of capacity problems here. The explanation also notes that the mechanism ensures the right to "participate in management of the state" and "raise criticisms and proposals."²⁹⁹ Professor Jiao Hongchang characterizes the proposal mechanism as a "political right" rather than a "litigation right."³⁰⁰ Jiao's characterization is reinforced by the text of the Legislation Law itself, which does not provide any right to a reply, feedback on, or formal review and resolution of citizen review proposals. In addition to serving as an information channel for the Party-state, such public participation and complaint mechanisms act as a kind of pressure release valve and, in the view of some Chinese observers, as an alternative form of "democratic" participation.³⁰¹ For a government obsessed with preserving stability and delaying broader political reforms, citizen review proposals also provide a channel for identifying legislative conflicts that are generating public anger.

Second, issuing a response to a citizen review proposal could be perceived as a formal public rebuke of the promulgating organ. As discussed above, unwritten conventions and dependence on lower-level organs limit the political capacity of review organs to issue formal rulings to annul conflicting legislation. Filing and review organs avoid issuing formal responses to citizen review proposals for the same reasons they handle nearly all conflicts through internal communication and consultation: responses validating citizen claims would damage the face and authority of promulgating organs and undermine the narrative of unity under Party leadership.³⁰²

Third, the NPCSC and State Council lack the political capacity to resolve the types of claims that are often incorporated into review proposals at the central level. Many citizen review proposals to the NPCSC and State Council involve constitutional rights claims or claims for review of legislation on sensitive issues such as the residence registration system or re-education through labor. In many cases, such proposals are advanced by legal elites with broad political-legal reform agendas.³⁰³ As discussed above, the NPCSC lacks

²⁹⁹ *Id.*

³⁰⁰ *Channels for Resolving Conflicts*, *supra* note 16 (comments of Jiao Hongchang).

³⁰¹ *Establishment of the Filing and Review Office*, *supra* note 130 (review mechanism acts as a kind of "social pressure release valve"); Hu, *supra* note 111, at 79 (review mechanism as a substitute for democracy); 2011 FILING AND REVIEW, *supra* note 9, at 127–28 (review mechanism provides an information channel for state organs and a kind of "direct democracy").

³⁰² For Chinese discussions along this line, see Xu, *supra* note 292; Huang, *supra* note 236, at 132–34.

³⁰³ See generally Wang, *supra* note 233 (discussing citizen review proposals as a form of constitutional review); Huang, *supra* note 236 (review of 48 citizen review proposals finds many are advanced by legal elites, incorporate political or

the political capacity to address the sensitive and unresolved political questions that many of these claims implicate. Even if some review proposals do not involve sensitive issues, central filing and review organs fear creating precedents and an expectation of formal rulings that might encourage a wave of more sensitive claims that they cannot handle.³⁰⁴ By contrast, local filing and review organs, which are more likely to handle mundane technical conflicts involving normative documents,³⁰⁵ have been more willing to require responses to citizen review proposals.

F. Summary

China's filing and review system is plagued by fundamental problems of capacity. Even a bifurcated, multi-level filing and review system that relies almost entirely on targeted priority review, consensus-building, and voluntary compliance must be supplemented by legislative "clean-up" campaigns. An appreciation of the magnitude of these capacity challenges provides a foundation for understanding the role that courts play in addressing legislative conflicts.

IV. PEOPLE'S COURTS AND LEGISLATIVE CONFLICTS

China's thousands of people's courts encounter legislative conflicts at all levels of the system. However, people's courts do not exercise any constitutional authority to invalidate legislation that conflicts with the Constitution or higher-level legislation. As discussed above, filing and review organs are incapable of discovering and handling most legislative conflicts on their own. In this context, how do people's courts address the problem of legislative conflicts in the day-to-day work of adjudication? This Part explores formal and informal practices that have emerged to address this basic problem. First, the NPCSC has granted the SPC limited authority to issue "judicial interpretations" on the application of legislation in concrete cases. Second, people's courts at all levels engage in a form of limited judicial review. They do so by evaluating many legislative conflicts internally and then deciding to apply higher-level legislation (and to disregard conflicting lower-level legislation) according to the conflicts rules set out in the Legislation Law.

constitutional claims, or focus on legislation related to sensitive issues). My own review of more than 120 citizen review proposals is consistent with these findings.

³⁰⁴ Wang, *supra* note 233, at § 4; Huang, *supra* note 236, at 135-36; Liu Renwen (刘仁文), *Gongyi Shangsu zhi Gaijin* (公益上诉之改进) [*Improving Public Interest Petition System*], *Jiancha Ribao* (检察日报) [PROCURATORIAL DAILY ONLINE], Sept. 27, 2006.

³⁰⁵ Huang, *supra* note 236, at 137.

Although this practice creates modest tensions in China's constitutional framework, other legal actors have accommodated it as a necessary supplement to the formal filing and review system. An exploration of these judicial practices highlights an important layer in China's legislative supervision system and reveals both opportunities and likely limitations in efforts to expand the role that courts play in addressing legislative conflicts.

A. Judicial Interpretations

For several decades, the SPC has issued judicial interpretations on issues related to the application of national law. Judicial interpretation is one tool that the SPC uses to address the problem of legislative conflicts. In a legislative system that is riddled with ambiguities and inconsistencies, and in which filing and review organs are incapable of resolving most legislative conflicts, SPC judicial interpretations provide an important supplement to the work of the NPCSC and other legislative organs.

The SPC practice of issuing judicial interpretations is the product of an NPCSC delegation of power. Under China's constitutional structure, the NPCSC exercises the formal power to interpret national law.³⁰⁶ Neither the Constitution nor the Legislation Law explicitly provides that the SPC may interpret law. In a 1981 resolution, however, the NPCSC authorized the SPC to issue interpretations related to the "specific application of law in court adjudication work."³⁰⁷ The NPC later confirmed this delegation of power in the Organic Law of the People's Courts.³⁰⁸ The SPC is the only court that may issue judicial interpretations.³⁰⁹ Moreover, the resolution only empowers the SPC to interpret national law. The SPP and the State Council are authorized to issue

³⁰⁶ Constitution, *supra* note 9, art. 67(4); Legislation Law, *supra* note 21, arts. 42–47.

³⁰⁷ 1981 Resolution on Interpreting Law, *supra* note 205, art. 2.

³⁰⁸ Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa (中华人民共和国人民法院组织法) [PRC Organic Law of the People's Courts] (promulgated by Nat'l People's Cong., July 1, 1979, amended Sept. 2, 1983, Dec. 2, 1986, Oct. 31, 2006) art. 32, 2006 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 691.

³⁰⁹ Zuigao Renmin Fayuan Guanyu Difang Geji Fayuan Buyi Zhiding Sifa Jieshi Xingzhi Wenjian Wenti de Pifu (最高人民法院关于地方各级法院不宜制定司法解释性质文件问题的批复) [Reply on the Issue of the Inappropriateness of Local Courts at All Levels Promulgating Judicial Interpretation-Type Documents] (promulgated by the Sup. People's Ct., Mar. 31, 1987, effective Mar. 31, 1987) (Chinalawinfo). In practice, provincial-level higher people's courts issue official documents that have the effect of interpretations. See *supra* note 177 and accompanying text; Nicolas Calcina Howson, *Corporate Law in the Shanghai People's Courts 1992–2008*, 5 E. ASIA L. REV. 303, 334–37 (2010).

interpretations related to the concrete application of law in procuratorial and administrative work, respectively, and the State Council exercises the power to interpret its own administrative regulations.³¹⁰

Judicial interpretations take several different forms.³¹¹ Under current SPC provisions, judicial interpretations include “interpretations” (解释) (*jieshi*), “provisions” (规定) (*guiding*) and “replies” (批复) (*pifu*).³¹² Interpretations are lengthy documents that address general issues in the application of national law. Provisions, which resemble interpretations in form, are internal instructions to courts. The SPC issues replies in response to requests for instructions from lower courts. Replies are shorter documents that address legal issues that arise in the context of specific cases. Judicial interpretations are formulated in accordance with concrete procedures, and the SPC’s Adjudication Committee must approve them. They are binding on lower-level courts and may be cited in judgments.³¹³ The SPC issues numerous judicial interpretations and other official documents each year.³¹⁴

Judicial interpretations are a necessary supplement to the work of legislative organs and provide one tool for coping with legislative conflicts. Chinese sources express concern that the NPCSC has not exercised its formal legislative interpretation authority efficiently or effectively.³¹⁵ As noted in Part

³¹⁰ Provincial-level people’s congress standing committees interpret local regulations, while provincial-level people’s governments interpret local rules. 1981 Resolution on Interpreting Law, *supra* note 205, arts. 2, 3, 4. Ministries interpret their own rules. State Council General Office Interpretation Notice, *supra* note 205.

³¹¹ For excellent discussions of the range of SPC interpretations and official documents, see Howson, *supra* note 309, at 330–34; CHEN, *supra* note 24, at 161–166; Wang, *supra* note 34, at 285–87.

³¹² Guanyu Sifa Jieshi Gongzuo de Guiding (关于司法解释工作的规定) [Provisions on the Work of Judicial Interpretation] (promulgated by the Sup. People’s Ct., Mar. 23, 2007, effective Apr. 1, 2007), SUP. PEOPLE’S CT. GAZ., May 1, 2007, at 25 [hereinafter 2007 Provisions on Judicial Interpretation]. A fourth form called a “decision” is used to amend or repeal other judicial interpretations.

³¹³ See generally, 2007 Provisions on Judicial Interpretation, *supra* note 312.

³¹⁴ The SPC and its specialized tribunals issue a variety of other official documents to lower courts. Such documents provide instructions or guidelines on legal issues, but they are not adopted in accordance with the procedures for judicial interpretations. Nonetheless, lower courts may consider them authoritative in practice.

³¹⁵ See, e.g., *The Legislative System of China*, *supra* note 1 (“Legislative Procedures of the NPC Standing Committee”) (NPCSC has failed to exercise its power of interpretation efficiently or satisfactorily); Cai, *supra* note 5, at 58–59 (the NPCSC, which meets every two months, lacks the capacity to interpret law effectively); Faxue Jie Guanzhu Lifa Fa (法学界关注立法法) [*Field of Legal Studies Pays Attention to the Legislation Law*], Fazhi Ribao (法制日报) [LEGAL DAILY ONLINE], Mar. 9, 2000 (comments of Jiang Bixin, who notes that the NPCSC cannot possibly carry out the task of issuing the many legal interpretations needed in China). Albert Chen suggests that

II(D), while the NPCSC LAC issues informal interpretations that have significant weight in the legal system, its interpretations are not binding. In this context, judicial interpretations provide a way to address some ambiguities, gaps, and inconsistencies in legislation and to guide the work of lower courts when they encounter such issues in concrete cases. Chinese jurists emphasize that judicial interpretations play a crucial role in unifying the legal system and ensuring consistency in the application of law.³¹⁶ Part IV(C) references numerous examples of SPC replies that perform these functions.

Although courts have no constitutional power to legislate, some SPC judicial interpretations are legislative in nature. Interpretations (解释) (*jieshi*) are abstract. Like laws and regulations, they are organized into sections and articles and have general binding effect.³¹⁷ In some instances, interpretations

the NPCSC has expressly exercised its power to interpret law on only a handful of occasions. CHEN, *supra* note 24, 155–56. However, in a 1997 article, Michael Dowdle concluded that the NPCSC had exercised its interpretation authority more frequently (at least up to that point). Dowdle argued that many documents identified as “resolutions,” “supplemental regulations” and “supplemental amendments” should be considered NPCSC legislative interpretations. Dowdle, *supra* note 24, at 82–85 (notes and accompanying text). Cai Dingjian occupies a middle ground. He states that the NPCSC “seldom” exercises its power to interpret law, but he also acknowledges that many documents are not clearly labeled as “legislative interpretations.” Cai Dingjian, *Functions of the People's Congress in the Effective Implementation of Law*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 38 (Jianfu Chen et. al eds., 2000).

³¹⁶ See, e.g., Xiao Shiwei (肖仕卫), *Zuigao Fayuan Sifa Jieshi de Luoji ji Yingxiang* (最高法院司法解释的逻辑及影响) [*Logic and Influence of SPC Judicial Interpretations*], in *Zuigao Fayuan Yanjiu* (最高法院研究) [SUP. PEOPLE'S CT. STUDIES] 337, 344–346 (Zuo Wemin [左卫民] ed., 2004) (unifying the legal system is the most important function of judicial interpretation in practice); Cai, *supra* note 315; *Zuigao Renmin Fayuan Yinfu Guanyu Renmin Fayuan Jiaqiang Falü Shishi Gongzuo de Yijian de Tongzhi* (最高人民法院印发《关于人民法院加强法律实施院加强法律事实工作的意见》的通知) [SPC, Notice on Issuance of “Opinions on People's Courts Strengthening the Work of Implementing Laws”] (promulgated by the Sup. People's Ct., Aug. 1, 2011, effective Aug. 1, 2011), SUP. PEOPLE'S CT. GAZ., Sept. 1, 2011, at § 12 (we shall strengthen judicial interpretation and unify the application of the law); *Xingzheng Susong Zhong de Falü Shiyong* (行政诉讼中的法律适用) [APPLICATION OF THE LAW IN ADMINISTRATIVE LITIGATION] 234 (Cai Xiaoxue [蔡小雪] et al eds., 2011) (discussing a reply in which the SPC addressed a conflict through judicial interpretation); Yang Linping (杨临萍), *Zhongguo Sifa Shencha Xu Guanzhu de Wu Ge Wenti* (中国司法审查需关注的五个问题) [*Five Issues that China's Judicial Review Must Pay Attention To*], *Zhongguo Fayuan Wang* (中国法院网) [CHINA COURTS ONLINE], Jan. 7, 2004 (noting that to ensure unified implementation of the law, only the SPC issues interpretations).

³¹⁷ See, e.g., Guanyu Zhixing “Zhonghua Renmin Gongheguo Xingzheng Susong Fa” Ruogan Wenti de Jieshi (关于执行“中华人民共和国行政诉讼法”若干问题的解释) [SPC

may include provisions that alter the effect of the laws they are based on.³¹⁸ Judicial interpretation procedures provide for the circulation of draft interpretations to other courts, the NPCSC LAC, the State Council LAO, state organs, and the public for comment.³¹⁹ Interpretations are legally binding on lower courts and must be cited in judgments. Thus, they are a *de facto* source of law.³²⁰ Finally, like formal legislation, interpretations are subject to filing and review requirements. Chinese commentators acknowledge that in issuing interpretations, the SPC is legislating in effect.³²¹

While some scholars have questioned the SPC's judicial interpretation practices, other scholars and legal actors have accepted them as a necessary component of China's constitutional order. For example, some Chinese scholars have expressed concern that the SPC has exceeded the NPCSC's delegation of authority and encroached on the legislative power of the people's congresses in practice.³²² The drafters of the Legislation Law attempted to resolve such concerns by providing for judicial interpretation in early drafts of the law. However, the subsequent deletion of these provisions renewed questions about the appropriateness of the SPC's judicial interpretation practices.³²³ A statement by Justice Jiang Bixin of the SPC captures these tensions well:

With regard to the issue of the SPC's judicial interpretation power, the Legislation Law does not make clear provisions. Article 42 provides that 'the power to interpret law belongs to the NPCSC . . . This provision does not preclude the SPC's judicial interpretation power. However, the SPC's judicial interpretation power is that of interpretation for application.

Interpretation on Several Issues in Enforcing the "PRC Administrative Litigation Law") (promulgated by the Sup. People's Ct., Mar. 8, 2000, effective Mar. 10, 2000), SUP. PEOPLE'S CT. GAZ., Mar. 1, 2000, at 87 [hereinafter SPC 2000 ALL Interpretation].

³¹⁸ Fan, *supra* note 21, at 40. For example, a 2000 judicial interpretation of the Administrative Litigation Law arguably altered the scope of review established under the ALL. Xiao, *supra* note 316, at 346.

³¹⁹ 2007 Provisions on Judicial Interpretation, *supra* note 312, arts. 9–23; Yang, *supra* note 316, at § 3.

³²⁰ 2007 Provisions on Judicial Interpretation, *supra* note 312, arts. 5, 27; Fan, *supra* note 21, at 423.

³²¹ Wang, *supra* note 34, at 13; CHEN, *supra* note 24, at 165–66.

³²² For examples, see Xiao, *supra* note 316, at 335–36 (in practice, SPC has long exceeded delegation of authority); Hu, *supra* note 111, at 79; Wang, *supra* note 34, at 13; CHEN, *supra* note 24, at 165–66; LIN FENG, CONSTITUTIONAL LAW IN CHINA 222 (2000).

³²³ Li, *supra* note 83, at 138.

It must be loyal to the original intent and spirit of legislation and may not infringe on the NPC's power to interpret law.³²⁴

With such considerations in mind, judicial sources take pains to distinguish judicial interpretations from legislative interpretations and legislation more generally.³²⁵ The SPC avoids confrontation with legislative organs by seeking the opinion of the NPCSC LAC and State Council LAO on many interpretations.

Within this framework, the SPC has continued to issue judicial interpretations in an expansive manner. Other legal actors have accepted and accommodated SPC practices.³²⁶ The incorporation of some judicial interpretations into the filing and review system provides both tacit recognition of this constitutional reality and a mechanism for ensuring that judicial interpretations remain within acceptable boundaries.³²⁷ An understanding of these judicial interpretation practices provides a useful foundation for thinking about judicial review of legislation in China. As discussed below, China's limited form of judicial review creates constitutional tensions. However, like the practice of judicial interpretation, it is viewed as a necessary supplement to the work of legislative institutions.

³²⁴ Jiang Bixin (江必新), *Lifa Fa Shi Renmin Fayuan Shiyong Falü Guifan de Jiben Zhunsheng* (立法法是人民法院适用法律规范的基本准绳) [*The Legislation Law Is the Basic Yardstick for People's Court Application of Legal Standards*] Xingzheng Faxue Yanjiu (行政法学研究) [ADMIN. L. STUD.], no. 3, 2000, at 12–13.

³²⁵ As one article in the *People's Court Daily* emphasizes, "[w]hat must be explained is that the SPC's judicial interpretations are only judicial interpretations for the concrete application of law and administrative regulations and are not legislative acts." Yang, *supra* note 316, at § 2.

³²⁶ See, e.g., Hu, *supra* note 111, at 79 (noting Hu's personal view that judicial interpretations are unconstitutional, but discussing them because they are a reality in the current system); Wang, *supra* note 114, at 13 (arguing that while interpretations encroach on legislative power and should be used sparingly, they cannot be completely eliminated).

³²⁷ Hu, *supra* note 111.

B. Judicial Commentary on the Validity of Legislation

We can begin our exploration of the limited power of people's courts to review legislation by confirming what people's courts *may not* do. It is clear in theory, law, and practice that people's courts may not declare legislation invalid. The people's courts are subject to the supervision of people's congresses at the corresponding level, and the Constitution and Legislation Law vest legislative organs with the authority to amend or annul conflicting legislation. The 1989 Administrative Litigation Law empowers courts to review the legality of concrete administrative acts. By contrast, courts may not review abstract administrative acts such as the formulation of regulations and rules.³²⁸ As prominent constitutional law scholars maintain, judicial decisions to invalidate legislation are inconsistent with a constitutional system in which people's congresses are the organs of state power. Among Chinese jurists, there is overwhelming consensus in support of the proposition that Chinese courts may not declare legislation invalid.³²⁹ Local courts have tested the boundaries of this consensus on at least four occasions. In three of the four cases, they faced significant legislative backlash. In response, the SPC prohibited courts from making explicit determinations on the validity of legislation in judicial judgments.

Although foreign observers are most familiar with the celebrated Luoyang Seed Case, that case was not the first in which a people's court generated controversy by openly commenting on the validity of a local regulation. An earlier case was decided in Qinyang city, Henan province in 1998. In the Qinyang case, a local branch of the State Commission of Industry and Commerce seized products that had been mislabeled and did not meet quality standards.³³⁰ A Henan local regulation authorized the seizure of sub-standard

³²⁸ Xingzheng Susong Fa (行政诉讼法) [Administrative Litigation Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) arts. 11, 12 (Chinalawinfo) [hereinafter Administrative Litigation Law or ALL].

³²⁹ Statements in this regard are too numerous to cite comprehensively. For examples, see Jiang, *supra* note 324, at 12; Cai and Li, *supra* note 258; Wang Lei (王磊), Faguan Dui Falü Shiyong De Xuanze Quan (法官对法律适用的选择权) [The Power of Judges to Decide on Application of the Law], Faxue (法学) [LEGAL SCI.], no. 4, 2004, at 126–127; Yang, *supra* note 316; HAN DAYUAN (韩大元), Xianfa Xue Jichu Lilun (宪法学基础理论) [BASIC THEORY IN CONSTITUTIONAL LEGAL STUDIES] 385–87 (2008); Wang, *supra* note 122, at § 4(2); Feng Xi (冯希), Xingzheng Falü Guifan Chongtu Zhong Sifa Quan de Xiandu yu Yunxing (行政法律规范冲突中司法权的限度与运行) [Limits and Function of Judicial Power When Administrative Legal Norms Conflict], Guangzhou Shenpan Wang (广州审判网) [GUANGZHOU TRIAL ONLINE], June 6, 2011, at § 2(3).

³³⁰ Unless otherwise provided, this account of the Qinyang case is based on Zi Nan & Fan Fu (自南 & 凡夫), Fagui Da Haishi Fayuan Da?—Guanyu Qinyang Shi Fayuan Fouding Difangxing Fagui Xiaoli de Diaocha yu Sikao (法规大还是法院大?—关于沁阳市法院否定地方性法规效力的调查与思考) [Do Local Regulations or Courts Control? Investigation and Reflection on the Qinyang City Court Denying the Validity of a Local

products as an administrative punishment. In adjudicating an administrative lawsuit challenging the seizure, the Qinyang People's Court canceled the punishment decision and ordered the return of the seized property. The court cited the PRC Product Quality Law, which does not provide for seizure of property as an administrative punishment, and the PRC Administrative Punishment Law, which provides that local regulations may only establish administrative punishments within the scope set out in laws or administrative regulations. The court concluded that the local regulation exceeded the scope of national law and refused to uphold (不支持) (*bu zhichi*) the administrative punishment decision.

In available reports on the Qinyang case, there is no indication that the court explicitly declared the Henan local regulation invalid. Nonetheless, after researching the case, Henan legislative officials determined that there was no conflict and that the court's judgment amounted to a declaration that the Henan regulation was invalid. At a meeting to discuss the case, the Henan People's Congress Standing Committee severely criticized the court:

With regard to the method of the Qinyang People's Court, if it were allowed to go unchecked, the consequences would be unimaginable. The rest may be inferred. May courts determine that laws violate basic laws, and that basic laws in turn violate the Constitution? This kind of misplaced legal determination will inevitably damage and disrupt the principles of China's socialist legal system. . . [T]he political and professional quality of the Qinyang People's Court is not high, its constitutional consciousness is weak, and it does not have a correct understanding of China's people's congress system.

Following this meeting, the Henan People's Congress Legislative Affairs Commission issued a document stating that the local regulation was valid and must be enforced. The Henan Higher People's Court also circulated a notice to provincial courts. This notice criticized the Qinyang court for "incorrectly" reviewing a local regulation and confirmed that people's courts "[h]ave no authority to directly determine that local regulations are unlawful and invalid."³³¹ A people's congress journal also criticized the court for violating the Constitution.³³²

Regulation], Renda Jianshe (人大建设) [CONSTRUCTION OF THE PEOPLE'S CONG.], no. 6, 1998, at 3-4.

³³¹ Henan Renda Zhi Luoyang Zhongyuan Rending Difang Fagui Wuxiao Shi Yanzhong Weifa (河南人大指洛阳中院认定地方法规无效是严重违法) [The Henan LPC Charges that the Luoyang Intermediate Court Determination that a Local Regulation Is Invalid Is a Serious Violation of Law], Zhong Xin Wang (中新网) [CHINA NEWS ONLINE],

A similar case emerged a year later in Jiuquan, Gansu province. In an administrative case, the Jiuquan Intermediate People's Court considered an appeal of a basic-level people's court decision to overturn a fine. The local technology supervision bureau had levied the fine against a repair company for operating without the proper license.³³³ In upholding the lower court decision, the intermediate people's court determined that the provisions of the Gansu local regulation that the bureau relied on were "contrary to (有悖于) (*you bei yu*) Article 11(2) of the PRC Administrative Punishment Law . . . and may not constitute a basis for the administrative fine."³³⁴ Shortly after the case was decided, a judicial clerk published an article confirming that the local regulation exceeded the scope of national law and "could not constitute a basis for implementing an administrative punishment." While the court does not appear to have stated explicitly that the local regulation was "invalid," academic commentary on the case indicates that the court was perceived as having made such a determination in its judgment.³³⁵

As in Qinyang, these actions sparked a political backlash. The Gansu People's Congress disputed the court's determination that a conflict existed and, after holding a meeting to discuss the case, stated that the court had "seriously violated the legislative power of the local people's congress standing committee endowed by the Constitution and Local Organic Law" and "exceeded the limits of judicial power." It concluded that the decision was a "serious violation of the law . . . rarely seen in the entire country" and demanded that the Gansu Higher People's Court cancel the judgment, publicly criticize the intermediate people's court, and sanction the individuals

Nov. 8, 2003, reprinted on Renmin Wang (人民网) [PEOPLE'S DAILY ONLINE]; Han Junjie (韩俊杰), Henan Li Huijuan Shijian Zai Qi Bolan, Jiedao Huiyuan Gongzuo Tongzhi (河南李慧娟事件再起波澜, 接到回院工作通知) [Henan Li Huijuan Incident Again Makes Waves: Work Notice to Return to Court Received], Zhongguo Qingnian Bao (中国青年报) [CHINA YOUTH DAILY ONLINE], Feb. 6, 2004 [hereinafter Henan Li Huijuan Makes Waves].

³³² Zi & Fan, *supra* note 330.

³³³ This account of the Gansu case draws on three sources: Zhongguo Xianzheng Wenti Yanjiu Fanlun (中国宪政问题研究泛论) [GENERAL SURVEY OF ISSUES IN THE STUDY OF CHINESE CONSTITUTIONALISM] 183–86 (Su Yue [苏越] ed., 2008); Wang, *supra* note 122, at § 1; Jiuquan Fasheng Fayuan Wushi Difangxing Fagui Shijian (酒泉发生法院无视地方性法规事件) [Court Disregards Local Regulation in Jiuquan], Renda Yanjiu (人大研究) [PEOPLE'S CONG. STUD.], no. 10, 2000.

³³⁴ GENERAL SURVEY OF ISSUES IN THE STUDY OF CHINESE CONSTITUTIONALISM, *supra* note 333, at 183. Specifically, the court determined that the PRC Product Quality Law did not endow product quality supervision departments with the authority to levy administrative penalties against those engaged in repair activities.

³³⁵ *Id.* (referring to the case as "Gansu Jiuquan Intermediate People's Court Cancels [Feichu] Provincial People's Congress Legislation"); Wang, *supra* note 329, at 126.

responsible. It argued that the court should have reported the conflict to the provincial people's congress or to higher-level judicial organs (and in turn to the NPCSC) for a ruling. In the view of the legislative officials, the court should not have engaged in "arbitrary criticism or interpretation" or determined that the local regulation was invalid. In canceling the judgment, the Gansu Higher People's Court noted that while the court's determination of the facts was correct, "it was an error to directly criticize the validity of the local regulation."

A third case, decided in 1999, involved a dispute over a land use contract in Shanxi province. A local hotel company signed a contract with the Datong Land Administration Bureau for the right to use state-owned land.³³⁶ At that time, it paid both earnest money and a portion of the fee for the transfer of the land use right. When the company failed to perform the land-use contract and pay the remaining transfer fee, the bureau revoked the contract. A Shanxi Provincial People's Government rule provided that when parties that obtain the right to use state-owned land fail to fulfill their contractual obligations, they are not entitled to the return of state land use fees. As such, the bureau refused to refund the earnest money and the partial fee payment. In a first instance judgment, the Datong Intermediate People's Court, relying on the General Principles of Civil Law and a State Council administrative regulation, decided that the company had a right to the return of the land use fee less the earnest money. On the basis of this analysis, it ignored the conflicting Shanxi rule. On appeal, the Shanxi Higher People's Court upheld the judgment and stated explicitly that because the Shanxi rule conflicted with an administrative regulation, it was "invalid (无效) (*wuxiao*)."³³⁷

It is unclear whether this Shanxi judgment generated significant controversy. Because the case involved a conflicting provincial rule rather than a conflicting provincial people's congress regulation, the court's declaration of invalidity did not involve a constitutional conflict with the local people's

³³⁶ This discussion of the case is based on a detailed summary and commentary that appeared in the *Supreme People's Court Gazette*. Taifeng Da Jiudian Youxian Gongci Su Datong Shi Tudi Guanli Ju Tudi Shiyongquan Churang Jiufen An (泰丰大酒店有限公司诉大同市土地管理局土地使用权出让纠纷案) [Taifeng Hotel Co. Suing the Datong City Land Administration Bureau in a Case Involving a Dispute Over the Transfer of Land-Use Rights], *Zuigao Renmin Fayuan Gongbao* (最高人民法院公报) [SUP. PEOPLE'S CT. GAZ.], no. 4, 2000 (Chinalawinfo).

³³⁷ *Id.*

congress.³³⁸ The SPC also published a discussion of this case in a 2000 issue of the *Supreme People's Court Gazette*.³³⁹

The fourth and most famous case involving a judicial declaration on the validity of legislation was the Luoyang Seed Case. In adjudicating a 2003 civil case over a seed contract, Judge Li Huijuan of the Luoyang Intermediate People's Court determined that a Henan local regulation provided a standard for seed pricing that conflicted with a standard set out in the PRC Seed Law.³⁴⁰ Judge Li not only applied the Seed Law but also declared the Henan local regulation "naturally invalid" (自然无效) (*ziran wuxiao*). Chinese sources reported that the municipal government, the local Party political-legal committee, and leaders of the Luoyang court were consulted and approved the decision.³⁴¹

The Luoyang decision sparked a national controversy. Similar to several of the cases above, the Henan People's Congress reacted furiously and declared that Judge Li had no power to declare a local regulation invalid.³⁴² The People's Congress General Office claimed that there was no legislative conflict, that the court had unlawfully reviewed the local regulation, and that the court's "serious illegal action . . . violated China's people's congress system and encroached on the official powers of an authoritative state organ." It demanded that the municipal people's congress supervise the court, correct the illegality, and sanction both the judge responsible and her superiors. The General Office then issued a formal notice to the Henan Higher People's Court referencing the earlier judicial notice in the Qinyang case, accusing the

³³⁸ Unlike local people's congresses, people's governments do not exercise formal constitutional authority to supervise the work of courts at the corresponding level. Moreover, under the Administrative Litigation Law, courts are only required to "consult" administrative rules. See *infra* Part IV(C).

³³⁹ Professor Peng Yan'an indicates that this was the first time the *Gazette* published a case in which a court declared a piece of lower-level legislation invalid. Peng Yan'an (彭亚楠), "Zixing Panjue," "Jinshen Biaoshu," (自行判决, 谨慎表述) [*Self-Adjudication, Cautious Expression*], Faxue [LEGAL SCI.], no. 3, 2007, at 119. I am grateful to Professor Peng for his reference to this case.

³⁴⁰ This account draws on Otto Malmgren, *Fragile Constitutionalism in China* (Aug. 31, 2010) (unpublished ms.), at 7–8 (and sources cited therein); GENERAL SURVEY OF ISSUES IN THE STUDY OF CHINESE CONSTITUTIONALISM, *supra* note 333, at 186–89; *Henan Li Huijuan Makes Waves*, *supra* note 331.

³⁴¹ Henan Zhongzi 'An—Fayuan yu Renda Guanxi (河南种子案—法院与人大关系) [*Henan Seed Case—The Relationship Between Courts and People's Congresses*], Xianfa Xue (宪法学) [CONST. L. STUD.], Apr. 12, 2006; Qiu Feng (秋风), Cong Li Huijuan Dao Fagui Shencha Bei'an Shi (从李慧娟到法规审查备案室) [*From Li Huijuan to Legislative Review and Recording Office*], Nanfang Wang (南方网) [SOUTHERN ONLINE], June 24, 2004.

³⁴² Jim Yardley, *A Judge Tests China's Courts, Making History*, N.Y. TIMES, Nov. 28, 2005.

Luoyang court of a knowing violation of law, and demanding that the court "earnestly and severely deal with this serious illegal action." Following these criticisms, court leaders suspended the judicial credentials of Judge Li and the vice-head of the civil tribunal in which the case was adjudicated.³⁴³ Although it upheld the substantive result in the case on appeal, the Henan Higher People's Court criticized Judge Li for declaring the local regulation invalid.³⁴⁴

The strong legislative backlash in these cases not only confirmed that courts may not declare legislation invalid, but also that courts should refrain from *commenting on* the validity of legislation. Writing in 2004, Peking University Professor Wang Lei noted that while it is preferable for courts to explain their reasoning, in the present environment, it is not appropriate for courts to discuss the validity of legislation.³⁴⁵ According to Guangzhou judge Feng Xi, courts have no authority to comment on (评述) (*pingshu*) the validity of legislation. Feng concludes that courts should avoid language that suggests they are doing so.³⁴⁶ Other judicial commentary confirms that courts should not make statements on the validity of legislation.³⁴⁷

³⁴³ Han, *supra* note 331.

³⁴⁴ Yardley, *supra* note 334.

³⁴⁵ Wang, *supra* note 329, at 126. The cases discussed above leave some uncertainty regarding the scope of these conventions. In contrast to the court in the Seed Case, the courts in Qinyang and Jiuquan do not appear to have explicitly declared local regulations invalid. In the Qinyang case, the court observed that the Henan local regulation exceeded the scope of national law and that it could not uphold the punishment decision. In the Jiuquan case, the court observed that the local regulation was "contrary to" national law. Local people's congresses appear to have interpreted these statements as declarations on the validity of the legislation at issue.

³⁴⁶ Feng, *supra* note 329, at §§ 2(3), 3(2).

³⁴⁷ Shanghai Shi Di Er Zhongji Renmin Fayuan Shanghai Dongzhao Huagong Youxian Gongsi Su Shanghai Shi Gongshang Xingzheng Guanliju Jing'an Fenju Xingzheng Chufa An Shengming (上海市第二中级人民法院上海东兆化工有限公司诉上海市工商行政管理局静安分局行政处罚案声明) [Declaration of the Administrative Punishment Case of the Shanghai No. 2 Intermediate Court, Shanghai Dongzhao Chemical Co. Ltd. v. Shanghai City Administrative Bureau of Industry and Commerce Jing'an Branch], Shanghai No. 2 Interim. People's Ct., July 19, 2004 (Chinalawinfo) (supplemental commentary of Wang Caojun, Shanghai No. 2 Intermediate People's Court, stating that courts may not directly determine that a provision violates the Legislation Law and is invalid); Zhongguo Youse Gongcheng Sheji Yanjiu Zongyuan yu Beijing Yifang Wuye Guanli Youxian Zeren Gongsi Wuye Fuwu Hetong Jiufen Shangsu An (中国有色工程设计研究总院与北京亿方物业管理有限责任公司物业服务合同纠纷上诉案) [Appellate Case of the Service Contract Dispute Between the China Youse Project Design Main Office and Beijing Yifang Property Management LLC], Beijing No. 1 Interim. People's Ct., Oct. 30, 2008 (Chinalawinfo) (case judgment stating that "the people's court does not have the power to amend or cancel lower-level legislation that conflicts with higher-level legislation").

The SPC has affirmed these constitutional understandings both directly and indirectly. In its replies to requests from lower courts for instructions on legislative conflicts, the SPC sometimes notes a lack of consistency in legislation and directs lower courts to apply certain legislation. However, it generally refrains from making statements on the validity of the legislation that is not applied.³⁴⁸ More importantly, the SPC issued a directive on the citation of legal documents in 2009 that provides:

When the normative legal documents that a people's court truly must cite to in formulating judgment documents conflict with each other *and the court cannot select which one to apply* according to the Legislation Law and related legal provisions, it should submit [the matter] to the organ with decision-making authority for a ruling in accordance with law, and *is not permitted on its own to make a determination on the validity of the normative legal document in its judgment document (emphasis added)*.³⁴⁹

Although there is some ambiguity in the language of this provision, a senior judge has confirmed that it was intended to prohibit courts from making explicit statements on the validity of legislation *in all cases*.³⁵⁰

C. Choice in Application of Legislation as Limited Judicial Review

The discussion above may prompt some readers to conclude that Chinese courts may not review legislation. However, if we think of judicial review of legislation as encompassing a spectrum of acts and authorities, it is clear that Chinese courts engage in a weak or limited form of judicial review. As the Luoyang Seed Case suggests and the following discussion will demonstrate, Chinese courts may internally evaluate and decline to apply conflicting lower-level legislation. Over the course of the reform era, this convention has

³⁴⁸ Wang, *supra* note 122, at § 4(2). The SPC replies and documents cited in Part IV(C) provide numerous examples of this approach.

³⁴⁹ SPC Provisions on Legal Citation, *supra* note 35, art. 7.

³⁵⁰ This provision could be interpreted to mean that courts are only prohibited from making a determination (认定) (*rending*) on the validity of legislation in a judgment if they cannot determine which of two or more conflicting provisions to apply. In the context of PRC practice, the controversy over the Seed Case, and the resolution of the constitutional dispute the Seed Case generated, it is my judgment that the ambiguity here is the product of poor drafting. One senior judge confirmed this conclusion by emphasizing that the 2009 provision was a definitive statement on the issue of courts including determinations of validity in their judgments. Interview with Senior Chinese Judge, July 2012 (on file with author).

gradually become embedded in Chinese practice. This subsection explores the evolution, operation, and boundaries of the convention.

Judicial review comes in different varieties.³⁵¹ For example, we might consider differences in the “strong form” judicial review that American courts exercise and the “weak form” of review that courts in other common law systems exercise.³⁵² Within the “weak form” jurisdictions, variants can be found. For example, the New Zealand Bill of Rights instructs courts to interpret legislation to be compatible with the Bill. It does not give courts any power to make declarations of incompatibility or refuse to apply conflicting statutes. The U.K. Human Rights Act authorizes courts to declare statutes incompatible with fundamental rights, but these determinations are not binding on the parties and courts do not exercise the power to invalidate statutes. Under Article 33 of the Canadian Charter of Rights, the Canadian Parliament may insulate statutes from a judicial finding of incompatibility with the Charter.³⁵³ Even in the United States, courts may limit the impact of their review of legislation in certain situations.³⁵⁴

Civil law jurisdictions have also embraced a range of judicial review models. Traditionally, civil law jurisdictions were hostile to judicial review of legislation. For example, the Dutch Constitution prohibits courts from reviewing the constitutionality of treaties and acts of parliament. In practice, this provision has been interpreted to mean that Dutch courts may evaluate and make pronouncements on, but may not refuse to apply, acts of parliament that conflict with the Constitution. They *may* review and refuse to apply lower-level legal norms that conflict with the Constitution.³⁵⁵ Swiss courts may

³⁵¹ See, e.g., Mauro Capelletti, *Judicial Review in Comparative Perspective*, 58 CAL. L. REV. 1017 (1970); Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 J. CONST. L. 977 (May 2001); Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 278, 278–86 (2003); GERHARD VAN DER SCHYFF, *JUDICIAL REVIEW OF LEGISLATION: A COMPARATIVE STUDY OF THE UNITED KINGDOM, THE NETHERLANDS, AND SOUTH AFRICA* (2010).

³⁵² Tushnet, *supra* note 351, at 278–86; VAN DER SCHYFF, *supra* note 351.

³⁵³ Tushnet, *supra* note 351, at 278–85; VAN DER SCHYFF, *supra* note 351, at 19–22, 184–89.

³⁵⁴ For example, courts may determine that legislation is facially invalid and thus null and void in all circumstances or that it is invalid as applied to the facts of a specific case. For an argument that the Supreme Court is responsive to congressional preferences in making this choice, see generally Stephanie Lindquist & Pamela Corley, *The Multiple Stage Process of Judicial Review: Facial and As-Applied Constitutional Challenges to Legislation Before the US Supreme Court*, 40 J. LEGAL STUD. 467 (June 2011). Tushnet has explored varieties of weak form review in the United States. Tushnet, *supra* note 351, at 278, 279–98.

³⁵⁵ Grondwet voor het Koninkrijk der Nederlanden [Constitution of the Kingdom of the Netherlands], Feb. 17, 1983, art. 120; VAN DER SCHYFF, *supra* note 351, at 4, 23–33, 189–94. In addition, courts may refuse to apply, but may not invalidate, acts of

review and disregard cantonal laws that conflict with higher law, but they may not review or disregard acts of parliament. Ordinary Italian courts must disregard administrative regulations that conflict with statutes, but they must refer questions regarding the constitutionality of legislation to a central constitutional court. Scandinavian courts review and disregard laws that conflict with the Constitution, but they exercise this authority with significant restraint.³⁵⁶ To conclude that Chinese courts do not review legislation because they do not enjoy the “strong form” review powers of American courts is to ignore the rich variety of judicial review models that have evolved in different jurisdictions.

In thinking about the authority that Chinese courts do exercise with respect to legislative conflicts, it is helpful to disaggregate the power to review legislation into a spectrum of acts and authorities. Chinese scholar Pan Aiguo disaggregates judicial review into the authority to evaluate and discover conflicts and the authority to make review decisions, with the authority to choose the applicable law in a concrete case falling somewhere in between.³⁵⁷ In thinking about China’s experience and the variants noted above, we might further disaggregate this spectrum of authorities into (1) the authority to evaluate legislation in the context of concrete cases; (2) the authority to determine internally that a conflict exists; (3) the authority to choose the applicable law in a concrete case (i.e., to apply higher-level legislation and decline to apply conflicting lower-level legislation); (4) the authority to request that authoritative organs annul conflicting legislation; (5) the authority to comment or make declarations on the validity of conflicting lower-level legislation; and (6) the authority to cancel the effect of the conflicting legislation in a manner that binds other courts and political actors. In practice, Chinese courts exercise authorities one through four on this spectrum. As the following analysis will demonstrate, the SPC even exercises a limited form of the sixth authority (invalidation), as its replies on conflicts bind lower courts in practice.

Support for these practices is not universal in China. Some commentators argue that people’s courts have no power to engage in even limited review of legislation. Under this interpretation of China’s constitutional framework, when people’s courts encounter conflicts between two effective legal provisions, they may not choose the legal provision to apply on their own initiative. Instead, they must suspend adjudication of the case, request a ruling on the conflict from an authoritative legislative organ, and apply the

parliament that are inconsistent with treaties or international resolutions. However, such decisions do not formally bind other courts.

³⁵⁶ For a discussion of the Swiss, Italian, and Scandinavian models, see Capelletti, *supra* note 351, at 1035–49; de Andrande, *supra* note 351, at 978.

³⁵⁷ Pan, *supra* note 256, at 129, 133–34.

legislation in accordance with the legislative ruling.³⁵⁸ A statement by Beijing Municipal People's Congress Standing Committee Vice-Chairman Li Xiaojuan echoes that of the local people's congress in the Jiuquan case and highlights the pressures that courts face in such situations:

It does not work in practice for Beijing courts to not apply the local regulation when there are conflicts between local regulations and laws. Foreign countries have separation of powers. China has a system of democratic centralism. Courts are created by people's congresses and are responsible to them. [Local courts] exceed their authority when they act in this way.³⁵⁹

Although many Chinese jurists have adopted a more flexible approach on this issue, they acknowledge that it is controversial and that juristic opinion is not uniform.³⁶⁰ Even Cai Dingjian and Jiang Ming'an, leading legal scholars who have advocated for an expansion of judicial roles, note that suspending cases and applying for a ruling from legislative organs is technically the correct procedure.³⁶¹

National law instructs courts to apply for a ruling in a number of circumstances. Under the Administrative Litigation Law and the Legislation Law, when courts find inconsistencies between ministry and local people's

³⁵⁸ For statements on this conservative approach, see the Gansu Jiuquan case discussed above; Lüshi Jianyi Quanguo Renda Dui "Luoyang Zhongzi An" Jinxing Lifa Shencha (律师建议全国人大对“洛阳种子案”进行立法审查) [*Lawyers Propose that the NPC Undertake Legislative Review of the "Luoyang Seed Case"*], Zhongguo Fayuan Wang (中国法院网) [China Courts Online], Nov. 30, 2003 [hereinafter *Lawyers Propose Review*] (citing Jiang Ming'an statement); Xie Yuandong (谢远东), Shi Yue Quan Haishi Hu Fa: Zhongzi Guansi de Yiwai Zhanfang (是越权还是护法: 种子官司的意外绽放) [Exceeding Authority or Protecting Law: The Unexpected Blossoming of the Seed Lawsuit], Fazhi Ribao(法制日报) [Legal Daily Online], Nov. 26, 2003 (statement of Yu An); Cong Li Huijuan An Kan Zhongguo de Sifa Shencha (从李慧娟案看中国的司法审查) [Looking at Judicial Review in China from the Li Huijuan Case], Nanfang Zhoumo (南方周末) [Southern Weekend Online], Sept. 9, 2004 [hereinafter *From the Li Huijuan Case*]; Wang, *supra* note 122, at § 4(1) (noting the view of some scholars).

³⁵⁹ Cai & Li, *supra* note 258 (statement of Li Xiaojuan, Vice Chairman of the Beijing LPCSC).

³⁶⁰ See, e.g., Wang, *supra* note 122, at § 4; Jiang, *supra* note 8, at 1076–77.

³⁶¹ *Lawyers Propose Review*, *supra* note 358 (citing Jiang Ming'an statement); *Judge Sows Seeds of Lawmaking Dispute*, PEOPLE'S DAILY, Nov. 24, 2003 (citing Cai Dingjian statement).

government rules, they must apply to the State Council for a ruling.³⁶² Similarly, when provisions of local regulations conflict with ministry rules, or when there are inconsistencies between new general and old special provisions of legislation with equal rank in the hierarchy, courts must apply to legislative organs for a ruling.³⁶³ As noted below, the SPC has issued guidelines that give courts limited discretion to apply conflicting legislation in these situations without a formal legislative ruling.

i. Judicial Review Prior to the Legislation Law

Legislative and judicial statements on court authority to review conflicting legislation and choose the legislation to apply appear as early as the 1980s. In a 1986 Reply to the Jiangsu Higher People's Court, the SPC stated that courts may cite local, autonomous, and separate regulations "that do not conflict with the Constitution, law, or administrative regulations." It also authorized courts to consult (but not to cite) a range of rules and normative documents, provided that such documents "do not conflict with the Constitution, law, or administrative regulations."³⁶⁴ This SPC document implied that courts must conduct an internal review of the legality of such legislation before citing or consulting it in cases.³⁶⁵

Legislative entities expressed tacit approval of these judicial practices in the Administrative Litigation Law and other official documents. Under the ALL, courts may not review and annul "abstract" administrative acts such as the formulation of regulations and rules.³⁶⁶ However, the drafters of the ALL

³⁶² Administrative Litigation Law, *supra* note 328, art. 53; Legislation Law, *supra* note 21, art. 86. See also Guanyu Bumen Guizhang Zhijian Guiding Buyizhi Shi Ying Ruhe Duidai Wenti de Fuhuan (关于部门规章之间规定不一致时应如何对待问题的复函) [SPC Administrative Tribunal, Reply Letter on the Issue of Addressing Provisions of Department Rules When They Are Inconsistent] (promulgated by the Sup. People's Ct. Administrative Tribunal, Oct. 16, 1991, effective Oct. 16, 1991).

³⁶³ Legislation Law, *supra* note 21, art. 86(1)–(2). For confirmation of these requirements, see, for example, Jiang, *supra* note 324, at 12; Cai & Li, *supra* note 258 (statement of Cai Dingjian).

³⁶⁴ The "other" normative documents referred to in this 1986 reply included orders, notices, and rules of State Council ministries; decisions and resolutions of local people's congresses at the city and county level; and decisions, orders, and rules of local people's governments. Guanyu Renmin Fayuan Zhizuo Falü Wenshu Ruhe Yinyong Falü Guifanxing Wenjian de Pifu (关于人民法院制作法律文书如何引用法律规范性文件的批复) [SPC Reply on How to Cite Legal Normative Documents in Formulating Legal Documents] (promulgated by the Sup. People's Ct., Oct. 28, 1986, effective Oct. 28, 1986) (Chinalawinfo).

³⁶⁵ Wang, *supra* note 329, at 125–26.

³⁶⁶ Administrative Litigation Law, *supra* note 328, arts. 11, 12.

contemplated that courts would undertake an internal review of legislation that provides the basis for concrete administrative acts and refrain from applying legislation that conflicts with higher-level law. For example, the ALL provides that courts may "consult" administrative rules. In an authoritative explanation of the draft ALL, former Vice Chairman of the NPCSC Wang Hanbin confirmed that courts may apply rules *if they are consistent with* higher-level legislation.³⁶⁷

A 1989 NPCSC LAC explanation expands on this view. In response to an SPC query, the NPCSC LAC validated the SPC's opinion that "if people's courts, when adjudicating administrative cases, discover that there are conflicts between a local regulation and a law promulgated by the highest organ of state power, they should enforce the law promulgated by the highest organ of state power."³⁶⁸ Thus, in adjudicating administrative cases, courts must undertake a review of legislation that constitutes the basis for the concrete administrative act at issue.

Several SPC documents issued after consultation with legislative organs reinforced these understandings. In a 1993 reply often cited in the Chinese legal literature, the SPC grappled with a Fujian Higher People's Court request for instructions. The case involved the seizure of a fishing vessel. While a Fujian local regulation authorized this administrative action, the PRC Fisheries Law did not. After consultation with the NPCSC LAC and State Council Legislative Affairs Bureau (the predecessor to the LAO), the SPC replied, "When people's courts are hearing administrative cases, with regard to local

³⁶⁷ During the drafting process for the ALL, the issue of applying administrative rules as a basis for judicial judgments generated controversy. The compromise was to provide that courts need only "consult" rules. Wang Hanbin, Guanyu "Zhonghua Renmin Gongheguo Xingzheng Susong Fa" (Cao'an) de Shuoming (关于《中华人民共和国行政诉讼法(草案)》的说明) [*Explanation on the PRC Administrative Litigation Law (Draft)*], Mar. 28, 1989. A 2000 SPC interpretation provides that courts may refer to other normative legal documents if such documents are consistent with higher-level legislation. SPC 2000 ALL Interpretation, *supra* note 317, art. 62; Wang, *supra* note 114, at 15.

³⁶⁸ The case that sparked this query to the NPCSC LAC involved a conflict between administrative penalty provisions in the PRC Land Administration Law and a Liaoning local regulation. Quanguo Renda Changweihui Fazhi Gongzuo Weiuanhui Guanyu Ruhe Lijie he Zhixing Falü Ruogan Wenti de Jieda (Yi) (全国人大常委会法制工作委员会关于如何理解和执行法律若干问题的解答(一)) [*NPCSC LAC, Answer on Several Issues in Understanding and Interpreting the Law (No. 1)*] (promulgated by the Standing Comm. Nat'l People's Cong. Legislative Affairs Commission, Apr. 25, 1988, effective Apr. 25, 1988) (Chinalawinfo). The Administrative Litigation Law provides that courts must take "laws, administrative regulations, and local regulations" as the basis for deciding cases. Administrative Litigation Law, *supra* note 328, art. 52. The ALL contains no express provisions on how courts should resolve conflicts between one of the binding sources of law identified in Article 52 and higher-level legislation. The NPCSC LAC confirms that courts should apply the higher-level legislation in such cases.

regulations that are inconsistent with provisions of law and administrative regulations, the provisions of law and administrative regulations should be enforced.”³⁶⁹ In a reply the following year, the SPC addressed a similar conflict involving the State Council’s Highway Administration Regulation and a Liaoning provincial government rule. After consulting the State Council Legislative Affairs Bureau, the SPC replied that the local rule “lack[ed] a basis in law and regulation.” It then stated, “When people’s courts are hearing concrete cases, they should apply the relevant provisions of the PRC Highway Administration Regulation.”³⁷⁰ Other SPC statements on legislative conflicts in the 1990s, judicial interpretations, judicial surveys, and accounts of early cases are consistent with this position.³⁷¹

³⁶⁹ Guanyu Renmin Fayuan Shenli Xingzheng Anjian Dui Difangxing Fagui de Guiding yu Falü he Xingzheng Fagui Bu Yi Zhi de Yingdang Zhixing Falü he Xingzheng Fagui de Guiding de Fuhuan (关于人民法院审理行政案件对地方性法规的规定与法律和行政法规不一致的应当执行法律和行政法规的规定的复函) [*Reply Letter Providing that People’s Courts Should Enforce the Provisions of Laws and Administrative Regulations When Hearing Administrative Cases and Local Regulations are Inconsistent with Laws and Administrative Regulations*] (promulgated by the Sup. People’s Ct., Jan. 13, 1993, effective Jan. 13, 1993) (Chinalawinfo) [hereinafter 1993 Fujian Fisheries Reply].

³⁷⁰ The provincial rule authorized the seizure of driver and vehicle licenses for failure to pay certain road fees in a timely manner. Guanyu Renmin Fayuan Shenli Xingzheng Anjian Dui Quefa Falü Yiju de Guizhang de Guiding Ying Ruhe Canzhao Wenti de Dafu (关于人民法院审理行政案件对缺乏法律和法规依据的规章的规定应如何参照问题的答复) [*Reply on the Issue of How to Consult the Provisions of Rules that Lack a Basis in Law and Administrative Regulation When Hearing Administrative Cases*] (promulgated by the Sup. People’s Ct., Jan. 13, 1994, effective Jan. 13, 1994) (Chinalawinfo).

³⁷¹ For additional SPC statements, see, for example, Zuigao Renmin Fayuan Xingzheng Shenpanting Dui Henan Sheng Gaoji Renmin Fayuan “Guanyu Ying Zezhong Su Xixia Xian Jiaotongju Xingzhen Qiangzhi Cuoshi An De Falu Wenti de Qingshi” de Dafu Yijian (最高人民法院行政审判庭对河南省高级人民法院《关于应泽忠诉西峡县交通局行政强制措施案的法律问题的请示》的答复意见) [*SPC Administrative Tribunal’s Reply Opinion on the Henan People’s Court’s “Request for Instructions on Legal Issues Regarding the Administrative Coercive Measure Case of Yin Zezhong v. Xixia County Traffic Bureau”*] (promulgated by the Sup. People’s Ct. Administrative Tribunal, Dec. 27, 1998, effective Dec. 27, 1998) (Chinalawinfo) (agreeing with Henan Higher People’s Court that relevant provisions of PRC Highway Law should be enforced); Zuigao Renmin Fayuan Xingzheng Shenpanting Dui “Guanyu Shenli Gongzheng Xingzheng Anjian Zhong Shiyong Fagui Wenti de Qingshi” de Dafu (最高人民法院行政审判庭对《关于审理公证行政案件中适用法规问题的请示》的答复) [*SPC Administrative Tribunal’s Reply to “Request for Instructions Regarding Issues in the Application of Laws in Hearing Administrative Cases on Notarization”*] (promulgated by the Sup. People’s Ct. Administrative Tribunal, Aug. 16, 1999, effective Aug. 16, 1999) (Chinalawinfo) (stating that where the PRC Temporary Regulations on Notarization and the Shanghai Notarization Regulations are inconsistent, the “people’s courts should apply the former”). For interpretations, see Guanyu Shiyong “Zhonghua Renmin Gongheguo Hetongfa” Ruogan Wenti de Jieshi (Yi) (关于适用《中华人民共和国

ii. Judicial Review After Adoption of the Legislation Law

Legislative, judicial, and scholarly acceptance of these practices over the first two decades of legal reform provides a foundation for understanding the conflicts rules in the Legislation Law. As discussed in Part II(C)(ii), the Legislation Law established three related but distinct mechanisms for resolving conflicts, including the rules for deciding the legislation to apply in the event of conflicts. Statements by both legislative officials and scholars during the Legislation Law drafting process indicate that the legislative hierarchy and conflicts rules were drafted in part to provide courts with clear standards for choosing and applying legislation.³⁷² Entities involved in the drafting process appear to have shared this understanding of the provisions, as some objected that it would not be appropriate for all “implementing organs” to apply legislation according to the rules set out in Chapter Five.³⁷³ Such

合同法》若干问题的解释(一)) [First Interpretation on Several Problems in Applying the PRC Contract Law (No. 1)] (promulgated by the Sup. People's Ct., Dec. 19, 1999, effective Dec. 29, 1999) art. 4, SUP. PEOPLE'S CT. GAZ., Jan. 1, 2000, at 24 (providing that “after implementation of a contract, if people's courts confirm that the contract is invalid, they should take law adopted by the NPCSC and administrative regulations adopted by the State Council as the basis, and may not take local regulations and administrative rules as the basis”). According to a senior Chinese judge, this provision confirmed that higher-level legislation should be applied in the event of conflicts. Interview with Senior Chinese Judge, July 2012 (on file with author). Peter Corne cites to a 1993 study in which judges were asked how they would handle a conflict between central and local legislation. Approximately 64% of judges replied that they would apply the central legislation, while about 28% indicated that they would seek the guidance of higher judicial organs. Only 5.4% of the judges indicated that they would apply the local regulation. Corne, *supra* note 6, at 418–19. For an early administrative case, see Jiang Yong & Guan Zheng (江勇 & 管征), *Xingzheng Shenpan: Shiwu Wenti Yanjiu* (行政审判: 实务问题研究) [ADMINISTRATIVE ADJUDICATION: RESEARCH ON PRACTICE ISSUES] 189–93 (2009) (describing a 1991 administrative case in which an intermediate people's court canceled a fine after determining that the departmental rule on highway administration on which the fine was based exceeded the scope of a State Council administrative regulation).

³⁷² The term “implementing organ” (执行机关) (*zhixing jiguan*) is understood to include people's courts. For example, during the drafting process, then NPCSC LAC Chairman Gu Angran reportedly explained, in reference to the conflicts rules, that “when implementing organs cannot confirm how to apply [legislation] according to the level of effectiveness, an authoritative organ should adjudicate the matter of how to apply it.” Gu's statement implies that when legislative hierarchies are clear, consultation with legislative organs is unnecessary. The statement is reported in *Discussion of Authority*, *supra* note 106, § 2. Cai Dingjian argued that the entire point of setting out a clear legislative hierarchy is to allow implementing organs to “automatically” choose the applicable law when they encounter conflicts. Cai, *supra* note 5, at 56.

³⁷³ *Legislation Law Roundtable*, *supra* note 10.

objections apparently were disregarded, as the conflicts rules were retained without the addition of language expressly providing that only legislative organs could apply them.

Post-promulgation discussions of the Legislation Law reinforce the conclusion that the conflicts rules were adopted with this intent. In a 2000 article, Justice Jiang Bixin noted that the Legislation Law standardized both legislative and judicial conduct. He then stated that courts play a role in managing legislative conflicts.

Today, as social relations become more complicated by the day, hoping for tens of thousands of normative legal documents to be completely consistent and perfect is impossible. Therefore, we must establish a kind of *transitional* or *intermediary mechanism* to take unconstitutional laws or bad laws and exclude them from the implementation process. Judicial organs are an important link in this mechanism. This requires that judicial personnel, when adjudicating cases, pay attention to the issue of the applicability of legal standards . . . One of the great values of the Legislation Law is that it has provided criteria for deciding whether legal standards are valid, whether they can be applied, and whether they are lawful (*emphasis added*).³⁷⁴

In a nod to legislative power, Jiang emphasized that courts do not exercise “judicial review” authority and may not choose the applicable legislation with complete independence. When legislative conflicts are *relatively clear*, he explains, courts may apply the conflicts rules themselves. In cases where the conflict is uncertain or there is no clear hierarchy, courts should consult legislative organs.³⁷⁵

Legislative officials and scholars expressed similar understandings. The NPCSC LAC’s explanation of Article 79 states that the provision is intended to provide standards on “choosing priority application” in the event of conflicts.³⁷⁶ At a forum on legislative conflicts in January 2001, then Vice Chairman of the NPCSC LAC State Law Department Chen Sixi was more direct:

Judicial handling [of legislative conflicts] has many advantages. Legislative organs themselves do not have the

³⁷⁴ Jiang, *supra* note 324, at 11.

³⁷⁵ *Id.* at 12. In a 2011 treatise, Jiang reaffirmed his position that the conflicts rules are “universally applicable” and were intended to provide guidance to courts. Jiang, *supra* note 8, at 1077.

³⁷⁶ LEGISLATION LAW EXPLANATION, *supra* note 44, at 231–32.

motivation to resolve them, as they are relatively removed from the parties [to disputes]. In the end we must still rely on judicial channels. The rules of application [in the Legislation Law] leave courts with some space. As for the size of this space, it will depend on what the courts strive for.³⁷⁷

In a similar statement, constitutional law scholar Wang Chenguang concluded, “[c]ourts cannot declare laws invalid, but they can decide not to use them . . . The Legislation Law has provided judicial organs with a definite space. Its potential is significant.”³⁷⁸ Chen’s statement that courts must supplement the work of legislative organs reinforces Jiang Bixin’s characterization of courts as an “intermediary” mechanism in the process of addressing legislative conflicts. While validating the idea that courts may apply the Legislation Law conflicts provisions, all three of these commentators convey a sense of caution with regard to the limits of this authority in practice.

The resolution of the 2003 Luoyang Seed Case helped to define these limits. Recall that after finding a conflict between a local regulation and national law, Judge Li Huijuan declared that the local regulation was “naturally invalid.” While harshly criticizing Judge Li and announcing that she had no power to make such a declaration, Henan People’s Congress officials also acknowledged that she had the discretion to choose which legal provision to apply.³⁷⁹ This statement provided a basis for the resolution of the constitutional dispute. The SPC concluded that in the event of such conflicts, the court should apply the higher-level legislation to decide the case.³⁸⁰ On the basis of this reply, the Henan Higher People’s Court criticized Judge Li for declaring the local regulation invalid, but it upheld the substantive result in the case. The Henan People’s Congress subsequently retreated from its threat to sanction the judge and amended the conflicting local regulation.³⁸¹ As I have argued elsewhere, the resolution of this constitutional crisis had the unmistakable imprint of a mediated outcome.³⁸² While the Seed Case confirmed the limits of judicial review power, the statements of officials and

³⁷⁷ Cai & Li, *supra* note 258, at 3 (statement of Chen Sixi).

³⁷⁸ *Id.* (statement of Wang Chenguang).

³⁷⁹ Yardley, *supra* note 342.

³⁸⁰ Malmgren, *supra* note 340, at 8 (citing SPC reply). For general (but not universal) consensus on this approach, see Zhongguo Xianfa Shili Yanjiu (Yi) (中国宪法事例研究(一)) [STUDIES OF CHINA’S CONSTITUTIONAL CASES (VOL. I)] 301–02 (Han Dayuan (韩大元) ed., 2005); *Judge Sows Seeds of Lawmaking Dispute*, *supra* note 361.

³⁸¹ Yardley, *supra* note 342; Malmgren, *supra* note 340, at 8. The Henan People’s Congress adopted the new regulation on April 1, 2004.

³⁸² Hand, *supra* note 236, at 111.

scholars also reinforced the authority of judges to internally review legislative conflicts and apply higher-level legislation.

The SPC took subsequent steps to clarify and expand this judicial authority. In 2004, it issued an important document titled the "Summary Record of a Forum on Problems in Adjudicating Administrative Cases" ("2004 Summary Record").³⁸³ The 2004 Summary Record states that after the promulgation of the Legislation Law, there was a "major change in the relevant rules for applying law." It confirms that when courts encounter legislative conflicts, "they should make a determination and choose the legal standard to apply according to the rules on the application of legislation . . . provided in the Legislation Law."³⁸⁴ The 2004 Summary Record specifically instructs courts to examine the legality of lower-level legislation that provides the basis for concrete administrative acts and, in the event of conflicts, to apply the higher-level legislation.³⁸⁵

The SPC also expanded judicial authority in several important respects. The 2004 Summary Record explicitly authorizes courts to comment on the "legality, effectiveness, reasonableness, and appropriateness" of administrative interpretations and normative documents.³⁸⁶ It also directs courts to decide whether to handle some difficult conflicts on their own. For example, in the event of conflicts involving administrative rules, the Legislation Law provides that the State Council should determine which rule applies.³⁸⁷ However, the 2004 Summary Record provides detailed guidance to courts on how to choose the applicable rule in such situations. Courts are directed to suspend adjudication and consult legislative organs only "if they cannot determine how to apply" the rules.³⁸⁸ The 2009 SPC Provisions on Legal Citation, which apply to all cases, reinforced and expanded this principle. That directive provides

³⁸³ Guanyu Shenli Xingzheng Anjian Shiyong Falü Guifan Wenti de Zuotanhui Jiyao (关于审理行政案件适用法律规范问题的座谈会纪要) [*Summary Record of Forum on Problems in Adjudicating Administrative Cases*] (issued by the Sup. People's Ct., May 18, 2004, effective May 18, 2004), SUP. PEOPLE'S CT. GAZ., June 10, 2004, at 5 [hereinafter 2004 Summary Record].

³⁸⁴ *Id.* at Introduction, § 2.

³⁸⁵ *Id.* at § 2.

³⁸⁶ *Id.* at § 1.

³⁸⁷ Legislation Law, *supra* note 21, art. 86.

³⁸⁸ 2004 Summary Record, *supra* note 383, at § 2. Similar detailed guidance is provided for conflicts between new general and old specific provisions promulgated by the same organ (which, according to the Legislation Law, should be resolved by the promulgating organ) and between ministry rules and local regulations (which should be resolved by the State Council and NPCSC in the event it is "difficult to determine which provisions shall prevail"). For a discussion of court discretion and application of the detailed Summary Record provisions in these contexts, see Jiang, *supra* note 8, at 1086–1101.

that when courts encounter conflicting legal provisions, they should submit the matter to an organ with decision-making authority when “the court cannot select which one to apply according to the Legislation Law and related legal provisions.”³⁸⁹ As these SPC documents indicate, courts exercise discretion in deciding whether to submit conflicts for a ruling. Notably, the 2004 Summary Record states that the SPC Administrative Tribunal consulted the “relevant departments,” an indication that the State Council LAO and the NPCSC LAC probably reviewed and approved the document.³⁹⁰

The SPC has reinforced these principles in replies to many post-Legislation Law requests for instructions in concrete cases. In one notable administrative case, local authorities seized property transported without the required license. A local Chongqing regulation that authorized such seizures conflicted with two national laws. In its report requesting instructions from the SPC, the Chongqing Higher People's Court acknowledged a division of opinion within its adjudication committee. A majority of the judges argued that there was a conflict and that the courts should disregard the local regulation in accordance with the principle that “higher law takes priority over lower law.” A minority of judges opposed this view. These judges argued that the power of Chinese courts is limited and that the court had no authority to disregard the local regulation and find the seizure unlawful.³⁹¹ The SPC concluded that the local regulation exceeded the scope of the relevant national laws and that “when adjudicating administrative cases,” people's courts “should apply the provisions of higher law.”³⁹² The SPC has affirmed these

³⁸⁹ SPC Provisions on Legal Citation, *supra* note 35, art. 7. The full text of this provision is provided in Part IV(B).

³⁹⁰ 2004 Summary Record, *supra* note 383, at Introduction.

³⁹¹ Chongqing Shi Gaoji Renmin Fayuan Guanyu Qin Dashu Bu Fu Chongqing Shi Fuling Qu Linyeju Xingzheng Chufa Zhengyi Zaishen Yi An Ruhe Shiyong de Qingshi (重庆市高级人民法院关于秦大树不服重庆市涪陵区林业局行政处罚争议再审一案如何适用法律的请示) [Chongqing Higher People's Court, Request for Instructions on How to Apply the Law in the Retrial of the Dispute Involving Qin Dashu's Challenge of the Administrative Punishment of the Chongqing Fuling District Forestry Bureau], Yu Gao Fa (渝高发) [CHONGQING HIGHER PEOPLE'S CT. GAZ.], no. 78, 2001, *reprinted in* Zuigao Renmin Fayuan Qingshi yu Dafu (Shang) (最高人民法院请示与答复(上)) [SPC REQUESTS FOR INSTRUCTIONS AND REPLIES, VOL. I] 521–24 (2010).

³⁹² Zuigao Renmin Fayuan Dui “Guanyu Qin Dashu Bu Fu Chongqing Shi Fuling Qu Linyeju Xingzheng Chufa Zhengyi Zaishen Yi An Ruhe Shiyong de Qingshi” de Dafu (最高人民法院对《关于秦大树不服重庆市涪陵区林业局行政处罚争议再审一案如何适用法律的请示》的答复) [SPC Reply to Request for Instructions on How to Apply the Law in the Retrial of the Dispute Involving Qin Dashu's Challenge of the Administrative Punishment of the Chongqing Fuling District Forestry Bureau] (promulgated by the Sup. People's Ct., June 23, 2003, effective June 23, 2003) (Chinalawinfo).

principles in numerous other replies and responses to higher people's courts.³⁹³

Individual judges have also incorporated these principles into judgments and commentaries on cases. One Shanghai Intermediate People's Court case involved an administrative fine. The court determined that the administrative regulation that authorized the fine conflicted with the PRC Production Safety Law. In a commentary attached to this case, a court representative explained:

In hearing this case, the court encountered conflicts between legal standards. When courts adjudicate cases, may they determine how to apply the law in accordance with conflict

³⁹³ Most of these replies deal with administrative punishments that exceed the scope of punishments established under national law. For two replies that are often cited in the Chinese literature, see Guanyu Dui Renmin Fayuan Shenli Gonglu Jiaotong Xingzheng Anjian Ruhe Shiyong Falü Wenti de Dafu (关于对人民法院审理公路交通行政案件如何适用法律问题的答复) [Reply on the Issue of How to Apply the Law When People's Courts Hear Highway and Traffic Administrative Cases] (promulgated by the Sup. People's Ct., Feb. 1, 2001, effective Feb. 1, 2001) (when local regulations are inconsistent with relevant provisions of the PRC Highway Law, the relevant provision of the PRC Highway Law should be applied); Dui Renmin Fayuan Zai Shenli Yanye Xingzheng Anjian Zhong Ruhe Shiyong Guowuyuan "Shiyan Zhanying Banfa" Di Er Shi Wu Tiao Guiding yu "Henan Sheng Yanye Guanli Tiaoli" Di San Shi Tiao Di Yi Kuan Guiding Wenti de Dafu (对人民法院在审理盐业行政案件中如何适用国务院《食盐专营办法》第二十五条规定与《河南省盐业管理条例》第三十条第一款规定问题的答复) [Reply on the Issue of How People's Courts, in Hearing Administrative Cases on the Salt Industry, Should Apply Article 25 of the "Edible Salt Monopoly Measures" and Article 30(1) of the Henan Province Salt Industry Management Regulations] (promulgated by the Sup. People's Ct., Apr. 29, 2003, effective Apr. 29, 2003) (Lawyer) (acknowledging conflicts between State Council administrative regulation and local regulation and directing the court to apply the legislation in accordance with articles 64(2) and 79(2) of the Legislation Law). For more recent SPC documents, see Zuigao Renmin Fayuan Xingzheng Shenpanting Guanyu Jiangsu Gaoyuan Jiu Xu Jikang Bu Fu Nanjing Shi Gongshang Xingzheng Guanliju Xiaguan Fenju Kouya Caichan Yi An Qingshi de Dafu (最高人民法院行政审判庭关于对江苏高院就徐继康不服南京市工商行政管理局下关分局扣押财产一案请示的答复) [SPC Administrative Tribunal's Reply to the Jiangsu High Court's Request for Instructions Regarding the Case of Xu Jikang Challenging the Xiaguan Branch of the Nanjing SAIC's Confiscation of Property] (promulgated by the Sup. People's Ct., Sept. 27, 2006, effective Sept. 27, 2006) (Chinalawinfo) (Jiangsu local regulation authorizing seizure of property conflicts with PRC Anti-Competition Law, which does not authorize such seizures, and the Anti-Competition Law should be applied) [hereinafter 2006 Jiangsu Property Seizure Reply]; 2011 Jiangsu Salt Case Reply, *supra* note 13 (the State Council Salt Industry Management Regulations do not establish administrative punishments for the salt wholesale business of any enterprise other than salt companies). In accordance with the SPC reply, a Jiangsu court declined to apply a provincial rule that conflicted with national law and administrative regulations. For details on the case, see *Judicial Decision Breaks Industrial Salt Administrative Monopoly*, *supra* note 13.

resolution rules? After the implementation of the Legislation Law, there is no dispute over this question. It has been confirmed that the power to choose the legislation to apply is a proper judicial power.³⁹⁴

In another case, a court overturned a public security decision to revoke a driver license because the Ministry of Public Security (MPS) rule on which the decision was based conflicted with the PRC Road Traffic Safety Law. In a commentary attached to the case, a representative of the district people's court explained the application of the Legislation Law conflicts provisions and recommended that the MPS immediately amend the conflicting rule.³⁹⁵ A review of case judgments and commentaries available in Chinalawinfo, an online legal database administered at Peking University, reveals numerous such examples.³⁹⁶ A 2005 survey of judges in one intermediate people's court reinforced these materials. The survey found that the overwhelming majority

³⁹⁴ See Case Summary, Commentary, and Supplemental Commentary in Shanghai Shi Di Er Zhongji Fayuan, Shanghai Dongzhao Huagong Youxian Gongsi Su Shanghai Shi Gongshang Xingzheng Guanliju Jing'an Fenju Xingzheng Chufa An Shengming (上海东兆化工有限公司诉上海市工商行政管理局静安分局行政处罚案声明) [Declaration of the Administrative Punishment Case of the Shanghai No. 2 Intermediate Court, Shanghai Dongzhao Chemical Co. Ltd. v. Shanghai City Administrative Bureau of Industry and Commerce Jiang'an Branch], Shanghai No. 2 Intern. People's Ct., July 19, 2004 (Chinalawinfo). For a similar statement by a judge in Guangzhou, see Feng, *supra* note 329, at § 2(1) (Courts "certainly" exercise the power to assess and correctly apply conflicting legal norms.)

³⁹⁵ Wuxi Shi Chong'an Qu Renmin Fayuan Cai Guoqiang Su Wuxi Shi Gonganju Jiaotong Xunluo Jingcha Zhidui Xingzheng Chufa An (无锡市崇安区人民法院蔡国强诉无锡市公安局交通巡逻警察支队行政处罚案) [People's Court of Chong'an District, Wuxi City, Case of Cai Guoqiang Suing the Wuxi City Public Security Bureau Traffic Patrol Police Unit], Wuxi Chong'an Dist. People's Ct., Dec. 9, 2004 (Chinalawinfo).

³⁹⁶ The annotations to Legislation Law Articles 64(2), 78-83, and 86-87 in Chinalawinfo contain links to about 50 cases. An examination of these cases reveals many examples of direct court application of the Legislation Law conflicts provisions. For two examples, see Wu Qinbao Deng Bufu Fuzhou Shi Fangdichan Guanliju Fangwu Chaiqian Guanli An (吴钦宝等不服福州市房地产管理局房屋拆迁管理案) [Case of Wu Qinbao and Others Challenging the Fuzhou City Real Property Management Bureau Over Housing Demolition and Relocation Management], Fuzhou Intern. People's Ct., Aug. 27, 2004 (Chinalawinfo) (applying Legislation Law Article 79 to address conflict involving an administrative regulation and a local regulation); Guangzhou Shi Yuhui Diannao Gongsi yu Liang Jiao Laodong Zhengyi Jiufen Shangsu An (广州市俞辉电脑有限公司与梁娇劳动争议纠纷上诉案) [Appellate Case of the Labor Controversy Between Guangzhou City Yu Hui Computer Ltd. Co. and Liang Jiao], Guangzhou Intern. People's Ct., 2010 (Chinalawinfo) (applying Legislation Law Article 83 in conflict between new specific law and old general law promulgated by the NPCSC) [hereinafter Guangzhou Labor Arbitration Case].

of judges simply apply higher-level legislation without commenting on conflicts.³⁹⁷

An observer might conclude that one of the principal differences between strong-form judicial review in the United States and limited judicial review in China is the effect of *stare decisis*. However, even this distinction is blurred in Chinese judicial practice. As noted in Part IV(A), SPC interpretations are binding on and must be cited by lower courts. Although SPC “replies” are formally binding only with respect to the specific case for which they are issued, in practice they have *de facto* binding effect in subsequent cases.³⁹⁸ Lower court judges facing legislative conflicts in subsequent cases and fearful of professional sanction for wrongful judgments respect SPC replies, other SPC documents, and higher court judgments (particularly if higher courts have identified such judgments as models that should be consulted).³⁹⁹

Scholarly opinion has settled firmly in support of these judicial practices. While noting some divergence of opinion, most Chinese scholars support the view that courts may choose the applicable legislation in the event of conflicts.”⁴⁰⁰ Some scholars go further and argue that judges have a

³⁹⁷ In the survey, researchers asked judges how they would address legislative conflicts in judicial judgments. Of 48 valid responses received, the overwhelming majority of judges (37, or 77% of the respondents) indicated that they would apply the higher-level legislation without commenting on the conflict in their judgment. Two respondents indicated that they would apply the lower-level legislation without commenting on the conflict. Only one respondent indicated that he or she would declare the lower-level legislation invalid, and only three respondents indicated that they would state that the lower-level legislation “violated” or was “inconsistent with” higher-level legislation. The remaining respondents either did not respond or gave multiple responses. Peng, *supra* note 339, at 119-20. It should be noted that this survey was conducted before the SPC issued its 2009 directive that instructed judges to refrain making statements on the validity of legislation in their judgments.

³⁹⁸ The SPC Provisions on Legal Interpretation do not specify that different types of judicial interpretations have different legal effect. 2007 Provisions on Judicial Interpretation, *supra* note 312, art. 5. In correspondence with the author, Chinese constitutional law scholars indicated that while replies are formally binding only in the individual cases for which they are issued, lower courts generally follow them in subsequent cases. In a discussion with the author, one basic-level judge related a case along these lines. The case involved a legislative conflict that implicated an important local interest. Because the SPC had issued a reply to another provincial high court on the same conflict, the basic-level court felt that it must consider the reply and address the conflict.

³⁹⁹ For judicial responsibility systems, see Carl Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, 39 N. M. L. REV. 63 (2009). In 2007, I worked with a Chinese higher people’s court on the issue of judicial precedent. The Chinese judges participating in the workshop indicated that they placed great weight on higher court judgments for the reasons discussed here.

⁴⁰⁰ Wang, *supra* note 122, at § 4 (some scholars believe that courts must report all conflicts to legislative organs, but most scholars disagree); Cai & Li, *supra* note 258

constitutional duty to apply higher-level legislation in such situations.⁴⁰¹ SPP directives, which require procuratorates to protest administrative judgments when judges fail to apply Articles 78 to 86 of the Legislation Law, reinforce this argument.⁴⁰² Judges also emphasize this point and suggest that legislative officials have no choice but to accept judicial practice in this regard because the conflicts rules are grounded in the Constitution itself.⁴⁰³ Indeed, legislative officials at both the central and provincial levels acknowledged these judicial practices and expressed acceptance of them.⁴⁰⁴

In some respects, courts exercise meaningful discretion within this space. As noted in Part II(A), neither the Legislation Law nor the Supervision Law provide statutory definitions for terms such as “conflict with,” “contravene” or “inconsistent.” Although the NPCSC LAC attempted to define “conflict with” in its explanation of the Legislation Law, the explanation is not binding. The statutory gap leaves judicial organs with some discretion. Under the language of Article 86(2), courts exercise discretion in deciding whether conflicts between local regulations and ministry rules should be submitted to the State Council for a ruling. The NPCSC LAC has validated this discretion in past cases.⁴⁰⁵ Moreover, as noted above, the SPC’s 2004 Summary Record and 2009 Provisions on Legal Citation instruct courts to submit conflicts to legislative

(most scholars at a Qinghua conference believed that when courts identify conflicts between higher-level and lower-level legislation, they should apply the higher-level legislation); *Discussion of Authority*, *supra* note 106 (acknowledging divergent opinions on the practice, but arguing that the Legislation Law resolved this problem and that courts are not required to send all conflicts to legislative organs for a ruling; precondition for courts sending conflicts for a ruling is that they cannot make a determination themselves; filing and review and judicial application of legal rules are not mutually exclusive); Pan, *supra* note 256, at 133; Wang, *supra* note 43, at § 1.

⁴⁰¹ See, e.g., Yang, *supra* note 316 (courts have no authority to apply conflicting lower-level legislation); Feng, *supra* note 329 at § 2(1)—2(2) (courts have the power and the responsibility to evaluate the consistency of norms at different levels and must be loyal to the Constitution and law).

⁴⁰² Renmin Jianchayuan Minshi Xingzheng Kangsu Anjian Ban'an Guize (人民检察院民事行政抗诉案件办案规则) [People's Procuratorate Rules for Handling Protests of Civil and Administrative Cases] (promulgated by Sup. People's Proc., Sept. 30, 2001, effective Sept. 30, 2001) art. 37(3), SUP. PEOPLE'S PROC. GAZ., Jan. 1, 2001, at 24.

⁴⁰³ Yang, *supra* note 316; Interview with Senior Chinese Judge, July 2012 (on file with author) (conflicts rules are grounded in the Constitution; to deny them is to deny the Constitution, so legislative organs must accept these practices).

⁴⁰⁴ Meeting with Filing and Review Officials, July 2012 (on file with author); Meeting with Senior Hunan Legislative Officials, July 2012 (on file with author).

⁴⁰⁵ Wang, *supra* note 122, at § 3(2) (recounting a 2003 case in which the NPCSC LAC instructed the SPC that if the court believes it should apply the local regulation, it should do so).

organs *only* if they cannot determine the proper application of relevant legislation on their own. Courts may also exercise discretion when multiple Legislation Law rules apply and lead to different results.⁴⁰⁶ Although courts may request instructions from higher courts and ultimately the SPC, decisions on the majority of conflicts are made within the judicial system and without consulting legislative organs.⁴⁰⁷ From this perspective, courts not only choose which legislation to apply, but also decide when a conflict exists and when to consult legislative organs.

However, in other respects, the position of the courts is fragile. For example, lower courts do not exercise any formal power to interpret law. The NPC's delegation of interpretation power to the SPC applies only to the interpretation of national law, not to other types of legislation. The process of determining that a legislative conflict exists may require courts to interpret the legislation at issue. Although these lines are stretched in practice (in most cases, the act of applying legislation involves an act of interpretation at some level), limitations on the formal authority to interpret legislation may discourage courts from acting too aggressively in identifying conflicts.

Courts are also cautious in disregarding conflicting lower-level legislation. Senior Party leaders have stated explicitly that China must not blindly copy Western governance models and does not implement a system of separation of powers.⁴⁰⁸ Courts are constitutionally subordinate to people's congresses at the corresponding level, which supervise their work and have the power to appoint and remove senior judges. The cases discussed in Part IV(B) demonstrate the potential for retaliation against judges who step too far. Local people's governments control the finances, salaries, and benefits of courts and judges at the corresponding level. In dealing with conflicts, courts may find themselves confronting the entire local Party-state structure. As one Guangzhou judge notes in discussing legislative conflicts, the Seed Case left many judges with "lingering fears," and courts must exercise their authority to apply legislation cautiously, avoid confrontation, and "strive for balance and a subtle boundary."⁴⁰⁹

Courts employ a variety of strategies to cope with their fragile position. Some courts find creative ways to avoid confronting legislative conflicts. For example, judges may dispose of cases on procedural grounds or substantive

⁴⁰⁶ Interview with Senior Chinese Judge, July 2012 (on file with author).

⁴⁰⁷ Wang, *supra* note 122, at § 2(2); Interview with Senior Chinese Judge, July 2012 (most conflicts are resolved within the judicial system and consultation with legislative organs takes place in only a small number of cases) (on file with author).

⁴⁰⁸ See, e.g., *We Should Not Copy Western System: Wu*, PEOPLES DAILY [ENGLISH EDITION], Mar. 10, 2009.

⁴⁰⁹ Feng, *supra* note 329, at Introduction, §§ 1(1), 1(3), 2(2). As Judge Feng acknowledges, "[I]n practice there are many departments that censure courts for the act of correctly applying the law."

grounds other than those related to the conflict.⁴¹⁰ Another strategy is to interpret the relevant legislation (sometimes creatively) to avoid finding conflicts.⁴¹¹ In some cases, courts avoid analyzing conflicts by noting that legislation has been filed with and (presumably) reviewed by higher-level legislative organs.⁴¹²

Courts may also pressure parties to mediate. Although mediation is prohibited in administrative cases, Chinese courts faced with the difficult task of ruling against local administrative organs often undertake “coordination” or “reconciliation” in an effort to encourage settlements.⁴¹³ In the context of such “coordination” meetings or even after trials have concluded, judges may suggest to administrative organs that a rule conflicts with higher-level legislation and should be amended. Finally, if the conflict touches on an important local interest and the local promulgating organ persists in its opinion on the matter, some courts relent and apply the local legislation.⁴¹⁴ If the disputed legislation involves a minor issue rather than a clear conflict, courts may have some room to maneuver around the conflict. Avoiding

⁴¹⁰ Feng, *supra* note 329, at § 3(1); Wang Jing (王静), Cong Xingsu Anjian Kan Laojiao Zhidu Gaihe Lujing (从行诉案件看劳教制度改革路径) [*Looking at the Path for Reforming Re-education Through Labor From Administrative Lawsuits*], Guojia Xingzheng Xueyuan Xuebao (国家行政学院学报) [J. OF THE CHINESE ACADEMY OF GOVERNANCE], no. 3, 2012, at 97–102 (surveying administrative cases involving re-education through labor decisions and the creative ways that courts avoid the widely acknowledged conflict between re-education through labor provisions and national law).

⁴¹¹ *Discussion of Review Standards*, *supra* note 16 (comments of SPC Justice Kong Xiangjun, who notes that “pure” conflicts are uncommon and that in most cases courts engage in legal interpretation); Wang, *supra* note 122, at §§ 3(1), 4(1)–(2); Feng, *supra* note 329, at § 3(2); *Discussion of Authority*, *supra* note 106, at § 4.

⁴¹² See, e.g., Guangzhou Shi Zhongji Renmin Fayuan Guangzhou Zhujiang Niunai Youxian Gongsi yu Wang Jiafeng Gongshang Baoxian Daiyu Jiufen Shangsu An (广州市中级人民法院广州珠江牛奶有限公司与王甲凤工伤保险待遇纠纷上诉案) [Appellate Case of the Worker Compensation Benefits Dispute Between the Guangzhou Pearl River Milk Co. and Wang Jiafeng], Guangzhou Interm. People's Ct., Nov. 2, 2010 (Chinalawinfo).

⁴¹³ Feng, *supra* note 329, at §§ 3(1), 3(2); Hand, *supra* note 236, at 139–43. For one discussion of court reluctance to challenge the legality of normative documents establishing the re-education through system and related efforts to “coordinate” with public security on difficult re-education through labor cases, see Han Yong, Laojiao Kunjing Yinfa “Yuhui” Zhihui (劳教困境引发“迂回”智慧) [*The Re-Education Through Labor Predicament Triggers “Roundabout” Thinking*], Zhongguo Xinwen Zhoukan (中国新闻周刊) [CHINA NEWSWEEK ONLINE], Jan. 21, 2008, at 40–41.

⁴¹⁴ Interview with Senior Chinese Judge, July 2012 (on file with author); Interview with Legal Scholar C, July 2012 (on file with author).

conflicts and preserving the face of promulgating organs are clearly first lines of defense for courts fearful of offending local legislative authorities.

If lower courts cannot avoid conflicts, they often request instructions from higher courts. In many cases, such requests are elevated to the SPC. Wang Guisong characterizes the request for instructions as a “golden shield” that courts use to mitigate risk.⁴¹⁵ Because SPC replies to such requests are binding, they help local courts resist pressure by shifting responsibility for decisions to the SPC. In theory, such requests should be limited to difficult or complex legal issues, and SPC replies, once issued, should guide lower courts in subsequent cases.⁴¹⁶ However, there are no specific rules that dictate when a court may or may not request instructions.⁴¹⁷ In practice, some courts request instructions on legislative conflicts even when the conflict has been addressed in a previous SPC reply.⁴¹⁸

Courts are also cautious with their language. One judge advises courts to avoid the use of “sensitive” words on the issue of validity. Instead, judges should apply the law and use “tactful” terms like “inconsistent” or “not in accord with” to indicate that there is a conflict.⁴¹⁹ In the judgments examined for this study, courts were generally reserved in their discussions of conflicts. In most cases, courts simply cited the Legislation Law and applied the higher-level legislation. To the extent that they engaged in more expansive discussion of conflicts, they did so in case abstracts or commentaries attached to judgments rather than in the judgments themselves. Even the SPC is careful in its replies. It is cautious in commenting on most legislation and seems to reserve more robust language for conflicts involving rules.⁴²⁰ Generally, judges avoid the suggestion that they are engaging in “constitutional review” or “judicial review of legislation” and instead emphasize that they are exercising their “authority to choose the application of the law” (适用法律选择权) (*shiyong falü xuanze quan*).⁴²¹

⁴¹⁵ Wang, *supra* note 122, at § 1. For discussion of a case in which SPC intervention proved decisive in protecting a local court against legislative backlash, see Randall Peerenboom, *More Law, Less Courts: Legalized Governance, Judicialization, and Dejudicialization in China*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA* 185 (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

⁴¹⁶ Feng, *supra* note 329, § 3(2); Wang, *supra* note 122, § 4(1).

⁴¹⁷ Interview with Senior Chinese Judge, July 2012 (on file with author).

⁴¹⁸ Wang, *supra* note 122, at § 4(1); Wang, *supra* note 329, at 127.

⁴¹⁹ Feng, *supra* note 329, § 3(2).

⁴²⁰ Wang, *supra* note 122, at § 4(2).

⁴²¹ Feng, *supra* note 329, §§ 2(2), 3. See also Peng, *supra* note 339, at 117-21 (results of 2005 survey indicating that most judges in one court simply apply higher-level legislation without commenting on conflicts and characterize their actions as either “choosing application of the legislation” (67%) or interpreting legislation (21%). Only 31% characterize their action as “judicial review”).

The SPC itself consults with NPCSC and State Council organs on issues related to conflicts. In cases involving rules or other normative documents, the SPC typically makes its own decision on conflicts. However, if a conflict relates to a sensitive matter or to a national law or State Council administrative regulation, the SPC often (but not always) solicits the opinion of the NPCSC LAC, the State Council LAO, or both. In almost all such cases, the SPC notes in its official reply that such consultations took place.⁴²² Once legislative officials provide their opinion on a conflict, the SPC may handle similar conflicts in the future without such consultations. Because the NPCSC supervises the legislation of provincial people's congresses (and the State Council supervises the legislation of provincial people's governments), such consultations help to insulate courts from backlash.⁴²³ They are also consistent with a political-legal culture that emphasizes consensus building.

In some cases, courts may simply decline to address conflicts or defer to legislative organs on sensitive legal issues. For example, courts refrain from applying the Constitution as a legal basis for deciding cases and have not addressed conflicts with the Constitution by disregarding conflicting lower-level legislation.⁴²⁴ By extension, they avoid problems involving NPC and NPCSC laws, as the NPC is the highest organ of state power and the Constitution is the only source of law with higher rank in the legal hierarchy.⁴²⁵

Courts are also careful in handling conflicts that touch on sensitive issues. The legality of administrative provisions on the controversial re-education through labor (RETL) system provides a good example. In a 1999 document on a conflict between an RETL notice and the PRC Criminal Procedure Law, the SPC Administrative Tribunal acknowledged inconsistency but stated candidly:

⁴²² See, e.g., 1993 Fujian Fisheries Reply, *supra* note 369; 2011 Jiangsu Salt Case Reply, *supra* note 13. Occasionally, if there is a division of opinion within the NPCSC LAC or State Council LAO (or among them), the SPC will not mention the consultation in its official reply. Interview with Senior Chinese Judge, July 2012 (on file with author).

⁴²³ Wang, *supra* note 122, at § 2(1) (noting with respect to one conflict that the SPC, NPCSC LAC, and the State Council LAO "joined forces" to deny application of a Fujian local regulation).

⁴²⁴ *Id.* at §§ 3(1), 4(2).

⁴²⁵ As Cai Dingjian states, "[t]he ideal method is of course to resolve [legislative conflicts] through judicial methods . . . But presently, this is not a reality. China's system is a people's congress system. The NPCSC is the highest organ of state power. Can the SPC refuse to apply law that the NPC has promulgated?" Cai & Li, *supra* note 258 (see also the comments of Xia Jianlin). In some cases, courts may grapple with technical conflicts between NPC laws. For example, one court addressed a conflict between two laws that provided different time requirements for arbitration applications. Guangzhou Labor Arbitration Case, *supra* note 396.

However, before the state standardizes the re-education through labor system in the form of law, denying the effectiveness of this notice will generate instability. Therefore, taking the overall perspective of stability as the point of departure, people's courts, when adjudicating administrative cases on re-education through labor, should still view this notice as an effective normative document.⁴²⁶

Although many jurists argue that China's RETL provisions conflict with national law, lower courts have avoided confronting these conflicts head-on.⁴²⁷ Courts have demonstrated limited willingness to address conflicts between specific RETL provisions in a manner that benefits citizens.⁴²⁸ However, they simply cannot address the sensitive issue of whether the provisions that establish the RETL system violate the Constitution and national law.

⁴²⁶ Zuigao Renmin Fayuan Xingzheng Shenpanting Guanyu "Renmin Fayuan Shenli Laodong Jiaoyang Xingzheng Anjian Shifou Zunxun 'Xingshi Susong Fa' Queli de Jiben Yuanze de Qingshi" de Dafu (最高人民法院行政审判庭关于《人民法院审理劳动教养行政案件是否遵循<刑事诉讼法>确立的基本原则的请示》的答复) [SPC Administrative Tribunal's Reply on People's Courts Respecting the Basic Principles of the Criminal Procedure Law when Adjudicating Administrative Cases on Re-Education Through Labor] (promulgated by Sup. People's Ct. Administrative Tribunal, Oct. 18, 1999, effective Oct. 18, 1999) (Chinalawinfo).

⁴²⁷ For an excellent example, see Henan Sheng Xinxiang Shi Zhongji Renmin Fayuan Li Xu yu Henan Sheng Xinxiang Shi Renmin Zhengfu Laodong Jiaoyang Guanli Weiyuanhui Laodong Jiaoyang Jiufen Shangsu An (河南省新乡市中级人民法院李旭与河南省新乡市人民政府劳动教养管理委员会劳动教养纠纷上诉案) [Appellate Case at Henan Province Xinxiang City Intermediate People's Court Involving the Re-education Through Labor Dispute Between Li Xu and the Henan Province Xinxiang City People's Government Re-education Through Labor Committee], Xinxiang City Intern. People's Ct., Nov. 15, 2010 (Chinalawinfo) (dodging a citizen argument that that RETL provisions violate the Legislation Law and noting that the provisions had been reviewed in legislative "clean up" campaigns). See also Han, *supra* note 413, at 39-41.

⁴²⁸ In 2005, the SPC issued a reply on a conflict between a State Council decision on the RETL system and a Ministry of Public Security provision on handling RETL cases. The SPC found that the State Council decision established recidivism as a condition for sentencing certain individuals who committed theft to RETL. The MPS provision eliminated this condition. The SPC determined that the MPS provision was not consistent with the State Council decision and that a first offender could not be subjected to RETL. Guanyu Nengfou Dui Jin You Yi Ci Daoqie Xingwei de Gongmin Shishi Laodong Jiaoyang Wenti de Dafu (关于能否对仅有一次盗窃行为的公民实施劳动教养问题的答复) [Reply on Whether RETL May be Imposed on a Citizen Who Has Committed Theft Only Once] (promulgated by the Sup. People's Ct., July 21, 2005, effective July 21, 2005) (Chinalawinfo). For a fascinating discussion of some of the other creative methods that courts have used to overrule RETL decisions, see generally Wang, *supra* note 410.

Accommodation of limited judicial review is in part the product of an understanding that filing and review organs lack the capacity to address most legislative conflicts. Leading legal scholars complain that the process of submitting conflicts for legislative rulings, which can take as long as two or three years to complete, is "inefficient" and that it is impractical for courts to suspend cases and apply for ruling every time they face a conflict.⁴²⁹ Other scholars note that filing and review is problematic because it is difficult for review organs to discover conflicts in the abstract.⁴³⁰ Similarly, a *People's Daily* article acknowledged that the "limitations to these methods [filing and review and clean-up campaigns] are difficult to overcome" and that they are "insufficient to cope with the demands of judicial practice."⁴³¹ While noting problems with implementing judicial review in China's constitutional system, senior scholars argue that allowing courts to play a greater role in managing legislative conflicts would be a more effective approach.⁴³²

The practical solution to these capacity problems is to accommodate a limited judicial role that creates modest tensions in China's constitutional framework but provides a necessary supplement to the work of filing and review organs. As the discussion above makes clear, in evaluating legislative conflicts, disregarding conflicting lower-level legislation, and applying higher-level legislation, Chinese courts are in fact engaging in a limited form of judicial review. Pan Aiguo captures this idea in a 2011 article:

Because at present review by legislative and administrative organs has not played the role that it should in practice, the final backstop of review by judicial organs is extremely important . . . Because China's judicial organs do not possess a complete power to review laws and regulations, this review

⁴²⁹ Cai & Li, *supra* note 258 (statements of Cai Dingjian, Li Honglei); *Lawyers Propose Review*, *supra* note 358; *Discussion of Authority*, *supra* note 106, at § 4.

⁴³⁰ *Horizontal Legislative Conflicts*, *supra* note 16 (comments of Wang Fanghua).

⁴³¹ Xie, *supra* note 358.

⁴³² Cai & Li, *supra* note 258 (comments of Cai Dingjian, Wang Lei, and Wang Chenguang); *China Establishes Special Organ*, *supra* note 250 (comments of Jiang Ming'an and He Weifang); *Horizontal Legislative Conflicts*, *supra* note 16 (comments of Chinese University of Politics and Law scholars Wang Fanghua and Wang Jingbo noting the limitations of formal legislative supervision mechanisms and arguing that it would be more efficient to expand judicial roles in addressing legislative conflicts). Even Li Xiaojuan, the Beijing legislative official who argued that courts must suspend all cases and seek legislative rulings, acknowledged that while "under the current system, [legislative conflicts] cannot be resolved through the judiciary . . . this need really does exist." Cai & Li, *supra* note 258.

power is limited to the “authority to choose the application of the law”⁴³³

Chinese scholars and even China’s *Legal Daily* have referred to judicial choice of legislation as “limited,” “incomplete” or “rudimentary” judicial review.⁴³⁴ Most legal actors in China have accepted and even encouraged this limited form of judicial review. As the reform era has evolved and the limited capacity of the filing and review system has become more apparent, this convention has become more deeply embedded in China’s legal system and its boundaries have been defined more clearly through practice.

V. IMPLICATIONS AND RECOMMENDATIONS: PRAGMATIC APPROACHES TO LEGAL REFORM AND DEVELOPMENT IN CHINA

Unwritten conventions shape constitutional dynamics in many legal systems. As an analysis of the multiple layers of China’s legislative supervision system demonstrates, such conventions may evolve as responses to practical problems in law and governance. They may also contribute to such problems. In the case of legislative conflicts in China, we find practices that on the surface appear aberrational. Legislative organs possess the formal power to amend and annul conflicting lower-level legislation. However, despite widespread recognition that the problem of legislative conflicts is severe, they rarely (or, in the case of the NPCSC, never) exercise this formal power. Unwritten conventions that emphasize consultation, consensus building, and unity under Party leadership limit the ability of legislative organs to exercise these formal powers in practice. Moreover, supervision organs depend heavily on the voluntary compliance and cooperation of lower-level legislative organs to address most conflicts. As such, they cannot afford to alienate these legislative organs by aggressively applying their formal powers.

Conversely, China’s courts have no formal constitutional authority to review and invalidate legislation. However, limited judicial review provides an

⁴³³ Pan, *supra* note 256, at 133–34.

⁴³⁴ See, e.g., *From the Li Huijuan Case*, *supra* note 358 (using the term “limited judicial review”); Pan, *supra* note 256, at 134 (referring to the power alternately as “incomplete authority to review legislation” and a “rudimentary review authority”); *Channels for Resolving Conflicts*, *supra* note 16 (comments of SPC Judge Liao Fengyun, noting that the power is “incomplete” and that some scholars refer to it as “roundabout review”). As discussed in note 421, judges in one court differed in how they characterized the authority they were exercising, with nearly one-third referring to it as “judicial review authority.” As Peng Yan’an notes, the overwhelming majority of scholars view choice in application of legislation as at least “limited judicial review” and, while some judges may be cautious and characterize the authority they are exercising as the authority to “choose the application of legislation,” the choice of terms does not change what courts are doing in practice. Peng, *supra* note 339, at 117–18, 121.

important stopgap for addressing legislative conflicts in the context of individual cases. Judicial organs arguably have a constitutional duty to apply the provisions on legislative hierarchy in the Constitution and the Legislation Law. The scope of court authority to interpret law and address conflicts is contested and fragile. Nonetheless, as we have seen, acceptance of limited judicial review of legislation has strengthened as the filing and review system has evolved and its limitations have become clear. Chinese legal actors may not explicitly identify the court practice of reviewing and disregarding conflicting lower-level legislation as "judicial review of legislation." However, as Tushnet has observed, "allocation strategies may be designed, consciously or otherwise, to conceal the reality of judicial review . . . to pretend that courts are permitting the people to be truly self-governing in the areas subject to weak-form review."⁴³⁵ Even in the United States, strong-form judicial review evolved only gradually and did not take its current form until the 20th century.⁴³⁶ While we should not assume that Chinese courts are on a trajectory toward, or even have a desire to establish, "strong-form" judicial review, it is also problematic to insist that Chinese courts are not engaging in a limited form of judicial review in practice.

These observations highlight the need for integrated approaches to the study of legal problems in China. In the case of legislative conflicts, a compartmentalized analysis of the filing and review system clearly is inadequate. China's system for supervising legislation and resolving conflicts operates as a multilayered system shaped by capacity challenges. We can think of these multiple layers as a cascading system of containers, with lower containers designed to catch overflow from containers above and pumps at lower levels that recycle selected conflicts back to the top container.

The formal filing and review system is the first container. As we have seen, filing and review organs and their subordinate departments face an overwhelming flow of legislation and cannot review, identify, and address most conflicts. Limited judicial review provides a second container that catches some of the overflow and supplements the review system. The ability of courts to assess legislative conflicts internally and apply higher-level legislation to decide concrete cases provides some parties with remedies. If courts could not perform this function, many claims would be held up for years as courts or citizens filed proposals with legislative organs to address conflicts. Such a result would be problematic. China's political-legal system places enormous emphasis on social stability, and unresolved disputes are potentially destabilizing.⁴³⁷

⁴³⁵ Tushnet, *supra* note 351, at 2802.

⁴³⁶ Tushnet, *supra* note 351. For a detailed historical account of this evolution, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

⁴³⁷ See generally Minzner, *supra* note 272.

The capacity of the judicial container is also limited and generates its own overflow. As noted above, courts generally have avoided addressing conflicts involving the Constitution or sensitive issues such as RETL. Courts fearful of such sensitive issues or of local government power may leave parties without a judicial remedy. China has borrowed from the practice of civil law systems, and a judgment is binding only in the case at hand (at least formally). Court decisions in concrete cases do not provide remedies for parties facing repeated contact with the same conflicting legal provisions. Such parties must raise the conflicts issue anew in each subsequent case.⁴³⁸ In the meantime, they face the uncertainty of deciding whether to comply with legislation that other political actors may continue to enforce and assessing the risk that a new court may view the conflict differently.⁴³⁹ Chinese courts also are hostile to collective litigation.⁴⁴⁰ As such, limited judicial review does not provide a remedy for groups that have collective grievances and seek repeal or amendment of conflicting lower-level legislation.

Citizen proposal mechanisms provide a third container that catches some of this overflow from the courts and recycles conflicts back into the top container (the filing and review system). Filing and Review Office officials note that many citizen review proposals relate to individual cases, an indication that some citizens who fail to obtain a remedy in the judicial system (or through other adjudicative mechanisms such as administrative reconsideration) are using the review mechanism as an alternative.⁴⁴¹ Many other proposals involve collective claims or attempts to address legislative conflicts that are chronic or destabilizing. For example, 1,600 Hepatitis B carriers filed a collective proposal calling for review of legislation that discriminated against them. Other proposals have called for review of legislation on property seizures or legislation that discriminates against citizens with rural residence registrations.⁴⁴² These are the types of claims that courts often cannot or will not address in individual cases. As discussed in Part III(E), while filing and review organs have not issued formal written responses

⁴³⁸ Peerenboom, *supra* note 7, at 212–13.

⁴³⁹ The prospect of such conflicting decisions is one reason some civil law jurisdictions have been hostile to the idea of vesting ordinary courts with the power to review legislation. Capelletti, *supra* note 351, at 1041–44.

⁴⁴⁰ See generally Jun Xie & Lijuan Sun, Access to Collective Litigations [sic] in China: A Tough Work, 3 J. POL. & L. 45, 45–55 (Mar. 2010).

⁴⁴¹ Meeting with Filing and Review Office Officials, July 2012 (on file with author).

⁴⁴² For the Hepatitis B proposal, see 1611 Ren Suqing Weixian Shenchu Huiyu Xiugai Gongwuyuan Zhaokao Jinling (1611 人诉请违宪审查呼吁修改公务员招考禁令) [1611 People Appeal for Constitutional Review and Call for Amendment of Ban on Recruitment and Testing of Public Servants], *Xinjing Bao* (新京报) [Beijing News Online], Nov. 12, 2003. For a discussion of review proposals on property seizures, see Hand, *supra* note 236, at 115–25.

to such proposals, in some cases they have responded with limited legislative or policy reforms. Citizen review proposals provide a mechanism for channeling some legislative conflicts back into the formal filing and review system. Citizen review proposals also help overwhelmed filing and review organs prioritize their work by alerting them to conflicts that are generating public anger. To understand how these layers developed and the functions they perform, they must be evaluated as part of an interactive, multilayered system.

Even this multilayered system cannot address all conflicts. Constitutional claims or conflicts involving legislative pillars of Party-state power present significant difficulty. As discussed in Part III(C), the NPCSC lacks the political capacity to adjudicate constitutional claims through a formal adjudicative process. Domestic reformers and international agencies focusing on the problem of legislative conflicts should recognize that establishing a meaningful process for constitutional review of legislation probably is not feasible in the absence of broader political reform. Given the sensitivity of constitutional review, pressuring filing and review organs or courts to review the constitutionality of legislation may slow progress on addressing a broader range of conflicts involving legislation at lower levels of the system. Reformers may be better served by first improving legislation, institutions, and procedures for resolving mundane lower-level conflicts and then working from this foundation to promote constitutional review in the future.⁴⁴³

Despite such limitations, courts and citizens have found ways to leverage the space created by institutional responses to legislative conflicts and related capacity problems. In so doing, they have promoted their own interests. As other scholars have noted, Chinese courts have demonstrated pragmatism and a capacity for limited reform, innovation, and autonomy in the face of difficult constitutional and political constraints.⁴⁴⁴ One Chinese scholar of the SPC argues that the SPC has used its limited judicial interpretation authority in subtle but important ways to expand its institutional authority.⁴⁴⁵ Such

⁴⁴³ For one Chinese argument along these lines, see Wang, *supra* note 233, at § 4 (constitutional review may be premature; China should focus on improving legality review first).

⁴⁴⁴ See, e.g., Benjamin Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 2 (2007), at § IV; Nicholas Calcina Howson, *Judicial Independence and the Company Law in the Shanghai Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2010) 134–153; Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 COLUM. J. ASIAN L. 1 (2012) (SPC motivated primarily by pragmatic strengthening of its own security and status in China political-legal system); Xin He, *Judicial Innovation and Local Politics: Judicialization of Administrative Governance in East China*, CHINA JOURNAL, Jan. 2013, 20–43.

⁴⁴⁵ Xiao, *supra* note 316, at 347–49.

dynamics are evident here. To address capacity limitations, legislative organs allow courts to interpret law for application in concrete cases and to choose the legislation that applies in the event of conflicts. Courts have cultivated this space through cautious implementation, consultation with legislative organs on both specific conflicts and general guidelines for handling conflicts, and, as the Seed Case demonstrated, strategic retreat. In some respects, courts have gently expanded their authority, as the 2004 Summary Record and 2009 SPC Provisions on Legal Citation illustrate. Although these judicial practices remain tenuous and subject to continued balancing, other legal actors have accommodated them. Such dynamics demonstrate that China's courts have found space to expand their authority in cautious ways that address concrete problems and accommodate the interests of, rather than overtly challenge, other Party-state actors.⁴⁴⁶

Citizens have also exploited space created by institutional responses to the problem of legislative conflicts. Legislators may have intended citizen review proposal mechanisms primarily as one-way information channels designed to alleviate capacity deficiencies. However, some citizens have treated the mechanisms more like constitutional litigation procedures and have raised review proposals in an effort to establish constitutional review precedents. For example, rights lawyer Xu Zhiyong refuses to refer to review proposals as "petitions." As Xu argues, "our constitutional review proposals are not a plea to some leader, but are *legal documents* that are raised in strict accordance with the provisions of the Legislation Law (*emphasis added*)."⁴⁴⁷ Others have used the mechanism as a platform for protest, to advance broad political claims about rule of law, or to pressure the Party-state to engage in system-wide legal reforms on sensitive issues. Some citizens raise review proposals not with the expectation of obtaining a concrete legal response but instead as part of a long-term effort to raise citizen constitutional consciousness and shape

⁴⁴⁶ Judge Feng Xi's article on legislative conflicts captures this pragmatism and caution perfectly. Feng, *supra* note 329. See also Liebman, *supra* note 444, at 37-41 (courts have space to innovate because they serve as a safety valve, reflect Party interests in modest institutional competition, and are not viewed as rival sources of power); Randall Peerenboom, *Between Global Norms and Domestic Realities: Judicial Reforms in China*, in LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSES OF LEGAL TRANSFER 181-202 (John Gillespie ed., 2012) (courts accept some limits on their power and refrain from challenging other actors in exchange for cooperation that enhances their authority in other aspects).

⁴⁴⁷ Xu Zhiyong (许志永), Weixian Shenchu Gongmin Jianyi (Gongmin Weiquan Di Er Ji) (违宪审查公民建议(公民维权第二辑)) [*Citizen Proposals for Constitutional Review (Citizen Rights Defense Part Two)*], Gongshi Wang (共识网) [CONSENSUS ONLINE], Apr. 2, 2011. For a general discussion of this dynamic, see Hand, *Citizens Engage the Constitution*, *supra* note 9, at 224, 226, 230-33, 241; Wang, *supra* note 233, at §§ 1, 4; Yang Tao (杨涛), Wo Weishenme Yao Xiang Quanguo Renda Ti Jianyi (我为什么要向全国人大提建议) [*Why I Want to Submit a Proposal to the NPC*], Jiancha Ribao (检察日报) [PROCURATORIAL DAILY ONLINE], Aug. 4, 2005.

China's political environment.⁴⁴⁸ In creating the review proposal mechanism, Chinese leaders provided citizens with a legal channel that they could use to disseminate sensitive constitutional arguments and to highlight tensions between the Constitution and Party-state practice. Citizens are leveraging this space to advance reform agendas that are not always consistent with Party-state interests.

This article also reveals both potential pitfalls and subtle but important opportunities for Chinese reformers and international agencies working on legislative conflicts. Reformers may be tempted to focus on strengthening the capacity of filing and review offices. There is little doubt that developing the capacity of this system is one part of the reform picture. Central filing and review offices with fewer than twenty staff members and provincial offices with three to five employees and minimal budgets clearly lack the capacity to carry out even limited review functions effectively. Some offices work with people's congress special committees or other departments to conduct review, but these entities have a host of other duties. Some filing and review employees lack adequate legal training. Particularly at the sub-provincial level, specialized filing and review offices are undeveloped (if they exist at all). Strengthening filing and review organs and their specialized departments is consistent with capacity development guidelines that emphasize the need to take account of local contexts and work with existing institutions and stakeholders. Accordingly, such an approach may appeal to international development agencies.

The results of efforts to strengthen filing and review organs may be disappointing, however. Central filing and review organs are unlikely to ever have the capacity to address legislative conflicts in a comprehensive and effective manner. NPCSC Filing and Review Office officials estimate that they would need around three hundred new employees and significant additional resources to review all legislation that is filed with the NPCSC.⁴⁴⁹ Expansion on this scale seems unlikely.⁴⁵⁰ Even if it were possible, it would only address one dimension of a multidimensional capacity problem. Filing and review organs would still face the difficult task of identifying conflicts in thousands of effective laws and regulations in the abstract. To the extent these technical capacity challenges could be overcome, filing and review organs would continue to face problems of political capacity. Bifurcation of filing and review procedures and replication of these structures at lower levels of the system help alleviate some capacity problems. However, they also make central filing and review organs dependent on the lower-level organs they supervise.

⁴⁴⁸ For discussions of these dynamics, see generally Hand, *supra* note 236. See also Huang, *supra* note 236, at 128–30, 135.

⁴⁴⁹ Meeting with Filing and Review Office Officials, June 2012 (on file with author).

⁴⁵⁰ The entire NPCSC LAC has only about 200 staff members.

Moreover, enhancing the capacity of local filing and review organs and their subordinate departments would not alleviate review bottlenecks at the national level. Filing and review organs clearly need more resources and better trained personnel, but they probably will never have the capacity to effectively address the problem of legislative conflicts in China's large and complex system.

As an alternative, reformers may be tempted to strengthen the authority of people's courts to review legislation. Such steps are unlikely to be effective in the short to medium term and may even be counterproductive. China's constitutional system is grounded in a theory of legislative supremacy. Granting courts the authority to invalidate people's congress legislation would require amendments to the Constitution, the Local Organic Law, and other statutes.⁴⁵¹ Such efforts would almost certainly trigger people's congress resistance and a sensitive debate over China's constitutional structure.⁴⁵²

One alternative might be to expand court authority gradually. Indeed, Chinese scholars have proposed amendments to the Administrative Litigation Law that would empower courts to review and invalidate normative documents and administrative rules.⁴⁵³ However, even this modest reform is likely to face significant obstacles in practice. Twenty years after the adoption of the ALL, courts continue to face well-documented problems in exercising even their limited authority to review concrete administrative acts.⁴⁵⁴ Although the ALL prohibits "mediation" of administrative lawsuits, courts have promoted "reconciliation" and "coordination" of administrative lawsuits in part to avoid issuing judgments that are difficult to enforce and may anger local authorities.⁴⁵⁵ Although the SPC has authorized courts to comment on

⁴⁵¹ Wang, *supra* note 250, at 378.

⁴⁵² For an example of the type of constitutional debate such a move might provoke, see generally Tong Zhiwei (童之伟), Xianfa Shiyong Ying Zunxun Xianfa Benshen Guiding de Lujing (宪法适用应遵循宪法本身规定的路径) [*Application of the Constitution Should Follow the Path of the Constitution's Own Provisions*], Zhongguo Faxue (中国法学) [CHINESE LEGAL SCI.], no. 6, 2008. The cases discussed in Part IV(B) also suggest that people's congresses would resist attempts to reallocate constitutional authorities.

⁴⁵³ Renda Ban Xingsufa Xiugaigao Jianyi Kuoda "Min Gao Guan" Shou An Fanwei (人大版行诉法修改稿建议扩大“民告官”受案范围) [NPC Publishes Draft of Administrative Litigation Law Amendment Proposing an Expansion of the Scope for Accepting Cases in which "Citizens Sue Officials"], Xinjing Bao (新京报) [BEIJING NEWS ONLINE], Mar. 17, 2012.

⁴⁵⁴ See generally Wang Qinghua (汪庆华), Zhongguo Xingzheng Susong: Duozhongxin Zhuyi de Sifa (中国行政诉讼: 多中心主义的司法) [*China's Administrative Litigation: Polycentric Adjudication*], 5 Zhongwai Faxue (中外法学) [PEKING U. L. J.] 513 (2007); Feng, *supra* note 329.

⁴⁵⁵ For the legality of mediation in administrative litigation, see Administrative Litigation Law, *supra* note 328, art. 50. For falling enforcement rates, see Zhu, *supra*

the legality of normative documents, judges indicate that they rarely do so.⁴⁵⁶ As Peerenboom has argued, the recent trend has been to *de-judicialize* sensitive or complex disputes.⁴⁵⁷

These problems will not suddenly disappear if courts are granted the authority to invalidate rules. Moreover, court action would still be shaped by conventions that emphasize informal consultation and consensus building as opposed to formal decisions to annul legislation. If the NPCSC and State Council refrain from issuing such decisions, it is unlikely that people's courts will issue them on a systematic basis. Instead, they are more likely to "coordinate" such issues. While the possibility of judicial action may give administrative entities some incentive to self-police, placing local courts in more direct confrontation with local people's governments could exacerbate existing tensions and generate backlash that might ultimately weaken judicial authority.⁴⁵⁸

A pragmatic and nuanced approach would seek to leverage and integrate existing institutional roles and patterns of interaction in ways that enhance the efficiency, capacity, and effectiveness of the entire multilayered system. China's more than three thousand local courts are an important resource for identifying and analyzing legislative conflicts. Courts regularly confront legislative conflicts that arise in the context of concrete cases. While the

note 2, at 247. For a discussion of efforts to promote "reconciliation" of administrative lawsuits, see, e.g., Feng, *supra* note 329, at § 1(1), (3); Zhang Xiaohua (张晓华), Guanyu Xingzheng Susong Hejie Zhidu de Sikao (关于行政诉讼和解制度的思考) [*Reflections on the Reconciliation System for Administrative Lawsuits*], Renmin Wang (人民网) [PEOPLE'S DAILY ONLINE], Mar. 22, 2011; Min Gao Guan: Hejie Chu Shuangying (民告官: 和解出双赢) [*Citizens Sue Officials: Reconciliation Produces a Double Win*], Shanxi Xinwen Wang (山西新闻网) [SHANXI NEWS ONLINE], July 4, 2010.

⁴⁵⁶ Feng, *supra* note 329; *Channels for Resolving Conflicts*, *supra* note 16 (SPC Judge Liao Fengyun noting that most courts do not dare to pass judgment on normative documents).

⁴⁵⁷ For a discussion of these dynamics, see generally Peerenboom, *supra* note 415.

⁴⁵⁸ The amendment of the Criminal Procedure Law (CPL) in 1996 provides an example of this type of risk. The amendments expanded the rights of defense lawyers and placed them in a more confrontational position with law enforcement organs. Some observers have suggested that the change contributed to a subsequent increase in official retaliation against defense lawyers. See, e.g., Fu Hualing, *When Lawyers Are Prosecuted: The Struggle of a Profession in Transition*, at 29–34 (May 2006) (SSRN). When the CPL was amended again in 2012, leading scholars tried to craft amendments that would better account for current realities. Chen Guangzhong: Xingshi Susongfa Da Xiu Hou Bufen Tiaokuan Zuodao Le Chaoqian (陈光中: 刑事诉讼法大修后部分条款做到了超前) [*Chen Guangzhong: After the Major Amendment of the Criminal Procedure Law, Some Provisions Achieve Advancement*], Xinjing Bao (新京报) [BEIJING NEWS ONLINE], Mar. 9, 2012.

professional capacity of judges in some basic-level courts is limited, most judges have legal training and experience in researching and applying complex legislation. Rather than reallocating constitutional authorities or placing courts in more direct confrontation with legislators, Chinese reformers and the international agencies supporting them should explore ways to reinforce the role that courts play and better integrate it with the work of the filing and review system.

What steps could be taken to leverage the work of courts? One meaningful step would be to amend the Legislation Law to validate the authority of courts to choose the applicable legislation when they encounter conflicts. This could be achieved with the addition of language to Chapter Five providing explicitly that judicial and administrative organs shall apply the conflicts rules in carrying out their respective duties. People's courts are already doing so, and other legal actors have accommodated and even encouraged the practice. However, the lack of an explicit statutory provision leaves courts in a vulnerable position. An amendment to the Legislation Law would flip a presumption that lingers among a minority of scholars and legislators, place the imprimatur of China's highest organ of state power on existing practices, and provide courts cover that could help insulate them from local legislative backlash.

More importantly, reformers should consider ways to improve communication between people's courts that identify and analyze legislative conflicts in their daily work and filing and review organs that have the formal power to eliminate such conflicts. At the national level, the NPCSC LAC and State Council LAO are alerted to a small number of conflicts when the SPC consults these offices prior to issuing replies to lower courts. However, many conflicts are addressed within the court system and without such consultation. In my discussions with legislative officials at the national and local level, it was clear that filing and review offices do not systematically track individual judgments in which courts disregard conflicting lower-level legislation.

For overwhelmed filing and review organs, the day-to-day work of the courts provides an important resource that could bolster their review capacity. The SPC should provide the NPCSC LAC and State Council LAO with copies of replies that address legislative conflicts and are resolved without their input. More importantly, legislative and judicial organs should explore ways to encourage lower-level courts to report legislative conflicts discovered in the course of adjudication.⁴⁵⁹ People's congresses could require such reporting. However, a more effective approach might be to incentivize courts by including such reporting in evaluation standards for judges. Reporting of a legislative conflict that filing and review organs eventually recognize and resolve could be considered a "plus" factor in evaluations for judicial

⁴⁵⁹ In theory, courts other than the SPC could file proposals for review of legislative conflicts under Article 90(2) of the Legislation Law and similar provisions. However, courts have not done so in practice.

promotion or commendation.⁴⁶⁰ Such reporting would help filing and review organs identify legislative conflicts that are generating actual disputes and provide a head start in analyzing them. To insulate local courts from confrontations with local people's congresses and people's governments, courts could report conflicts vertically through the judicial hierarchy in the same way that they elevate requests for instructions. The SPC or provincial high courts could then report the issue to the relevant filing and review organs.⁴⁶¹ Courts might also quietly encourage parties or their lawyers to file review proposals under the relevant citizen review proposal provisions.

Legislators should also consider inviting judges and scholars to participate as experts in the analysis of legislative conflicts and consultations to resolve them. Some local provisions allow filing and review organs or their subordinate departments to consult outside experts and even the general public as they analyze conflicts. These provisions might be expanded to include judges and incorporated into procedures at the national level. Legislative organs might also consider involving judges in the informal consultations they undertake to address most conflicts. Judicial involvement in such consultations could provide a useful mechanism for preventing misunderstandings, encouraging consensus building, and pre-empting backlash against courts that identify conflicts. Judicial involvement would also place the weight of judicial expertise behind the opinion of filing and review organs on the conflict at issue.

This type of institutional communication and dialogue is consistent with some existing Chinese practices. For example, the Administrative Reconsideration Law contains a rudimentary mechanism along these lines.⁴⁶² In recent years, the SPC has also worked to strengthen the system for "judicial suggestions" (司法建议) (*sifa jianyi*) to state organs. Specifically, the SPC has encouraged courts at all levels to raise "judicial suggestions" on a wide range of pressing legal and social issues that are discovered in the course of

⁴⁶⁰ Minzner has argued that responsibility targets should be considered in designing reform initiatives. Minzner, *supra* note 57, at 112–15.

⁴⁶¹ Of course, this type of vertical reporting would reduce the efficiency of the process.

⁴⁶² Under the Administrative Reconsideration Law, citizens may request review of the legality and appropriateness of concrete administrative acts. In connection with this review, they may also ask reconsideration organs to review certain normative documents that provide the basis for the concrete administrative act. Administrative regulations and rules are excluded from such review. In the event the administrative reconsideration organ lacks the authority to annul and amend the normative document in question, it is directed to report the matter to the proper authority for handling "in accordance with the law." Administrative Reconsideration Law, *supra* note 23, arts. 7, 26. For one Chinese discussion of administrative reconsideration as a supplement to the filing and review system, see Wang, *supra* note 114, at 17.

adjudication work.⁴⁶³ This effort is part of a broader push to promote a judiciary that takes the initiative to work with other state organs to resolve disputes and maintain stability. Courts may send judicial suggestions directly to the relevant Party organs, people's congresses, people's governments, or people's government departments. They may also send the suggestions to higher-level courts for transmission to the relevant organ.⁴⁶⁴ Xin He's recent study of an intermediate people's court in Jiangsu province demonstrates that local courts have experienced some success in using carefully drafted judicial suggestions to "facilitate benign interactions" and rectify unlawful administrative behavior. The court in He's study strengthens the impact of such suggestions by simultaneously sending copies to state and Party institutions that exercise supervision over the administrative organ in question.⁴⁶⁵ The establishment of a system of court notification of legislative conflicts would be consistent with, and could perhaps even be incorporated into, judicial suggestion procedures.

This approach is also consistent with practices in other countries. Chinese scholars argue that people's court decisions to disregard conflicting lower-level legislation have a signaling effect and act as a "friendly warning" or "informal advisory ruling" for legislative organs.⁴⁶⁶ Similar dynamics are evident in other jurisdictions with systems of parliamentary supremacy. The Netherlands is an example of a country with a strong parliament, a weak form of judicial review, and a political tradition that places heavy emphasis on consultation and consensus building. There, court commentary on conflicts serves a signaling function and encourages institutional dialogue.⁴⁶⁷ Similar observations have been offered with respect to weak-form judicial review in the United Kingdom.⁴⁶⁸ While Chinese courts may not comment on the validity of

⁴⁶³ For a discussion of judicial suggestions, see Zhang Xianming (张先明), Jiji Canyu Shehui Guanli Chuangxin Cujin Guomin Jingji Lianghao Yunxin—Zuigao Renmin Fayuan Youguan Fuzeren Jiu Sifa Jianyi Gongzuo Da Jizhe Wen (积极参与社会管理创新促进国民经济良好运行—最高人民法院有关负责人就司法建议工作答记者问) [*Actively Participate in Innovative Social Management and Promote the Healthy Operation of the National Economy—SPC Representative Responds to Reporter Questions on Judicial Suggestion Work*], Zuigao Renmin Fayuan Wang (最高人民法院网) [SUP. PEOPLE'S CT. ONLINE] (Dec. 7, 2011). For a recent SPC opinion on judicial suggestion work, see Guanyu Jiaqiang Sifa Jianyi Gongzuo de Yijian (关于加强司法建议工作的意见) [*Opinion on Strengthening Judicial Suggestion Work*] (promulgated by the Sup. People's Ct., Mar. 15, 2012, effective Mar. 15, 2012).

⁴⁶⁴ *Id.* at art. 14.

⁴⁶⁵ Xin, *supra* note 444, at 21–25.

⁴⁶⁶ Wang, *supra* note 122, at § 4(1); Corne, *supra* note 6, at 377; Pan, *supra* note 256, at 128–129; Wang, *supra* note 114, at 1, 15.

⁴⁶⁷ VAN DER SCHYFF, *supra* note 351, at 26–27, 183, 191–93.

⁴⁶⁸ *Id.* at 184–87, 200.

legislation in their judgments, institutional dialogue could be facilitated through informal channels appropriate to China's political-legal context.

With respect to citizen review proposals, some reformers have discussed requiring central filing and review organs or their subordinate offices to provide written responses. As discussed in Part III(E), some local people's congresses and people's governments require filing and review organs to respond to citizen claimants in writing. This practice may be more difficult to implement at the national level, however. Many review proposals raised with the NPCSC and State Council involve constitutional or other politically sensitive claims. Given the sensitive nature of such claims, the NPCSC and State Council are not likely to publicize review proposals or commit to formal response requirements.

To avoid such problems, legislators might consider ways to strengthen citizen analysis of legislative conflicts during the drafting stage. The Chinese government has aggressively promoted the circulation of draft legislation for public comment. In some cases, citizens have submitted thousands of comments on such drafts.⁴⁶⁹ One provincial-level legislative official noted that while few citizens have raised review proposals in his jurisdiction, many have offered comments on draft legislation.⁴⁷⁰ Legislative entities might try to encourage such participation by specifically inviting citizens to analyze draft legislation for potential conflicts with higher-level legislation. Citizens have already raised concerns about conflicts in commenting on some draft legislation.⁴⁷¹

There would be several advantages to shifting citizen review to the pre-promulgation stage when possible. Legislative entities are likely to be more flexible on conflicts before they formally promulgate and place their full authority behind legislation. As discussed in Part III(D), filing and review

⁴⁶⁹ Horsley, *supra* note 20, at 298, 303.

⁴⁷⁰ Interview with Senior Shanghai Legislative Official, July 2012 (on file with author).

⁴⁷¹ For example, after legal scholars raised proposals for the review of China's regulation on urban expropriations, legislative organs consulted them in the drafting of a replacement regulation and circulated the new draft regulation for public comment. Hand, *supra* note 236, at 121–24. In a more recent example, Heilongjiang province published a draft local regulation for comment. The regulation provided that wind and solar power were state-owned and that citizens were required to obtain administrative approval to use the resources. Citizens objected and claimed that the controversial provisions conflicted with the Constitution, Property Law, Legislation Law, and Administrative Licensing Law. Du Xiao, Heilongjiang She Taiyangneng Fengneng Tance Kaifa Xingui Helixing Shou Zhiyi (黑龙江设太阳能风能探测开发新规合理性受质疑) [*Reasonableness of New Heilongjiang Regulation on Development and Exploitation of Wind and Solar Power Is Questioned*], Fazhi Ribao (法制日报) [LEGAL DAILY ONLINE], June 20, 2012.

organs are reluctant to formally annul legislation because such action may damage the face and authority of the promulgating organ and because people's congress leaders may already have approved such legislation in their capacity as Party leaders. When legislation is only in draft form, promulgating organs and Party leaders have a face-saving out and may be less resistant to making changes.⁴⁷² In addition, citizens who offer comments on conflicts in draft legislation are guaranteed at least an indirect form of feedback, as they will always have the opportunity to review the final legislation and assess whether changes were made.

Encouraging citizens to identify potential conflicts in the pre-promulgation stage is not a comprehensive solution to the problem of citizen participation and feedback on legislative review proposals. Some conflicts may not become apparent until legislation is actually implemented in concrete cases. Some citizens may not be willing to challenge conflicts until their rights and interests are impacted directly. Moreover, the Party-state may suppress citizen comments if a conflict is too sensitive.⁴⁷³ However, to the extent that it is feasible, encouraging this type of citizen participation may ameliorate some of the problems with post-promulgation review proposals. Such steps would be consistent with a range of recent legal reforms designed to enhance government transparency and provide channels for citizen monitoring and input, including the adoption of China's Open Government Information Regulation and broader efforts to encourage citizen comments on draft legislation.⁴⁷⁴

⁴⁷² One Chinese legal scholar has noted these dynamics and urged local people's congresses to address concerns about legislation in the pre-promulgation stage to avoid confronting the tensions generated by the exercise of post-promulgation supervision authorities. Liu, *supra* note 263, at 89.

⁴⁷³ For example, in 2005 and 2006, Professor Gong Xiantian issued open letters arguing that the draft PRC Property Law violated the principles of socialism enshrined in the Constitution and several specific constitutional provisions. Legislative officials invited Professor Gong for consultations and later amended the draft to address several of his concerns. Yi Feng Xin Dangzhu Wuquan Fa Cao'an (一封信挡住物权法草案) [*One Letter Blocked the Property Law Draft*], Nanfang Wang (南方网) [SOUTHERN ONLINE], Feb. 23, 2006; Wu Bangguo: Xiugai Hou de Wuquan Fa Cao'an Fuhe Zhongguo Guoqing he Shiji (吴邦国: 修改后的物权法草案符合中国国情和实际) [*Wu Bangguo: the Revised Draft Property Law Is Consistent with China's National Condition and Realities*], Zhongguo Xinwen Wang (中国新闻网) [CHINA NEWS ONLINE], Mar. 11, 2007. Eventually, however, the Party-state suppressed further debate on the issue. Joseph Kahn, *China Backs Property Law, Buoying Middle Class*, N.Y. TIMES, Mar. 16, 2007.

⁴⁷⁴ See generally Horsley, *supra* note 20. The Open Government Information Regulation requires people's governments at all levels to establish systems for disclosing government information. Zhonghua Renmin Gongheguo Zhengfu Xinxi Gongkai Tiaoli (中华人民共和国政府信息公开条例) [PRC Regulations on Open Government Information] (promulgated by the St. Council, Apr. 5, 2007, effective May 1, 2008), ST. COUNCIL GAZ., May 30, 2007, arts. 15-19. Although the Regulation applies only

Finally, domestic legal reformers and international agencies should recognize that it might not be necessary or even desirable to eliminate *all* legislative conflicts. China has a history of experimenting with legal and policy reforms in a few locales before applying them nationwide. In some cases, these experiments and the normative documents that authorize them violate existing constitutional and legal provisions. Local experiments on the transfer of land use rights in the 1980s provide one example.⁴⁷⁵ While some leading Chinese scholars have criticized the concept of "benign violations," others have argued that some conflicts are an unavoidable and, within limits, a desirable feature of China's rapid reform and development.⁴⁷⁶ As one legislative official stated to me, filing and review officials cannot be "bookworms" who sit in a room and try to root out technical conflicts on paper. Instead, they need to evaluate conflicts in the context of China's broader development and keep the needs of reform in mind.⁴⁷⁷ Although not all legislative conflicts are benign, consultative approaches that involve discussion and consensus building may preserve some flexibility in dealing with technical conflicts that ultimately help to push Chinese reform agendas forward.

This final issue provides a useful reminder of the complexity of China's evolving political-legal environment. Such complexity must be acknowledged in considering even the limited reform steps discussed here. A central argument of this article is that multidimensional problems of capacity have shaped the evolution and operation of the filing and review system and the supplemental roles that both courts and citizens play in supervising legislation. Power dynamics, institutional relationships, and political-legal conventions limit the capacity of filing and review organs to exercise their formal powers to annul or amend conflicting legislation. The Party's role complicates the exercise of formal constitutional authorities and prompts legislative organs to resolve intrastate disputes through consultative processes. In short, the system has evolved as it has, and operates as it does, for complex reasons.

to administrative entities, such systems could facilitate the process of circulating drafts of administrative regulations, rules, and normative documents to the public.

⁴⁷⁵ Clarke, *supra* note 26, at 105–08.

⁴⁷⁶ Compare Hao Tiechuan (郝铁川), *Lun Liangxing Weixian* (论良性违宪) [On Benign Violations of the Constitution], *Faxue Yanjiu* (法学研究) [LEGAL STUD.] no. 4, 1996, at 89–91 with Tong Zhiwei (童之伟), "Liangxing Weixian" Buyi Kending ("良性违宪"不宜肯定) [It Is Not Appropriate to Affirm "Benign Constitutional Violations"], *Faxue Yanjiu* (法学研究) [LEGAL STUD.], no. 6, 1996, at 19–22.

⁴⁷⁷ Interview with Senior Shanghai Legislative Official, July 2012 (on file with author).

In such a political-legal environment, even incremental reforms that appear simple on paper may be challenging to implement in practice. For example, the drafters of the Legislation Law may have declined to mention people's courts in Chapter Five because the role of courts in applying the conflicts rules and policing legislation was contested. Even indirect court reporting of conflicts (for transfer to filing and review organs) may not adequately alleviate court concerns about local legislative backlash. In the context of a system that emphasizes face, relationships, and consensus building, judges may prefer to raise suggestions with promulgating organs informally, rather than trigger a formal legislative supervision process.⁴⁷⁸ Finally, even if the limited steps discussed here were implemented, they would not address broader concerns related to the inefficiency of the consultative dispute resolution processes at the core of the filing and review system, lack of transparency in the review process, the absence of effective constitutional review mechanisms, and other issues.

While the complexity of China's political-legal system highlights the need to approach reform discussions with a healthy dose of humility, it should not preclude such discussions. The Party-state's continued emphasis on the problem of legislative conflicts and its multistage effort to expand the filing and review system reinforce both the need and desire to improve China's legislative supervision system. In China, the problem of legislative conflicts has been acute in part because the formal institutions and processes for addressing it lack the capacity to do so effectively. The roles of other actors in the legal system have evolved over time to address these ongoing deficiencies. As we work to understand this system, we should think about the roles of filing and review organs, courts, and citizens in an integrated way. By doing so, we can begin to make sense of phenomena that appear to be aberrational on the surface and in turn better understand both the potential for and likely obstacles to future reform efforts.

Such an understanding highlights subtle but meaningful institutional synergies and trends that might be reinforced to improve the system. Rather than trying to alter basic constitutional authorities, roles, and patterns of interaction that have developed organically over three decades, reformers should explore pragmatic ways to leverage existing dynamics and shape them on the margins to make more of their collective potential. As one judge writing on legislative conflicts candidly observed:

We cannot disregard the rhythm of the judiciary's slow maturation. We must be steady but not conservative or rigid,

⁴⁷⁸ For example, the intermediate people's court in Xin He's study tries to deliver suggestions to administrative organs in a delicate and informal way to "facilitate benign interactions" and to avoid "placing the institutions addressed in an embarrassing situation." However, as noted above, the court often copies these "informal" suggestions to state or Party organs with control over the organ in question. He, *supra* note 444, at 22-24.

active but not blindly radical. We must rationally strive for development and, in the trials of strength and the competition of all types of authority, seek the middle path of subtle balance. Sometimes we must take detours, and sometimes we must advance in a roundabout way either by reconciling or by relieving pressure. We can only skillfully work through the brush of improper interference and calmly cultivate the roots of judicial authority until they are finally established.⁴⁷⁹

Although the judge was discussing the role of courts, his admonition is instructive in thinking about the development of the legislative supervision system generally. The Party-state has demonstrated an interest in improving legislative consistency. Gradualism, flexibility, and accommodation may ultimately be effective approaches in a political-legal framework in which constraints on more aggressive, system-altering reforms are significant. As the evolving roles of courts and citizens in this multilayered system suggest, such gradual approaches may open up unexpected space for a range of legal actors.

⁴⁷⁹ Feng, *supra* note 329, at § 3(3).

