
CHINESE COMMON LAW? GUIDING CASES AND JUDICIAL REFORM

Half a century ago, writing in this *Review*, Professor Jerome Cohen traced the “gradual abandonment” of the judicial-independence ideal in the early years of Chinese Communist Party rule.¹ Despite this trend, Cohen suggested, China’s leaders may in time “acquire a deeper appreciation of the virtues of functional specialization, professionalization, and judicial autonomy.”² A half century later, China’s judicial reform record is mixed. While the country has made considerable strides in building a more competent and professional judiciary,³ statist and populist forces have also deeply shaped the trajectory of reform.⁴

This Note assesses a relatively recent innovation in China’s judicial reform project: the use of “guiding cases” to achieve greater adjudicative consistency across lower courts.⁵ Since 2010, China’s highest court has converted fifty-six judicial opinions into what are intended to be de facto binding decisions that courts “at all levels should refer to . . . when adjudicating similar cases.”⁶ Traversing subjects as wide-ranging as securities, land use, homicide, and graft, these guiding cases

¹ Jerome Alan Cohen, *The Chinese Communist Party and “Judicial Independence”*: 1949–1959, 82 HARV. L. REV. 967, 967 (1969).

² *Id.* at 1006.

³ See STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 251–97 (1999) (summarizing how China’s “judicial system has been extensively rebuilt since 1979,” *id.* at 251); see also Xin He, *The Judiciary Pushes Back: Law, Power, and Politics in Chinese Courts*, in *JUDICIAL INDEPENDENCE IN CHINA* 180 (Randall Peerenboom ed., 2010) (describing courts resisting party pressure); Benjamin L. Liebman, *China’s Courts: Restricted Reform*, 191 CHINA Q. 620, 620 (2007) (pointing to areas of increased autonomy for Chinese courts).

⁴ See generally Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in *MAO’S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE GOVERNANCE IN CHINA* 165 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011); Carl F. Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935 (2011). Recent developments have further highlighted how China’s judicial (and legal) reforms have evinced a blend of professionalist, populist, and statist influences. While the Communist Party of China recently announced such “professionalist” reforms as reducing local interference with local courts, the Party has continued to emphasize its leading role in supervising the judiciary under a “socialist rule of law.” See Yang Yi, *Highlights of Communiqué of 4th Plenary Session of CPC Central Committee*, XINHUA (Oct. 23, 2014), http://news.xinhuanet.com/english/china/2014-10/23/c_133737957.htm [<http://perma.cc/WE8A-2357>].

⁵ See *infra* Part I.

⁶ Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding (最高人民法院关于案例指导工作的规定) [Provisions of the Supreme People’s Court Concerning Work on Case Guidance] (promulgated by the Adjudication Comm. of the Sup. People’s Ct., Nov. 15, 2010, issued Nov. 26, 2010) Beida Falü Xinxī Wang (北大法律信息网) [CHINALAWINFO], http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=143870 [<http://perma.cc/TNU5-792H>], translated in STANFORD LAW SCH., CHINA GUIDING CASES PROJECT (2015), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/08/guiding-cases-rules-20101126-english.pdf> [<http://perma.cc/9PP9-S7QY>] [hereinafter Provisions]. Figure is current as of May 8, 2016.

offer a potentially important new tool for the roughly 200,000 jurists charged with administering China's legal system.⁷

Guiding cases have generated significant discussion among scholars and officials. Some proponents cite their potential to fill statutory lacunae, unify legal standards, improve judicial efficiency, and limit judicial discretion.⁸ Others point generally toward returns to judicial flexibility,⁹ professionalism,¹⁰ and integrity.¹¹ Meanwhile, less sanguine commentators have raised doubts as to China's institutional readiness,¹² while others — even supporters — have focused attention on constitutional and political difficulties in the system's design.¹³

Perhaps due to the elevated role of “case law” in many non-Chinese legal systems, analyses of guiding cases have often taken on a distinctly comparative flavor. Some have likened guiding cases to common law precedents, arguing that imbuing cases with “stare decisis-like authority”¹⁴ may bring China's civil law system into closer alignment with the Anglo-American legal tradition.¹⁵ Others

⁷ Cao Yin, *Courts Court Change*, CHINA DAILY (Aug. 13, 2014, 7:24 AM), http://www.chinadaily.com.cn/2014-08/13/content_18298352.htm [<http://perma.cc/C3CC-789J>]. Consistent with prevailing rules of citation, a Chinese author's surname will appear in the order in which it appeared in the text of the publication.

⁸ See Li Shichun (李仕春), *Zhongguo Anli Zhidao Zhidu Kunju yu Chulu* (中国案例指导制度困局与出路) [China's Guiding Cases System: Dilemmas and Solutions], *Zhongguo Renmin Daxue “Minshang Fa Qianyan” Luntan Yanjiang* (中国人民大学“民商法前沿”论坛演讲) [Speech at the “Frontiers of Civil and Commercial Law” Forum at China's Renmin University] (Mar. 5, 2009), <http://old.civillaw.com.cn/article/default.asp?id=44157> [<http://perma.cc/XV8H-UYPN>].

⁹ See, e.g., Jinting Deng, *A Functional Analysis of China's Guiding Cases*, 14 CHINA: INT'L J. (forthcoming Aug. 2016) (manuscript at 3), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2381772 [<http://perma.cc/M945-H8P2>] (arguing that “the guiding case system has equivalent functions to the Common Law in adapting law to social needs”).

¹⁰ See, e.g., Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, 217 CHINA Q. 121, 123 (2014).

¹¹ See, e.g., Zhang Guangming (张光明), *Zuigao Renmin Fayuan Fabu Disanpi Zhidaoxing Anli* (最高人民法院发布第三批指导性案例) [*The Supreme People's Court Announced Third Batch of Guiding Cases*], *Zhongguo Fayuan Wang* (中国法院网) [CHINA COURT] (Sept. 26, 2012, 9:22 AM), <http://www.chinacourt.org/article/detail/2012/09/id/603873.shtml> [<http://perma.cc/L4RT-25UV>] (pointing to the role guiding cases can play in “raising judicial integrity”).

¹² See Li Shichun, *supra* note 8 (summarizing the argument of Peking University Professor Fu Yulin).

¹³ See *infra* text accompanying notes 53–60, 118–125.

¹⁴ Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 COLUM. J. ASIAN L. 1, 8 (2012). Professor Zhang himself does not make any claims of convergence, but his use of the term “stare decisis-like authority” is consonant with much of the rhetoric surrounding guiding cases.

¹⁵ See, e.g., Jinting Deng, *The Guiding Case System in Mainland China*, 10 FRONTIERS L. CHINA 1, 1 (2015) (writing that “the current guiding case system and common law system have the tendency to become more and more similar systems in reality”); Seth Gurgel & Ping Yu, *Stare Decisis in China? The Newly Enacted Guiding Case System*, in *READING THE LEGAL CASE: CROSS-CURRENTS BETWEEN LAW AND THE HUMANITIES* 142, 156 (Marco Wan ed., 2012) (describing how the possible incorporation of case study into Chinese judicial education “would seem to presage increasing levels of formal common law-type jurisprudence in a system that al-

have noted civil law analogs¹⁶ or sought to distinguish guiding cases as distinctively local.¹⁷

This Note aims to accomplish two goals in two parts. The first is to illumine a clearer image of guiding cases and their contemplated role within China's distinctive legal and political structure. The emerging portrait is that of a still-nascent system that has struggled to establish itself within China's hierarchy of legal authority. Still, appreciable progress has been made. The second goal is to place guiding cases in comparative context, finding that despite widespread "common law" rhetoric, systems of this sort are hardly foreign to civil law. In fact, unqualified invocations of the common law can mislead more than they inform. The Note ends with parting thoughts on future reform.

I. THE GUIDING CASE SYSTEM

Part I begins with a brief overview of the role of cases in modern Chinese legal history and the various constraints facing the Supreme People's Court. It then turns to the history, framework, and impact of guiding cases, with attention to challenges that have shaped, and will likely continue to shape, their development.

A. Forerunners

In its various forms, "case law" has played a longstanding but ancillary role within the Chinese legal tradition, dating back as early as the Western Zhou (eleventh century–711 B.C.).¹⁸ The legal systems of premodern China were primarily code based, and though ancient China boasted a rich array of case compilations,¹⁹ as did Republican

ready appears to have quite a bit of the informal variety"); cf. Jocelyn E.H. Limmer, *China's New "Common Law": Using China's Guiding Cases to Understand How to Do Business in the People's Republic of China*, 21 WILLAMETTE J. INT'L L. & DISP. RESOL. 96, 133 (2013) (pointing to the "recognition of Chinese legal precedent").

¹⁶ See, e.g., NINON COLNERIC, CHINA GUIDING CASES PROJECT, GUIDING BY CASES IN A LEGAL SYSTEM WITHOUT BINDING PRECEDENT: THE GERMAN EXAMPLE 7 (2013), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/09/commentary-7-English.pdf> [http://perma.cc/TJ5W-Y89M].

¹⁷ See, e.g., Fang Wencui (房文翠), Jiejin Zhengyi Xunqiu Hexie: Anli Zhidao Zhidu de Fazhexue Zhiwei (接近正义寻求和谐: 案例指导制度的法哲学之维) [*Approaching Justice Through Seeking Harmony: The Philosophical Dimension of the Guiding Cases System*], Fazhi yu Shehui Fazhan (法治与社会发展) [THE RULE OF LAW AND SOCIETAL DEVELOPMENT], no. 3, 2007, at 46, 46 (noting that guiding cases should not be wholly characterized as continental or common law "precedents").

¹⁸ See Nanping Liu, "Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 J. CHINESE L. 107, 109 (1991). Imperial authorities often sought to refine "statutory" law through compiling decided cases of general legal effect. See *id.* at 110 (discussing Han Dynasty (206 B.C.–220 A.D.)).

¹⁹ Case compilations of the sort described above were especially notable in the Song Dynasty (960–1279 A.D.), see Brian E. McKnight, *From Statute to Precedent: An Introduction to Sung Law and Its Transformation*, in LAW AND THE STATE IN TRADITIONAL EAST ASIA 111, 111

China (1912–1949) and its case reporters,²⁰ legal cases have generally been supplementary under the primacy of legal codes.

The story of modern Chinese case law begins in the early 1980s, shortly after the country began rebuilding its legal system from the rubble of the Cultural Revolution.²¹ In 1983, the Supreme People's Court (SPC) — once a “repressive and, at times, insignificant state security agency” under Mao²² — began to issue collections of decided cases as a kind of “internal regulation” of lower courts.²³ In 1985, the SPC commenced its now well-established practice of publishing “typical cases” (*dianxin anli*) in its official publication, the *Gazette of the Supreme People's Court*, alongside other guidance documents, including regulations, speeches, judicial interpretations, and replies.²⁴

The SPC's exercise of its guidance authority operates within a terrain of significant legal and political constraints. Though the Court is the “highest adjudicative organ of the state,”²⁵ with 340 judges and nine vice-presidents, it is controlled by the Communist Party through both the suffusion of Party membership in the Court's personnel and direction from the Party's Central Political-Legal Committee.²⁶ State institutions also play an important role, notably the National People's Congress (NPC), China's highest legislative body, whose standing committee “supervises” the SPC.²⁷ Still, whether due to the “entrepre-

(Brian E. McKnight ed., 1987), as well as the Ming Dynasty (1368–1644 A.D.), when one emperor was said to have personally overseen a case compilation known as the *Dagao*, see Nanping Liu, *supra* note 18, at 111. The Qing Dynasty (1644–1912 A.D.) was also well known for its case compilations. See DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 150–56 (1967).

²⁰ See Nanping Liu, *supra* note 18, at 112. Republican China overhauled imperial legal codes and borrowed liberally from foreign models. See MICHAEL H.K. NG, *LEGAL TRANSPLANTATION IN EARLY TWENTIETH-CENTURY CHINA* 1–3 (2014).

²¹ See LUBMAN, *supra* note 3, at 102. For three decades under the rule of Mao Zedong, the People's Republic of China (PRC) maintained a skeletal set of legal institutions, privileging ideological campaigns over law-based governance. See *generally id.* at 40–101. Unsurprisingly, case law played little to no role in the Maoist polity. See Nanping Liu, *supra* note 18, at 112–13.

²² Eric C. Ip, *The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 *COLUM. J. ASIAN L.* 367, 371 (2011).

²³ See Nanping Liu, *supra* note 18, at 114.

²⁴ For an early account of several of these documents, see Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 *J. CHINESE L.* 145, 215 (1993). Today, the 2007 SPC “Regulations on Judicial Interpretation Work” allow only four types of guidance documents to qualify as “judicial interpretations” in the broad sense: interpretations (*jieshi*), regulations (*guiding*), replies (*pifu*), and decisions (*juding*). Zuigao Renmin Fayuan Fabu Guanyu Sifa Jieshi Gongzuo de Guiding (最高人民法院发布关于司法解释工作的规定) [Provisions of the Supreme People's Court on Judicial Interpretation Work] (promulgated by the Adjudication Comm. of the Sup. People's Ct., Dec. 11, 2006, effective Apr. 1, 2007), NAT'L PEOPLE'S CONGRESS, http://www.npc.gov.cn/npc/xinwen/fztd/sfgz/2007-03/23/content_362927.htm [<http://perma.cc/LA4S-QWW8>].

²⁵ XIANFA [CONSTITUTION] art. 127 (1982).

²⁶ See Ahl, *supra* note 10, at 124–25.

²⁷ XIANFA art. 67 (1982). The Chinese Constitution also stipulates that the SPC is “responsible to the National People's Congress and its Standing Committee.” *Id.* art. 128.

neurial choices of senior justices” in “constructing support bases for judicial empowerment,”²⁸ more recent institutional pragmatism,²⁹ or the basic reality that it falls upon *some* institution to clarify legislative ambiguities — particularly in China’s modern market economy — the SPC has managed to carve out space for autonomous action while still following the Party-state’s overall direction.

The SPC’s issuance of various guidance documents, including typical cases, is just one example of this exercise of constrained autonomy. Because legislative power is constitutionally exercised through the NPC and the NPC Standing Committee (NPCSC),³⁰ the SPC is in theory precluded from engaging in guidance activities that might be construed as properly “legislative.”³¹ Understood in this context, the SPC’s typical cases have stayed in relatively safe waters. Chinese judges do not treat them as legal authority, have generally “retain[ed] discretion” as to when to follow them, and do not cite them in judicial opinions.³² The typical case’s primary purpose has not been the clarification of statutory ambiguity, but rather the promotion of “the correct application of well-established doctrine.”³³ Because they are paradigmatic but nonbinding, typical cases have generally steered clear of having the kind of authoritative ambiguity-resolving impact that might intrude upon the NPC’s lawmaking prerogatives or Party interests.³⁴

B. Guiding Cases — Overview

1. *History.* — Throughout its development, the guiding cases system proceeded in a manner fully characteristic of China’s evolving pol-

²⁸ Ip, *supra* note 22, at 367 (describing how SPC leaders cultivated support from influential commercial actors and reformed local courts in alignment with professionalist-activist values).

²⁹ See generally Taisu Zhang, *supra* note 14, at 8 (arguing that a rational actor model of institutional self-interest better explains SPC developments since 2007).

³⁰ XIANFA art. 58 (1982); see also *id.* art. 42 (vesting the power of legal interpretation in the NPCSC); Lifa Fa (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000, amended Mar. 15, 2015), art. 7, 2015 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 2.

³¹ See Li Shichun, *supra* note 8.

³² See Ahl, *supra* note 10, at 126.

³³ See Taisu Zhang, *supra* note 14, at 44. They can also take on instructive or promotional purposes. See Susan Finder, *Using Model Cases to Guide the Chinese Courts*, U. NOTTINGHAM CHINA POL’Y INST. BLOG (Apr. 7, 2014), <http://blogs.nottingham.ac.uk/chinapolicyinstitute/2014/04/07/using-model-cases-to-guide-the-chinese-courts/> [<http://perma.cc/VWH4-V7GG>].

³⁴ The current promotion of guiding cases has not necessarily come at the expense of typical cases, many of which now issue monthly as part of the SPC’s broader push to expand the use of various forms of “case law” as guidance instruments. See Susan Finder, *More on the Supreme People’s Court and Typical Cases*, SUP. PEOPLE’S CT. MONITOR (May 2, 2014), <http://supremepeoplescourtmonitor.com/2014/05/02/more-on-the-supreme-peoples-court-and-typical-cases/> [<http://perma.cc/6CFW-G6YQ>].

icy process at the start of the new millennium: local experimentation,³⁵ consultative authoritarianism,³⁶ and — in judicial administration specifically — the pendulum swing from professionalism to populism.

As early as 1987, Chinese scholars began seriously debating the merits of adopting “precedent” (*panli*) to further judicial reform.³⁷ Inspired by Anglo-American examples and responsive to the perceived inadequacies of typical cases and other guidance documents, scholars began to push proposals that would give adjudicated cases general legal effect.³⁸ In 1999, the SPC called for “diligence” in pursuing a system of case guidance,³⁹ which was soon followed by local experiments in Zhengzhou, Chengdu, and Tianjin in the early 2000s.⁴⁰ These experiments have been described as fairly spontaneous efforts to enhance the supervisory authority and political status of local courts.⁴¹ Meanwhile, scholars penned articles that continued to advocate for the adoption of case guidance.⁴²

In 2004, the SPC began to test the waters by adding a new section to published cases in the *Gazette* that contained legal rules abstracted from each case.⁴³ The SPC also began to publish more cases that focused on filling statutory holes rather than merely restating or explicating well-established doctrine.⁴⁴ Finally, in late 2005, the SPC’s Second

³⁵ See generally Sebastian Heilmann, *From Local Experiments to National Policy: The Origins of China’s Distinctive Policy Process*, 59 CHINA J., Jan. 2008 (describing a policy process that encourages local experimentation as a way of testing proposed national policies).

³⁶ See, e.g., Rory Truex, *Consultative Authoritarianism and Its Limits*, COMP. POL. STUD. (forthcoming) (manuscript at 1–2), <http://cps.sagepub.com/content/early/2014/06/06/0010414014534196.full.pdf> [<http://perma.cc/JC5C-4LEC>] (describing China’s increasing use of citizen participation channels in the policy process as a means of improving governance and shoring up legitimacy).

³⁷ See Zhang Qi (张骥), *Panlifa de Bijiao Yanjiu — Jianlun Zhongguo Jianli Panlifa de Yiyi, Zhidu Jichu yu Caozuo* (判例法的比较研究 — 兼论中国建立判例法的意义、制度基础与操作) [*Comparative Study of Legal Precedents: Discussing the Meaning, Systemic Basis, and Operations of China’s Construction of Legal Precedents*], *Bijiaofa Yanjiu* (比较法研究) [J. COMP. L.], no. 4, 2002, at 79 n.1. Other scholars have opposed introducing judicial precedent to the Chinese system. See Shen Zongling (沈宗灵), *Dangdai Zhongguo de Panli — Yige Bijiaofa Yanjiu* (当代中国的判例 — 一个比较法研究) [*Precedents in Modern China — A Comparative Law Inquiry*], *Zhongguo Faxue* (中国法学) [CHINA LEGAL SCI.], no. 3, 1992, at 32.

³⁸ See Zhang Qi, *supra* note 37, at 79; see also Email from Zhang Qi, Professor of Law, Peking University, to Mark Jia, Editor, *Harvard Law Review* (Dec. 26, 2015) (on file with the Harvard Law School Library) [hereinafter Zhang Interview].

³⁹ See Li Shichun, *supra* note 8.

⁴⁰ See Ahl, *supra* note 10, at 126. The Zhongyuan District People’s Court, for instance, had sanctions in place for judges who reached an incorrect result by ignoring “precedent decisions” without a legitimate reason. See *id.*

⁴¹ See Li Shichun, *supra* note 8.

⁴² See Zhang Qi, *supra* note 37. Other prominent theorists include Judges Wu Guangxia and Jiang Huiling, SPC research officer and now-judge Hu Yunteng, as well as Professor Chen Xingliang. Zhang Interview, *supra* note 38.

⁴³ Li Shichun, *supra* note 8.

⁴⁴ *Id.*

Five-Year Reform Plan listed the construction of a guiding cases system as a formal policy objective for the court.⁴⁵ Chinese academics were invited to consult.⁴⁶

Meanwhile, the SPC proceeded apace — at least for some time — as an institution with strong “professionalist” goals under its President, Xiao Yang, who generally evinced a commitment to technocratic reforms that sought to improve the competence, stature, and independence of the judiciary.⁴⁷ In his 2006 and 2007 annual reports before the NPC, Judge Xiao listed further work on guiding cases as a goal for the following year.⁴⁸ But although the Second Five-Year Plan directed that the SPC “issue regulations related to the case guidance system,” little progress was made.⁴⁹ When the SPC announced its Third Five-Year Reform Plan in 2009, it did not mention guiding cases at all.⁵⁰

This interlude might be attributed in part to the SPC’s later swing toward populism under its new president, Wang Shengjun, an official with no legal training who hailed from the state security apparatus.⁵¹ Wang’s tenure, beginning in March 2008, was characterized by a concerted revival of Maoist motifs and Confucian norms in adjudication, emphasizing mediation and popular responsiveness over formal legal institutions and processes.⁵² Guiding cases — a potentially significant reform within the formal legal apparatus — would seem to have meshed uncomfortably with this trend.

Another reason for delay may have been resistance from the NPC, which was said to have seen the court-led system of case guidance as

⁴⁵ See Zuigao Renmin Fayuan Renmin Fayuan Di Erge Wu Nian Gaige Gangyao (2004–2008) (最高人民法院人民法院第二个五年改革纲要 (2004–2008)) [*The Second Five-Year Reform Program for the People’s Courts (2004–2008) of the Supreme People’s Court*] (promulgated by the Sup. People’s Ct., Oct. 26, 2005, effective Oct. 26, 2005) LEGIS. AFF. OFF. ST. COUNCIL, <http://www.chinalaw.gov.cn/article/fgkd/xfj/sfwj/200904/20090400132177.shtml> [<http://perma.cc/17WCR-HQCC>], translated in *Second Five-Year Reform Program for the People’s Courts (2004–2008)* (CECC Partial Translation), CONG.-EXECUTIVE COMMISSION ON CHINA, <http://www.cecc.gov/resources/legal-provisions/second-five-year-reform-program-for-the-peoples-courts-2004-2008-cecc#body-chinese> [<http://perma.cc/89V9-QYZ5>].

⁴⁶ Among those was Peking University’s Professor Zhang Qi. Zhang Interview, *supra* note 38.

⁴⁷ Glenn D. Tiffert, *Chinese Law: Using the Past to Escape the Present: China’s Legal Reform Looks Back to the Mao Era*, CHINAFILE (Feb. 22, 2012), <http://www.chinafile.com/chinese-law-using-past-escape-present> [<http://perma.cc/VN4A-WUMJ>]; see also Taisu Zhang, *supra* note 14, at 4 n.6; Minzner, *supra* note 4, at 943 (describing the SPC’s first Five-Year Reform Plan in 1999).

⁴⁸ Li Shichun (李仕春), Anli Zhidao Zhidu de Ling Yitiao Silu: Sifa Nengdong Zhuyi Zai Zhongguo de Youxian Shiyong (案例指导制度的另一条思路: 司法能动主义在中国的有限适用) [*An Alternative Way of Thinking About the Guiding Cases System: The Limited Applicability of Judicial Activism in China*], Faxue (法学) [LEGAL STUD.], no. 6, 2009, at 59, http://www.pkulaw.cn/fulltext_form.aspx?Db=qikan&gid=1510091203 [<http://perma.cc/L434-AMKP>].

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Ahl, *supra* note 10, at 124; Taisu Zhang, *supra* note 14, at 5.

⁵² See Minzner, *supra* note 4, at 951–52; Tiffert, *supra* note 47.

interfering with its lawmaking authority. While the SPC already had a history of filling statutory lacunae through issuing judicial interpretations to lower courts, it encountered little “risk” in doing so because it often consulted first with the NPCSC before issuance and was legally required to post interpretations for NPCSC review afterward.⁵³ In contrast, the NPC would have a far harder time in “effectively supervising” individual guiding cases⁵⁴ — a point that some academics had made in defending guiding cases as a way of implementing “judicial activism” (*sifa nengdong zhuyi*).⁵⁵ Commentators cited fear of “harm to legislative power” as the reason why the SPC had to make a number of submissions to the NPCSC before finally winning approval.⁵⁶

Whatever the cause for delay, Zhou Yongkang — then the Communist Party Politburo Standing Committee member in charge of the country’s security apparatus — publicly endorsed guiding cases in late 2009, resuscitating the initiative.⁵⁷ But unlike the proposal described in 2005, Zhou’s vision was not limited to the judiciary; in his view, both the procuratorate and the public security bureaus should also erect their own case-guidance systems.⁵⁸

Though professionalist-leaning officials and many entrepreneurial academics undoubtedly saw this development as a victory, the system’s nonlinear development and tripartite outcome hint at a broader gulf between how different policy actors conceived of the system itself. Judicial professionalists and scholarly advocates of judicial activism might have preferred an exclusively judicial case-guidance system, while populists and other competing organs who believed the “needs of the masses” were best served through “balanced development” across all three legal institutions may have preferred a three-branch solution.⁵⁹ Given the nontransparency of internal deliberations, it is hard to know for certain, but it is likely that the system was established as a result of the kind of Party-led negotiated policymaking that has become characteristic of China’s modern policy process.⁶⁰

⁵³ Li Shichun, *supra* note 8.

⁵⁴ *See id.*

⁵⁵ Li Shichun, *supra* note 48.

⁵⁶ Wang Quanbao (王全宝), *Zuigaofa Tongguo Anli Zhidao Guifan Cailiang Quan: Bi Tongan Butongpan* (最高法通过案例指导规范载量权: 避同案不同判) [*The Supreme People’s Court Uses Guiding Cases to Standardize Discretionary Powers: Avoiding Adjudicative Inconsistency*], *Xinlang Xinwen Zhongxin* (新浪中文中心) [SINA NEWS] (Dec. 31, 2011), <http://news.sina.com.cn/c/2011-12-31/141123731493.shtml> [<http://perma.cc/K7BM-VBVR>].

⁵⁷ *See* Taisu Zhang, *supra* note 14, at 45. Zhou has since been deposed.

⁵⁸ *See id.* at 45–46. The Supreme People’s Procuratorate (SPP) has released several batches of its own regulations as well. Gurgel & Yu, *supra* note 15, at 153–54.

⁵⁹ *See* Ahl, *supra* note 10, at 124.

⁶⁰ As early as the 1980s, scholars pointed to how China’s policy process can at times be characterized as “a system of negotiations, bargaining, and the seeking of consensus among affected

2. *Framework.* — On November 26, 2010, the SPC's Adjudication Committee issued *The Provisions of the Supreme People's Court Concerning Work on Case Guidance* (Provisions).⁶¹ Later, in 2015, the SPC issued clarifying regulations (Rules).⁶² The two together comprise the system's formal architecture.

The Provisions begin with several overarching aims: "to summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality."⁶³ To realize these goals, the SPC is charged with issuing guiding cases through its Office for Case Guidance Work,⁶⁴ which manages the "collection, selection, review, release, study, and compilation of Guiding Cases," and coordinates case guidance work among courts nationwide.⁶⁵

To become a guiding case, a rendered decision must be "of widespread concern to society"; concern "legal provisions . . . of [a] relatively general nature"; possess "a typical nature"; be "difficult, complicated, or of new types"; or otherwise have "guiding effect."⁶⁶ It must also be a case in which the "facts are clearly ascertained, law is correctly applied, and reasoning for the adjudication is sufficient."⁶⁷ Finally, in a possible nod to more consequentialist populist ideologies, a guiding case must also contain "good legal and social outcomes."⁶⁸

The Office for Case Guidance Work considers guiding case recommendations from every level of the judicial system. Intermediate people's courts and basic people's courts recommend cases through the higher people's courts; a higher people's court may recommend cases once a majority of its adjudication committee concurs,⁶⁹ and an SPC adjudication unit may also refer SPC decisions or lower court decisions to the Case Guidance Office.⁷⁰ Meanwhile, "[r]epresentatives of peo-

bureaucracies." KENNETH LIEBERTHAL & MICHEL OKSENBERG, POLICYMAKING IN CHINA 3 (1988) (focusing on vertical bargaining).

⁶¹ See Provisions, *supra* note 6.

⁶² Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding Shishi Xize (最高人民法院关于案例指导工作的规定实施细则) [Detailed Rules for the Implementation of the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"] (promulgated by the Adjudication Comm. of the Sup. People's Ct., Apr. 27, 2015, issued May 13, 2015) Beida Falü Xinxī Wang (北大法律信息网) [CHINALAWINFO], <http://en.pkulaw.cn/display.aspx?cgid=249447&lib=law> [<http://perma.cc/235V-CYJ9>], translated in STANFORD LAW SCH., CHINA GUIDING CASES PROJECT (2015), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/10/guiding-cases-rules-20150513-english.pdf> [<http://perma.cc/5CQ2-955H>] [hereinafter Rules].

⁶³ See Provisions, *supra* note 6, pmb1.

⁶⁴ *Id.* art. 3.

⁶⁵ Rules, *supra* note 62, art. 4.

⁶⁶ Provisions, *supra* note 6, art. 2. Fulfillment of only one of five criteria is sufficient. See Ahl, *supra* note 10, at 131.

⁶⁷ Rules, *supra* note 62, art. 2.

⁶⁸ *Id.*

⁶⁹ *Id.* art. 4.

⁷⁰ See Provisions, *supra* note 6, art. 4.

ple's congresses, members of committees of the political consultative conference, people's assessors, experts, scholars, lawyers, and other people" can also recommend cases, either to the original court that rendered the effective judgment, or, after enactment of the 2015 Rules, directly to the Office for Case Guidance Work itself.⁷¹

In reviewing cases, the Office for Case Guidance Work may seek further consultations with state organs or outside experts.⁷² Once it is satisfied that the relevant criteria have been met, the Office forwards candidate guiding cases to the SPC Adjudication Committee for review.⁷³ Upon approval, guiding cases are printed and distributed to each of the higher people's courts and published in the *Gazette of the Supreme People's Court*, in the *People's Court Daily*, and on the SPC website.⁷⁴ Each higher people's court is in charge of "supervising" the use of guiding cases within its jurisdiction.⁷⁵

Guiding cases must appear in a standardized format, containing: a "Title," "Keywords," "Main Points of the Adjudication," "Related Legal Rule(s)," "Basic Facts of the Case," "Results of the Adjudication," "Reasons for the Adjudication," and notes.⁷⁶ To illustrate with a brief example, consider Guiding Case 14 (GC 14), entitled "A Certain Dong and a Certain Song: A Robbery Case."⁷⁷ Arising out of circumstances in which two minors committed robbery to fund their patronage of an Internet cafe, GC 14 endorsed a basic people's court's decision to issue an injunctive "prohibition order" banning the minors from entering "Internet bars, game rooms, and other such places" for three years.⁷⁸

Not unlike those found in American legal databases, GC 14 begins with a set of keywords designed to facilitate usage: "criminal," "robbery," "crimes committed by minors," and "prohibition order."⁷⁹ The next section, "Main Points of the Adjudication,"⁸⁰ is something akin to the "holding" of the case — which Hu Yunteng, the SPC's former top

⁷¹ Rules, *supra* note 62, art. 5. The Rules further detail specific submission procedures, which permit lower courts to send in "related news reports," *id.* art. 6, presumably to illustrate a case's gravity or perhaps the extent to which it might foster the kind of "good legal and social outcomes" highlighted earlier, *id.* art. 2.

⁷² *Id.* art. 7.

⁷³ Provisions, *supra* note 6, art. 6.

⁷⁴ Rules, *supra* note 62, art. 8.

⁷⁵ *Id.* art. 4.

⁷⁶ *Id.* art. 3.

⁷⁷ Zhidao Anli 14 Hao: Dong Moumou, Song Moumou Qiangjie An (指导案例14号: 董某某, 宋某某抢劫案) [A Certain DONG and a Certain SONG, a Robbery Case], Zhongguo Fayuan Wang (中国法院网) [CHINA COURT], <http://www.chinacourt.org/article/detail/2013/02/id/893722.shtml> [<http://perma.cc/XSP3-JJEX>], translated in STANFORD LAW SCH., CHINA GUIDING CASES PROJECT (2013), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/10/GC14-English.pdf> [<http://perma.cc/9DQT-3658>] [hereinafter GC 14].

⁷⁸ *Id.* at 3.

⁷⁹ *Id.* at 2.

⁸⁰ *Id.*

research officer, characterizes as the “deciding rules that were abstracted out of guiding cases.”⁸¹ In GC 14, the “holding” was that in certain cases involving minors who have been given a public surveillance sentence or a sentence suspension, courts may impose a “prohibition order” according to “the specific circumstances of [the] crime and the degree to which the prohibited items are related to the criminal act committed.”⁸² More concretely, and based on the facts of the case itself, the Main Points of the Adjudication also indicates that when a minor is “induced into crime by Internet use, [the court] may prohibit him from entering specified places such as Internet bars for a certain period of time.”⁸³ GC 14 thus offers both the abstracted rule — the validity of certain kinds of prohibition orders — and the case-specific holding on prohibitions against patronizing Internet cafes.

The next section, “Related Legal Rule(s),” lists relevant statutory provisions, while the final three sections home in on the facts, ruling, and reasoning of the originating court itself.⁸⁴ Under “Reasons for the Adjudication,” GC 14 explains that in part because “the defendants were induced into committing robbery mainly by the need for money to pay for Internet bars,” had “long indulged in online games,” and were minors with “relatively poor self-control,” a limited ban against patronizing Internet cafes would effectuate clear rehabilitation goals.⁸⁵

Once effective, guiding cases are intended to exert de facto binding power over courts. Article 7 of the 2010 Provisions stipulates that “People’s courts at all levels should refer to the Guiding Cases . . . when adjudicating similar cases.”⁸⁶ Textually, the use of the word “should” (*yingdang*) connotes obligation — a point that was bolstered by statements from Hu Yunteng shortly after the Provisions’ passage.⁸⁷ Discussion has also focused on the meaning of the word

⁸¹ Hu Yunteng (胡云腾), *Guanyu Anli Zhidao Zhidu de Jige Wenti (关于案例指导制度的几个问题)* [*Several Questions Concerning the Case Guidance System*], *Guangming Ribao* (光明日报) [GUANGMING DAILY] (Jan. 29, 2014), http://epaper.gmw.cn/gmrb/html/2014-01/29/nw.D110000gmrb_20140129_2-16.htm [<http://perma.cc/BTC7-C3ZU>].

⁸² GC 14, *supra* note 77, at 2.

⁸³ *Id.* (alteration in original).

⁸⁴ Rules, *supra* note 62, art. 3.

⁸⁵ GC 14, *supra* note 77, at 3.

⁸⁶ Provisions, *supra* note 6, art. 7.

⁸⁷ Responding to a question about ambiguity in language, Hu Yunteng clarified that “should means must” (*yingdang jiushi bixu*) [应当就是必须]. Jiang Anjie (蒋安杰), *Zuigao Renmin Fayuan Yanjiushi Zhuren Hu Yunteng — Renmin Fayuan Anli Zhidao Zhidu de Goujian* (最高人民法院研究室主任胡云腾 — 人民法院案例指导制度的构建) [*Hu Yunteng, Head of the Supreme People’s Court’s Research Office — On Constructing the Supreme People’s Court’s Guiding Cases System*], *Fazhi Ribao* (法制日报) [LEGAL DAILY] (Mar. 23, 2011, 1:13 PM), http://www.legaldaily.com.cn/zbzk/content/2011-03/23/content_2539051.htm?node=25492 [<http://perma.cc/T332-2C9Y>].

“refer” (*canzhaohao*).⁸⁸ For years, there was much uncertainty as to whether lower courts were permitted — or perhaps even required — to explicitly cite guiding cases.⁸⁹ Some suggested that guiding cases should be cited in the “basis” section of an opinion, others argued that they should be referenced in the “reasons” section, and still others opposed citing them at all.⁹⁰ This question touched directly on whether guiding cases are themselves binding sources of law; after all, permitting citation in the “basis” section of decisions might contravene the constitutional prohibition against Chinese courts from lawmaking.

The 2015 Rules put an end to this debate, stipulating that lower courts “should quote the Guiding Case as a reason for their adjudication, but not cite it as the basis of their adjudication.”⁹¹ In other words, guiding cases should be invoked not as an independent source of law but instead as a necessary aid to judicial reasoning. When citing, judges must quote the serial number of the guiding case and the case’s “Main Points of Adjudication.”⁹² Judicial personnel should also independently “inquire about relevant Guiding Cases.”⁹³ When litigating parties quote a guiding case as a “ground [for the] prosecution . . . or defense,” the judicial personnel should explicitly explain the decision to rely (or not) upon the cited guiding case.⁹⁴ Thus, the 2015 Rules did much to legitimate the use and citation of guiding cases in lower court decisions, while still supporting the view that guiding cases were binding *de facto* but not *de jure*.

3. *Growth, Impact, and Constraints.* — The guiding cases system has made marked strides since its inception. In total, the SPC has issued fifty-six guiding cases,⁹⁵ drawn fairly evenly from every level of the judiciary, with the SPC (fourteen) and the higher people’s courts (seventeen) producing the most.⁹⁶ The most represented substantive

⁸⁸ See Ahl, *supra* note 10, at 128 (citing the use of the same term in the Chinese Administrative Litigation Law to suggest that guiding cases are not legally binding). Ahl translates the term as “consult” rather than “refer,” *id.*, but in the interest of consistency, this Note adopts the Stanford translation. See Provisions, *supra* note 6, art. 7.

⁸⁹ See Ahl, *supra* note 10, at 129–30.

⁹⁰ See *id.* “Chinese judgments distinguish between a decision part and a reasoning part. The decision part includes the applicable sources of law and the reasoning part gives the detailed grounds of the decision.” *Id.* at 129 n.43.

⁹¹ Rules, *supra* note 62, art. 10.

⁹² *Id.* art. 9.

⁹³ *Id.* art. 11.

⁹⁴ *Id.*

⁹⁵ Zuigao Renmin Fayuan Zhidaoxing Anli Sifa Yingyong Niandu Baogao (2015) (最高人民法院指导性案例司法应用年度报告 (2015)) [*Annual Report on the Judicial Use of the Supreme People’s Court’s Guiding Cases (2015)*], Beida Falü Xinxī Wang (北大法律信息网) [CHINALAWINFO] (Liu Chunmei (刘春梅) ed., Dec. 24, 2015), <http://article.chinalawinfo.com/ArticleFullText.aspx?ArticleId=94379> [<http://perma.cc/6WR9-L3K4>] [hereinafter *Beida Statistics*].

⁹⁶ *Id.*

areas have been civil (twenty-six), criminal (nine), administrative (nine), and intellectual property law (nine).⁹⁷ Beijing and Shanghai courts account for nearly half (twenty-six) of the total cases issued.⁹⁸

The current pool of guiding cases offers a window into the concerns that animate China's policymaking elite, touching not just upon matters of commercial law that undergird the country's growth priorities,⁹⁹ but also upon hot-button social problems, from land use¹⁰⁰ to traffic liability¹⁰¹ to corruption.¹⁰² This configuration aligns with judicial populism's focus on consequences — recall the “good legal and social outcomes” line from the Rules — as well as a persistent tendency for China's legal apparatus to conceptualize law primarily as a tool of social management.¹⁰³

Judges and litigants have begun to cite guiding cases in court. In one account from an early adopter, Judge Ou Zelin of the Dongguan Municipality No. 1 People's Court describes how he “took the initiative to refer to Guiding Case No. 1” in two contract disputes in 2011.¹⁰⁴ Later, as guiding cases began to percolate down to the lower courts, scholars began to assess more data.¹⁰⁵ One widely circulated report found that, as of December 2015, judicial proceedings registered in the Fabao Judicial Proceedings Database had in some way utilized twenty-five guiding cases (an increase of three from 2014).¹⁰⁶ The most cited guiding case, which deals with tort liability mitigation in traffic accidents (GC 24), has been applied 103 times in cases in the

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ For a database containing English translations of all guiding cases save the most recent few, see *Guiding Cases in Perspective*, STANFORD LAW SCH. CHINA GUIDING CASES PROJECT, <https://cgc.law.stanford.edu/guiding-cases> [<http://perma.cc/8DGB-XUDG>]. Note in particular GC nos. 1, 2, 7, 8, 9, 15, 17, 18, 23, 33, 51, 52.

¹⁰⁰ *See id.* Note in particular GC nos. 22, 41.

¹⁰¹ *See id.* Note in particular GC nos. 19, 24, 32.

¹⁰² *See id.* Note in particular GC nos. 3, 11.

¹⁰³ *See* Long Weiqiu, *The Market Economy and Regulatory Change, in CHINA'S JOURNEY TOWARD THE RULE OF LAW* 347, 361 (Cai Dingjian & Wang Chenguang eds., 2010).

¹⁰⁴ *See* OU ZELIN, CHINA GUIDING CASES PROJECT, DISCUSSING THE GUIDING CASE SYSTEM WITH CHINESE CHARACTERISTICS BY FIRST COMBINING GUIDING CASE NO. 1 WITH ADJUDICATION PRACTICES 1, 5 (2012), <http://cgc.law.stanford.edu/wp-content/uploads/2012/11/CGCP-English-Commentary-4-Judge-Ou.pdf> [<http://perma.cc/5PTA-NRE2>]. Judge Ou referenced the “Main Points of the Adjudication” of GC no. 1 in the “reasoning” section of his opinion, *id.*, which was consistent with what eventually became law upon the release of the 2015 Rules.

¹⁰⁵ In this effort, both the Beida Fabao Judicial Cases Database, a daily updating database of over fourteen million cases in China, Beida Fabao (北大法宝) [PEKING UNIVERSITY JUDICIAL CASES DATABASE], <http://www.pkulaw.cn/Case> [<http://perma.cc/27JG-TPZZ>], as well as a new official online database of over fifteen million judgments, Zhongguo Caipan Wenshu Wang (中国裁判文书网) [CHINA JUDGMENTS ONLINE], <http://wenshu.court.gov.cn> [<http://perma.cc/178MF-8RRK>] [hereinafter COURT STATISTICS] have been essential research tools.

¹⁰⁶ *Beida Statistics*, *supra* note 95.

Fabao database.¹⁰⁷ Other studies have shown measurable increases in judicial awareness of guiding case regulations.¹⁰⁸ And according to one arbitration expert, guiding cases have also been applied as sources of substantive rules in a number of arbitral proceedings.¹⁰⁹

Still, the impact of guiding cases remains fairly limited. On the supply side, SPC officials have acknowledged the unsatisfactorily slow pace of issuance.¹¹⁰ Fifty-six cases hardly seem adequate to the task of “unifying legal standards” across numerous areas of law. On the demand side, usage rates of those cases issued have also remained low. More than half of all guiding cases have yet to be applied at all to cases in either the Fabao or another similar database.¹¹¹ Among those that have been applied in the Fabao database, all but one have been invoked fewer than twenty times.¹¹² Low usage rates could be due to several factors — the lack of pertinent guiding cases, poor broadcasting, judges’ or lawyers’ ignorance, or judicial timidity. One study found that in roughly one-fourth of the 181 total cases in the official database that mentioned guiding cases, litigants never mentioned the guiding case that was ultimately cited by the court, suggesting a mismatch between lawyers’ and judges’ reasoning consistent with deficiencies in legal representation.¹¹³ As for judicial timidity — in a system where judges, for reasons of “face” and promotion, often consult with appellate bodies prior to rendering their own decision¹¹⁴ — open invocations of a new uncertain form of authority may take more time. This point finds support in recent data indicating that judges have

¹⁰⁷ *Id.*

¹⁰⁸ See MEI GECHLIK, DIMITRI PHILLIPS & OMA LEE, CHINA GUIDING CASES PROJECT, SURVEY OF JUDGES IN CHINA (2013–2014), at 2 (2014), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/08/GC-Survey-1-English.pdf> [<http://perma.cc/4ADA-22N3>].

¹⁰⁹ Email from Lu Song, Professor, International Law Institute, China Foreign Affairs University to Mark Jia, Editor, Harvard Law Review (Mar. 13, 2016, 9:12 AM) (on file with the Harvard Law School Library). Most of those records are unfortunately closed.

¹¹⁰ See Hu Yunteng (胡云腾), Guanyu Anli Zhidao Zhidu de Jige Wenti (关于案例指导的几个问题) [*Several Questions Concerning the Case Guidance System*], Guangming Ribao (光明日报) [GUANGMING DAILY] (Jan. 29, 2014), http://epaper.gmw.cn/gmrb/html/2014-01/29/nw.D110000gmrB_20140129_2-16.htm [<http://perma.cc/8X7V-NJST>].

¹¹¹ See *Beida Statistics*, *supra* note 95; COURT STATISTICS, *supra* note 105.

¹¹² See *Beida Statistics*, *supra* note 95.

¹¹³ MEI GECHLIK, MINMIN ZHANG & LIYI YE, CHINA GUIDING CASES PROJECT, CUMULATIVE ANALYSIS OF ALL SUBSEQUENT CASES REFERRING TO GUIDING CASES IN CHINA (2014 Q1–2015 Q4), at 14 (2016), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2016/01/GC-Survey-2-English.pdf> [<http://perma.cc/846Q-XGLL>].

¹¹⁴ See *Beijing Court Announces Reform of Judicial Disciplinary System*, CONG.-EXECUTIVE COMMISSION ON CHINA (Oct. 4, 2006), <http://www.cecc.gov/publications/commission-analysis/beijing-court-announces-reform-of-judicial-disciplinary-system> [<http://perma.cc/WQL4-YX8J>] (explaining how Chinese judges have faced sanctions for “incorrect” decisions, sometimes even making personal appeals to higher courts to persuade them not to overturn their verdicts).

frequently opted to engage in implicit, or “hidden” application by invoking the “spirit” of a guiding case without directly citing it.¹¹⁵

Finally, even if the data indicate some progress, they tell us little about false positives and false negatives — proceedings in which guiding cases were improperly invoked or improperly ignored. For guiding cases to take cultural root, judges and litigants will have to not just apply them but also do so rigorously.¹¹⁶ One study identified several cases in which Chinese judges altered facts in order to conform them to the scope of applicability of certain guiding cases; others have narrowly construed pertinent guiding cases in order to avoid citation.¹¹⁷

The impact of guiding cases won’t come into full relief until they settle into a clearer role in relation to other guidance documents — especially judicial interpretations — which similarly resolve statutory ambiguities.¹¹⁸ Judicial interpretations tend to be general rule-like pronouncements whose drafts are often precleared with the NPC, especially when they border on the “legislative,”¹¹⁹ while guiding cases are fact-specific and selected through a process that contemplates no formal role for the NPC.¹²⁰ Some guiding case proponents have argued that the more “abstract” judicial interpretations often enable issuers to shape the law according to political interests, while guiding cases are less susceptible.¹²¹ It would seem, however, that because guiding cases are still selected in top-down fashion with judicial policymakers rewriting the facts and extracting the “Main Points of the Adjudication,” all under the directive of promoting “good social and legal outcomes,” these distinctions may be less sharp than they appear.

¹¹⁵ *Beida Statistics*, *supra* note 95.

¹¹⁶ For an account of how one might apply “analogism” in the guiding cases system, see generally Zhang Qi, *On the Method of Searching for Guiding Cases: On the Basis of Trial Experience*, 2 PEKING U. J. LEGAL STUD. 93 (2010).

¹¹⁷ Jinting Deng, *An Empirical Research on the Effects of China’s Guiding Cases* 20 (Apr. 11, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423746 [<http://perma.cc/JZ7L-8WFT>].

¹¹⁸ Judicial interpretations were also once subject to constitutional criticism from legal scholars similarly concerned about judicial usurpations of legislative power. See Li Shichun, *supra* note 8. For a discussion of how the SPC’s “typical cases” differ, see *supra* p. 2217.

¹¹⁹ Ahl, *supra* note 10, at 136 (citing Article 18 of the SPC Regulations on Judicial Interpretations); see also RONALD C. KEITH, ZHIQIU LIN & SHUMEI HOU, CHINA’S SUPREME COURT 68–69 (2014) (“NPC-SPC friction has been reduced in the informal regularization of inter-institutional consultations. Draft judicial interpretations are forwarded from the SPC Research Office and now vetted by NPC panel before they are considered in NPC debate. Controversy is now dealt with before the publication . . .”).

¹²⁰ However, under guiding case regulations, the SPC may still elect to consult with the NPC before issuance, see Rules, *supra* note 62, art. 7, which it might be inclined to do if it were to issue a particularly significant or controversial guiding case.

¹²¹ See Chen Linlin (陈林林) & Xu Yangyong (许杨勇), *Sifa Jieshi Lifahua Wenti Sanlun* (司法解释立法化问题三论) [*Three Points on the Legislative Character of Judicial Interpretations*], 2010 Zhejiang Shehui Kexue (浙江社会科学) [ZHEJIANG SOCIAL SCIENCE], no. 6, at 33, 34.

Still, the procedural and other differences do suggest that guiding cases can enable the SPC to respond more nimbly and more independently to emerging legal gaps in lieu of the formal consultations required of other guidance instruments.

Finally, there is the larger question of whether guiding cases might alter the balance of power between courts and other legal and political actors. The SPC's Hu Yunteng has lamented that the guiding cases issued so far have been fairly "safe"; it would be better, he argued, if guiding cases had more of a "breakthrough" quality, so as to promote judicial activism and exploration (*sifa nengdong zhuyi*).¹²² Whether this emboldened role is achievable will depend largely on the SPC's ability to navigate difficult political terrain. The tendency toward "safe" cases likely reflects not only policy incrementalism, but also caution in the face of carefully guarded NPC interests as well as the Party's historic skepticism of over-empowering judicial actors.¹²³ As Professor Fu Hualing notes: "Rule of law and judicial professionalism are possible to the extent they may strengthen and legitimize the CCP's rule."¹²⁴ Guiding cases have been billed as a means of standardizing judicial decisionmaking, a goal that the Party has endorsed; but if the new system entails a marked expansion of judicial authority, it will likely meet resistance.¹²⁵ For now, the SPC is unlikely to issue "breakthrough cases" that threaten to upset existing allocations of power.

II. GUIDING CASES IN COMPARATIVE CONTEXT

Part I mapped out several of the distinctive features of guiding cases: their top-down selection, their status as something less than "law," as well as the SPC's politically uncertain place in carving out for them a more definitive role. With that as background, Part II turns to a comparative question — whether guiding cases are appropriately characterized as something resembling a common law transplant.¹²⁶

¹²² See Hu Yunteng, *supra* note 110.

¹²³ See Hualing Fu, *Building Judicial Integrity in China*, 39 HASTINGS INT'L & COMP. L. REV. 167, 181 (2016) (noting that "even in the best case scenario, the courts will continue to be submissive to the CCP and compliant to its political demand").

¹²⁴ *Id.*

¹²⁵ Indeed, fear of such expansion was likely one reason why judicial guiding cases had to be erected alongside those at other legal bodies.

¹²⁶ A legal transplant is "the moving of a rule or a system of law from one country to another, or from one people to another." ALAN WATSON, LEGAL TRANSPLANTS 21 (1993). Analyzing transplants not only helps inform understandings of new legal developments, but also may inform broader theses around the convergence or divergence of global legal systems. Compare John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357, 368 (1981) ("Legal transplants across the Civil Law-Common Law boundary obviously lead in the direction of convergence of the two systems."), with Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 4 (2004) ("[T]he para-

Early scholarly literature in China focused heavily on Anglo-American analogies,¹²⁷ while top SPC officials later justified the adoption of guiding cases partially on comparative grounds. In 2007, then-SPC Research Chief Judge Shao Wenhong prefaced remarks on guiding cases by noting that the differences between common and civil law systems were becoming “increasingly small,” and that higher levels of mutual borrowing were part of a broader trend of global legal convergence.¹²⁸ Perhaps for these reasons, rhetoric surrounding guiding cases — including in English-language scholarship — has been highly comparative,¹²⁹ with terms like “stare decisis-like authority,”¹³⁰ “[c]ommon [l]aw with Chinese [c]haracteristics,”¹³¹ or the word “precedent” appearing as shorthand descriptors for guiding cases themselves.¹³²

Legal-family concepts such as “civil law” and “common law” are analytical devices¹³³ — taxonomies — that form a part of a broader “grammar of . . . legal discourse.”¹³⁴ If deployed appropriately, they can help us frame our understandings of legal phenomena and enable productive communication between disparate legal orders.¹³⁵ But to be gainful, the inquiry must be disciplined, or else invocations of foreign legal models can mislead more than they inform. This section seeks to bring analytic clarity to how we classify and speak of guiding cases — first by demonstrating that they actually resemble certain civil law constructs more than they do common law precedent; and second, by highlighting a few limited ways in which common law comparisons might still be helpful.

A. Case Law in the Common and Civil Law Traditions

The temptation to make comparisons to common law is unsurprising. In a somewhat exaggerated version of conventional wisdom, common law *is* almost exclusively judge-made law, while civil law *is*

doxical effect of American influence on the criminal procedures of the civil law tradition may not be Americanization, but rather fragmentation and divergence within the civil law.”).

¹²⁷ See, e.g., Zhang Qi, *supra* note 37, at 80–82.

¹²⁸ Zuigao Renmin Fayuan Yanjiushi Zhuren Shao Wenhong yu Wangyou Zaixian Jiaoliu (最高人民法院研究室主任邵文虹与网友在线交流) [*Shao Wenhong, Head of the Supreme People's Court's Research Office Chats with Netizens*], Zhongguo Fayuan Wang (中国法院网) [CHINA COURT] (Mar. 8, 2007), http://old.chinacourt.org/zhibo/zhibo.php?zhibo_id=354.

¹²⁹ See sources cited *supra* note 15.

¹³⁰ Taisu Zhang, *supra* note 14, at 8.

¹³¹ See Ip, *supra* note 22, at 409 (addressed as a question).

¹³² See Limmer, *supra* note 15, at 133.

¹³³ Bo Yin & Peter Duff, *Criminal Procedure in Contemporary China: Socialist, Civilian or Traditional?*, 59 INT'L & COMP. L.Q. 1099, 1099 (2010).

¹³⁴ Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal System*, 45 AM. J. COMP. L. 5, 5 (1997).

¹³⁵ See Albert A. Ehrenzweig, Book Review, 60 HARV. L. REV. 843, 845–46 (1947).

almost exclusively the law of systemized codes. In this telling, common law jurists are viewed as law-dispensing fountainheads — “culture heroes” like “Coke, Mansfield, Marshall, Story, Holmes, Brandeis, [and] Cardozo”¹³⁶ — while the civil law consigns judges to the role of “a kind of expert clerk.”¹³⁷

To be sure, these essentializing characterizations have some significant basis in truth. Common law systems trace back to a tradition in which “judges overtly make the law”¹³⁸ through deciding individual cases that, once rendered, become legally binding as precedents under the principle of *stare decisis*. The common law judge is in constant dialogue with the past and with the future.¹³⁹ In her exercise of applying, extending, refining, distinguishing, and fashioning rules from specific facts, she joins with her many colleagues as actors in a relatively decentralized model of legal evolution.¹⁴⁰ In contrast, civil law traditions, which trace their roots in some form or another to Justinian’s *Corpus iuris civilis* and later codifications, regard systemized legal codes as their primary source of law.¹⁴¹ As such, civil law judgments are generally not themselves new sources of formal law.¹⁴²

While generalized distinctions of the sort above make for useful shorthands, they can do violence to how both legal systems operate in practice. American law, to take an obvious example, is heavily statutory.¹⁴³ Precedents cannot easily substitute for the complexity, or the democratic legitimacy, of the U.S. Code.¹⁴⁴ Likewise, the variegated civil law systems of the world are administered by jurists who engage in more than the work of mere “expert clerk.” Contrary to the “folk-

¹³⁶ JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 34 (1969).

¹³⁷ *Id.* at 36.

¹³⁸ See Bernard Rudden, *Courts and Codes in England, France and Soviet Russia*, 48 TUL. L. REV. 1010, 1010 (1974) (“England’s particular features are that there are no comprehensive codes . . .”).

¹³⁹ See *id.* at 1016–18.

¹⁴⁰ Cf. Frederic R. Kellogg, *Holmes, Pragmatism, and the Deconstruction of Utilitarianism*, 23 TRANSACTIONS CHARLES S. PEIRCE SOC’Y 99, 107–108 (1987) (writing that Justice Oliver Wendell Holmes believed that the “proper derivation of general principles in the law . . . arise[s] gradually, in the emergence of a consensus from a multitude of particularized prior decisions,” *id.* at 108).

¹⁴¹ William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 683 (2000).

¹⁴² See Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT’L REV. L. & ECON. 519, 522–23 (2006).

¹⁴³ Indeed the latest pedagogical innovation coming out of Harvard Law School, the progenitor of the Langdellian case method, is a required first-year class on statutory interpretation. See generally John F. Manning & Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. LEGAL EDUC. 45 (2015). This is of course not to suggest that civil law codes are equivalent to American statutes.

¹⁴⁴ Of course, the U.S. Code is not a codification in the Continental sense.

lore"-ish belief that "systematic legislation would be clear, complete, and coherent,"¹⁴⁵ even the great civil codes and statutes¹⁴⁶ do not self-evidently possess determinate meanings at every turn. Like their common law brethren, civil law jurists must necessarily "fill gaps and resolve conflicts in the legislative scheme."¹⁴⁷

Absent a binding system of precedent,¹⁴⁸ how do civil law countries prevent judges from divergently applying ambiguous law? As a general matter, many systems rely on fear of appellate reversal to enforce consistency. This mechanism has helped give rise in some systems to a doctrine of *jurisprudence constante*, which gives authority to a series of cases that continuously and uniformly apply the same rule of law.¹⁴⁹ While constituting something less authoritative than legal precedent,¹⁵⁰ *jurisprudence constante* nonetheless crystallizes legal rules through autonomous judicial action. In that sense, it is similar to other civil law doctrines that have created "effective precedent."¹⁵¹ Other civil law jurisdictions' treatment of case law has been more top-down. For instance, Taiwan's Supreme Court compiles select adjudications into "precedents" that are generally followed by lower courts.¹⁵² A Committee for the Compilation of Precedents is responsible for reviewing and selecting candidate cases, and the final compilations are heavily edited down to the level of legal principles.¹⁵³

B. Guiding Cases: More Civil Than Common

Viewed in this light, speaking of guiding cases as something analogous to a common law precedent would misrepresent much of what

¹⁴⁵ MERRYMAN & PÉREZ-PERDOMO, *supra* note 136, at 42.

¹⁴⁶ Civil law codes are general, while civil law statutes "further develop the codes." Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT'L L. REV. 555, 575 (2012).

¹⁴⁷ MERRYMAN & PÉREZ-PERDOMO, *supra* note 136, at 43. To take just one example, historically "[t]he French law of tort has . . . developed as a body of case law, leaving to the courts a freer reign than that given to them in Anglo-American law." Max Rheinstein, *Comparative Law — Its Functions, Methods and Usages*, 22 ARK. L. REV. 415, 420–421 (1968).

¹⁴⁸ Precedents help promote certainty and predictability in the common law. *Cf.* *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) ("[I]t is more important that the applicable rule of law be settled than that it be settled right.") (Brandeis, J., dissenting).

¹⁴⁹ *See* Oliveira & Garoupa, *supra* note 146, at 576–77.

¹⁵⁰ *See id.*

¹⁵¹ Examples include *ständige Rechtsprechung* in Germany, *dottrina giuridica* in Italy, and *doctrina juridica* in Spain. *See id.* at 558. In Germany, a robust appellate process along with law reporters and case headnotes "has created a situation where precedents of the supreme courts are treated by the lower courts as having *de facto* binding effects." COLNERIC, *supra* note 16, at 7.

¹⁵² Oliveira & Garoupa, *supra* note 146, at 579–80.

¹⁵³ *See id.*; *see also* *About Us*, Zuigao Fayuan (最高法院) [SUPREME COURT], http://tps.judicial.gov.tw/english/index.php?parent_id=301 [<http://perma.cc/M34D-V7Y5>]. Meanwhile, Germany expressly gives its Constitutional Court decisions the "force of statute (*Gesetzeskraft*)" — instead of being binding *de facto*. Oliveira & Garoupa, *supra* note 146, at 578.

the system is today. First, in a formal sense, guiding cases are not themselves sources of law. This means, among other things, that all guiding cases must have a statutory hook, whereas many areas of the common law trace back only to judicial pronouncements.¹⁵⁴ Second, while common law judges are decentralized lawmakers who “proffer[] the individualized judgment as a statement of a rule or proposition that can be applied . . . to a generalized category of similar cases,”¹⁵⁵ Chinese judges wield vastly less authority in their relationship to guiding cases. Even decisions ultimately designated as “guiding” do not become binding upon completion of judgment. Chinese judges are thus far less likely to be forward looking in the way of common law judges, who must always — one would hope — consider the precedential implications of their interpretation moving forward. Third, guiding cases are heavily edited; top-down selectors abstract holdings out of cases and rewrite the facts and reasoning in a much more centralized process of judicial policymaking.

Finally, guiding cases do not share many of the common law’s underlying normative commitments. Consider Professor Douglas Edlin’s observation that “[t]he common law’s preoccupation with reason and judgment stems from its public claim of the intersubjective validity of the applications of reason in judgment, for if a particular judgment is valid for a given instance then it should be valid in all instances.”¹⁵⁶ In other words, the “reasoned judicial opinion” is itself a “form of public discourse” that in each iteration serves as a continuing justification for the common law’s ongoing legal authority.¹⁵⁷ Guiding cases, however, are not expressions of metanorms exalting reason, nor do they derive legitimacy from a “public claim of . . . intersubjective validity.”

Rather, China’s guiding cases bear more than a passing resemblance to several civil law practices that have also sought to promote uniformity in legal application. Like other civil law jurisdictions that cannot constitutionally regard judicial interpretation as legally binding, China has given de facto binding effect to decisions instead. And by mandating the inclusion of a “Related Legal Rule(s)” section in each guiding case, the SPC has made clear that guiding cases must have some basis in codified law, reinforcing the code supremacy of the Chinese legal system. Moreover, civil law judges do not typically view themselves as wielding a forward-looking lawmaking function; even in jurisdictions that adopt *jurisprudence constante* or its equivalents, ju-

¹⁵⁴ See, e.g., *Armory v. Delamirie* (1722) 93 Eng. Rep. 664 (KB), 1 Strange 505 (establishing judicially that the finder of property has superior title to everyone but the rightful owner).

¹⁵⁵ Douglas E. Edlin, *Introduction*, in *COMMON LAW THEORY* 1, 1 (Douglas E. Edlin ed., 2007).

¹⁵⁶ *Id.* at 2.

¹⁵⁷ *Id.* at 3.

dicial decisions only become softly binding after a higher court recognizes a trend of similar judgments. Meanwhile, Chinese judgments never automatically convert into “guiding decisions,” and are instead selected and edited in a process resembling Taiwan’s. The concept of a “civil law varietal” better approximates guiding cases’ less authoritative role within China’s legal system, as well as the fact that they have not altered other aspects of its civil law system — from the lesser authority of its judges to the monopoly of legal codes on sources of law.

C. *Enduring Common Law Frames*

To be clear, the claim of the previous subsection was not that commentators who make common law comparisons have all somehow imputed false elements to guiding cases. But because such comparisons are pervasive, our use of them should be disciplined so as to not unwittingly create false impressions. Indeed, common law comparisons *can* be helpful so long as they are appropriately limited in scope.

One can, for instance, speak of the common law case method as sharing some important parallels with guiding case reasoning. Professor Edward Levi defined precedential reasoning as “a three-step process” in which, first, “similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.”¹⁵⁸ At that level of generality, the description approximates the analogical reasoning required of Chinese jurists, except that the relevant “rule of law” has already been derived for them in the “Main Points of the Adjudication.”¹⁵⁹ These parallels help justify the SPC’s decision to seek training on the case method from foreign institutions steeped in the Anglo-American legal tradition.¹⁶⁰ Such partnerships have the potential to promote more rigorous application of guiding cases, so long as expositors of common law reasoning adapt their instruction to a localized context.¹⁶¹

Second, both guiding cases and common law precedents exist, at least in part, to promote uniformity and predictability. Unsurprisingly then, official Chinese rationales for constructing a case-guidance system have at times echoed justifications for *stare decisis* in Anglo-

¹⁵⁸ EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2 (1948).

¹⁵⁹ Rules, *supra* note 62, arts. 9, 11.

¹⁶⁰ See Susan Finder, *Case Law Chinese Style — Where Is It Going?* SUP. PEOPLE’S CT. MONITOR (Jan. 18, 2015), <http://supremepeoplescourtmonitor.com/2015/01/18/case-law-chinese-style-where-is-it-going> [<http://perma.cc/VG87-54XP>] (pointing to how universities in Hong Kong and the United States “have held training programs with Court staff on the case method”).

¹⁶¹ For instance, lessons on how to discern a holding from an opinion may make little sense in a system where the “Main Points of the Adjudication” have already been extracted, but lessons on how to analogize from similar facts based on a guiding case’s underlying policies would likely be helpful. Such training might assist not only judges, but also lawyers and litigants who are entitled to raise guiding cases in court.

American law. Writing for the Supreme Court, Chief Justice Rehnquist once defended *stare decisis* on the grounds that it “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”¹⁶² Compare this reasoning to the preamble to the 2010 Provisions on guiding cases, which aim “to summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality.”¹⁶³

Lastly, one might simply observe the functional overlap between common law judging and guiding case adjudication in their respective treatment of legislative ambiguity. In filling in statutory gaps,¹⁶⁴ guiding cases have applied a range of approaches, including what American scholars would call “textualist” and “purposivist” methods of statutory interpretation.¹⁶⁵ In GC 9, for instance, the SPC adopted a “strict textual reading of statutory articles,”¹⁶⁶ while in a variety of other cases, the approach has been decidedly more purposivist.¹⁶⁷ Such approaches are not foreign to civil law jurisdictions, but the functional overlap may suggest another area for educative exchange, as well as an area where “judicial activists” might be able to assert greater SPC authority by developing a body of model interpretive approaches.

CONCLUSION

Problems of interpretive ambiguity and adjudicative consistency are nothing new. The use of case law to help unify legal application has played an important role in a number of legal traditions. In spite of these longstanding practices, or perhaps because of them, China’s new guiding cases system has generated an unusual amount of attention and optimism. Still, many challenges remain. Low rates of case issuance and usage will require sustained effort from policymakers, as will the more politically delicate task of defining the system’s scope of authority amid competing institutional and ideological interests. The future of guiding cases will therefore hinge upon the political savvy of various institutional actors, as well as the Party-state’s still-evolving vision of what role courts should play in ordering Chinese society.

¹⁶² *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

¹⁶³ Provisions, *supra* note 6, pmb1.

¹⁶⁴ See Jinting Deng, *supra* note 9 (manuscript at 6).

¹⁶⁵ See generally ROBERT A. KATZMANN, *JUDGING STATUTES* 29–54 (2014).

¹⁶⁶ Jinting Deng, *supra* note 9 (manuscript at 44).

¹⁶⁷ See *id.* (describing the method of statutory interpretation used in GC nos. 6 and 17 as an “intentional approach”).