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# PARTY, PEOPLE, GOVERNMENT AND STATE: ON CONSTITUTIONAL VALUES AND THE LEGITIMACY OF THE CHINESE STATE- PARTY RULE OF LAW SYSTEM<sup>1</sup>

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I. INTRODUCTION .....	332
II. THE CONTOURS OF CONSTITUTIONALISM .....	345
III. THE TRADITIONAL STATE-PARTY MODEL OF POLITICAL ORGANIZATION: FROM LENINIST RUSSIA TO POST-REVOLUTIONARY CHINA .....	352
IV. MOVING TOWARD A NEW MODEL OF THE STATE-PARTY: FROM DENG XIAOPING TO HU JINTAO, AN EVOLVING IDEOLOGICAL CONSTRUCTION .....	364
V. SKETCHING THE CONTOURS OF A CONSTITUTIONALIST STATE-PARTY: THE PARTY AS POLITY, GOVERNMENT AND THE STATE, FROM IDEOLOGY TO APPARATUS .....	386
VI. IMPLICATIONS AND CONSEQUENCES FOR CONSTITUTIONALISM .....	402
VII. CONCLUSION .....	407

## ABSTRACT

*The Chinese constitutional order is grounded in the distribution of popular sovereign power between the Chinese Communist Party and the administrative apparatus of the government of the state, privileging the political authority assigned to the Party over the administrative authority vested in the government. For those who embrace the ordering framework of western style constitutionalism, this organizational model poses novel questions about the legitimacy of the system itself. This article addresses those questions and attempts to articulate a basis*

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*for a legitimizing constitutionalist theory for states, like China, organized on a State-Party model. Since the establishment of the Soviet Union, constitutional theory has tended to look suspiciously at the constitutionalization of Marxist governments under the control of a single party in power. Such arrangements, even when clothed in the formal language of written constitutions, are generally considered illegitimate, especially in regimes in which the state's power is vested in a government that is itself subject to the direction of an extra-constitutional power. In this context, constitutionalism is incomprehensible. These judgments have formed the basis of analysis of Chinese constitutionalism, serving as the foundations for critique of the reforms of Deng Xiaoping and his successors since the 1980s. This article examines whether these criticisms are inevitably correct in general, and wholly applicable in the current Chinese constitutional context. The relationship of constitutionalism to the Chinese constitutional system is examined. The article asserts that in order to understand Chinese constitutionalism, it is not sufficient to equate the constitutional system with the written constitution alone. Instead, China has moved toward a legitimately constitutionalist governance system in which power is divided between a vanguard party, which serves as the repository of political power, and the administrative organs of government. Thus understood, the Chinese constitutional system is both unique and legitimately constitutionalist.*

## I. INTRODUCTION

Scholars and policy makers have come to understand that the Chinese Communist Party (CCP) plays a role in the political life of the People's Republic of China. Chinese scholars have sought to explain that role to Western audiences in political terms. Zhu Soli provides a good example: "In my own view, and in the view (explicit and implicit) of many Chinese and foreign scholars, the CCP's influence and control is ubiquitous; it penetrates every aspect of society. . . ."<sup>2</sup> But notions of penetration, control and influence do little to provide a useful understanding of either the institutional role of the CCP or the constitutional legitimacy of the resulting structure of government under emerging principles of constitutional

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<sup>2</sup> Zhu Soli, *Political Parties in China's Judiciary*, 17 *DUKE J. COMP & INT'L L.* 533, 535 (2007) (citing in part SUN ZHONGSHAN & SUN SHINGSHAN QUAN JI, *COMPLETE WORKS OF SUN YAT-SEN*, vol. 8, at 267-68, vol. 9, at 103-04 (1986)).

Despite the many political differences between the CCP and its former arch-rival, the Nationalist Party (known as *the* Guomindang or GMD) and despite the fact that the CCP never used the GMD's often deployed concept 'State-Party,' in practice, the CCP inherited the political tradition, initiated by Sun Yat-Sen and pursued by the GMD, comprised of a 'party construction of the state,' 'party rule of the state,' and 'party above the state.'

*Id.*

theory. This article seeks to suggest a basis for theorizing a legitimate institutional role for the CCP within a Chinese constitutional system organized in conformity with global principles of National Constitutionalism.

China, like most other states, has adopted a written-constitution system.<sup>3</sup> The Chinese Constitution (Constitution) is meant to reflect not only the most crucial values the nation<sup>4</sup> and its people follow, it is also meant to serve as a fundamental law that legitimizes both the foundation of popular sovereignty and obligations exercised by state organs.<sup>5</sup> The Constitution recognizes Marxism as the country's leading ideology and the Communist Party as the leading party. At the same time, the Constitution recognizes all the powers of the nation belong to the people. This constitutional order — organized around Party, people, government, and state — has posed novel questions for western oriented constitutional thinking.<sup>6</sup> This article considers whether it is possible to theorize a State-

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<sup>3</sup> *Writing* a constitution has ideological significance in the context of emerging norms by which the legitimacy of state organization is judged. "Constitutionalism is commonly identified with a written constitution." Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 39, 40 (Michel Rosenfeld ed., 1994); WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER (2007). *Cf.* Thomas Paine, *The Rights of Man*, in THE SELECTED WORK OF TOM PAINE 93, 209-28 (Howard Fast ed., 1945) (1792). *But see, e.g.*, Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

<sup>4</sup> The term nation is complicated and contentious. This article does not mean to add more to the debate. The term here is used loosely. James Wilford Garner comes to mind:

The term 'nation' as used today by most writers connotes a political organization; that is, a nation is not only an association of which the bonds of union are cultural and spiritual, but it is also a politically organized aggregation. In short, it is a state. Consequently the terms 'state' and 'nation' are frequently used as synonyms.

JAMES W. GARNER, POLITICAL SCIENCE AND GOVERNMENT 113 (1928).

"The limits of the state may extend beyond the boundaries of the nation . . . and conversely the boundaries of the nation may be wider than those of the state." *Id.* at 114. *But see* John Hutchinson, *Ethnicity and Modern Nations*, 23(4) ETHNIC & RACIAL STUDIES 651-69 (2000) (considering "an alternative model of nation-formation, one that conceives of the nation as a quasi-kinship group, only contingently related to the state, and that recognizes the power of states to regulate populations is limited and fluctuating").

<sup>5</sup> *See, e.g.*, Ulrich K. Preuss, *Patterns of Constitutional Evolution and Change in Eastern Europe*, in CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 95 (1995).

<sup>6</sup> The novelty can be negative. *See, e.g.*, RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS (2010). *But see* *China's Legal System: New Developments, New Challenges*, THE CHINA QUARTERLY SPECIAL SERIES No. 8 (Cambridge University Press, 2008) (providing a more balanced analysis of China's constitutional order).

Party model of state organization that remains true both to the ideals of constitutionalism grounded in the core postulate of rule of law governance<sup>7</sup> and to the Marxist principles under which the Chinese state is organized and through which it is governed.<sup>8</sup>

Constitutionalism has, for the last century, sought to provide a basis in theory for legitimating certain forms of state organization within territorially based political communities.<sup>9</sup> Constitutionalism has come to be

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<sup>7</sup> This is undertaken in the spirit of the works of others as well as my own earlier works. See, e.g., RANDALL PEEREMBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (2002); STÉPHANIE BALME, *BUILDING CONSTITUTIONALISM IN CHINA* (2009). See generally Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CALIF. L. REV. 1307 (2001).

<sup>8</sup> This article is part of a larger U.S.-China constitutional law project called Theory and Implementation Issues and Examples on Harmonious Society, Rule of Law and Prospects for the Constitutional System of China. This project brings together prominent scholars of constitutional law in the U.S. and China for the purpose of bridging the research gap in Chinese constitutionalism, strengthening the comparative dimension of the study of constitutionalism with emphasis on U.S. and Chinese constitutional developments and bringing a more prominent focus to the issue of constitutional implementation in China, without the distraction and policy focus of constitutional legitimacy. See Miguel Schor, *Forward: Symposium on Constitutional Review in China*, 43 SUFFOLK U. L. REV. 589 (2010). See, e.g., Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case*, 43 SUFFOLK U. L. REV. 669 (2010); Larry C. Backer, *A Constitutional Court for China Within the Chinese Communist Party?: Scientific Development and a Reconsideration of the Institutional Role of the CCP*, 43 SUFFOLK U. L. REV. 593 (2010) [hereinafter Backer, *A Constitutional Court*]. For a strong caution, see, e.g., STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (2002); PITTMAN B. PORTER, *DOMESTIC LAW REFORMS IN POST-MAO CHINA* (1994); Neil J. Diamont, Stanley B. Lubman & Kevin J. O'Brien, *Law and Society in the People's Republic of China*, in 3 *ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE* (2005).

<sup>9</sup> "To formulate a basic definition of constitutionalism presents no problem at all. This is so because the elements of the definition are self-evident. The elemental components of constitutionalism are simply: limited, non-arbitrary government, legally enforceable rights and the dominance of the law." FRANÇOIS VENTER, *CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATES* 20 (2000). For a traditional understanding of national boundaries and the limits of domestic legal systems, see WESTEL W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 30 (1924). I have argued that the basic definition of constitutionalism is both more complex and flexible in embracing variation, but also suggested the requirement of a substantially well-structured system of substantive rules. For a discussion of the context in which I will use the notion, see, Larry C. Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671 (2009) [hereinafter Backer, *From Constitution to Constitutionalism*]; Larry C. Backer, *God(s) Over Constitutions: International and Religious TransNational Constitutionalism in the 21st Century*, 27 MISS. C. L. REV. 11 (2008) [hereinafter Backer, *God(s) Over*

understood as a complex systemic ideology of the construction of governance.<sup>10</sup> At the most basic level, it can be understood as consisting of five elements: (1) a system of classification, (2) the object of which is to define the key characteristics of constitutions, (3) for the purpose of determining the legitimacy of a constitutional system as conceived or as implemented to provide a principled basis for outsiders (foreign states, entities, individuals) to judge the lawfulness of the constitutional order created and for insiders (citizens) to judge the distance between the ideals of their constitutional system and its reality (and to act thereon), (4) based on the fundamental postulate that the use of governmental power is subject to rule of law limits that are in turn (5) grounded on values derived from a source beyond the control of any individual.<sup>11</sup>

Since the establishment of the Soviet Union, constitutional theory has generally looked suspiciously at the constitutionalization of Marxist state apparatuses under the control of a single party.<sup>12</sup> There exists a sense of illegitimacy and a suggestion of sham constitutions in regimes where ultimate state power is vested in an apparatus which itself is subject to the direction of an extra-constitutional power, which in turn is usually suspected of badly masking systems of personal rule. With state under Party, and Party serving as a system of leveraging personal power, the State-Party system is viewed as a cover for tyranny and despotism – as a veil over the personal rule of an individual or a clique according to their whim and supported by the coercive power of a military apparatus and internal terror regimes. In such a context, constitutionalism truly is incomprehensible.<sup>13</sup>

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*Constitutions*]. See generally Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 853-62 (1962).

<sup>10</sup> See Backer, *From Constitution to Constitutionalism*, *supra* note 9, at 671

<sup>11</sup> *Id.*

<sup>12</sup> Events in 1939 and after 1945 have made clear that all totalitarian dictatorships have much in common. Unnoticed by many, Stalinism has emerged as the dictatorial reaction to revolutionary communism. Stalin, like Napoleon, used revolutionary slogans but killed those who took them seriously. Fascism and Nazism were similarly reactionary to revolutionary socialism of Central Europe. CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 455 (1950).

<sup>13</sup> Concededly, the task before Russian Marxists could not have been accomplished according to the precepts of Western constitutionalism or democracy. Of the alternative methods available for political consolidation and economic reconstruction, the policy chosen at every step was one that would vest the most power in the dictator and his entourage. ADAM B. ULAM, *THE UNFINISHED REVOLUTION: AN ESSAY ON THE SOURCES OF INFLUENCE OF MARXISM AND COMMUNISM* 225 (1960).

These judgments have formed the basis for analysis of Chinese constitutionalism.<sup>14</sup> The pre-Deng Chinese state governance architecture could be dismissed as anti-constitutional,<sup>15</sup> rather than criticized for failures to appropriately incorporate constitutional principles.<sup>16</sup> Beginning in the late 1970s, the nature of the engagement with constitutionalism changed.<sup>17</sup> But that change also served as the foundation for criticism of Chinese constitutionalism following the reforms of Deng Xiaping and his successors starting in 1989.<sup>18</sup> The intensity of the critique increased in parallel with the institutionalization of China's campaign to separate the state from the Party apparatus and to introduce notions of law and rule of

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<sup>14</sup> See, e.g., Michael W. Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1 (2002) (esp. Parts I-V); Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 474 (2002); Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 Nw. J. INT'L & BUS. 383, 402 (2000). See also Li Yahong, *The Law-Making Law: A Solution to the Problems in the Chinese Legislative System?*, 30 HONG KONG L.J. 120, 125-26 (2000); W. Theodore de Bary, *The "Constitutional Tradition" in China*, 9 J. CHINESE L. 7 (1995).

<sup>15</sup> See, Jan F. Triska, *Introduction*, in CONSTITUTIONS OF THE COMMUNIST STATE-PARTYS. xi-xiii (Jan F. Triska ed., 1968). The Cultural Revolution added evidence to this assessment. "Structural conditions under Mao's rule reflected the dominance of politicized organizations over social groups . . . Mao acted as the charismatic leader – the socialist prophet, ideological educator, visionary poet, military commander, head of the CCP and moral architect of a transformed society." CHARLES F. ANDRAIN, *COMPARATIVE POLITICAL SYSTEMS: POLICY PERFORMANCE AND SOCIAL CHANGE* 121 (1994).

<sup>16</sup> See, e.g., ANITA M. ANDREW & JOHN A. RAPP, *AUTOCRACY AND CHINA'S REBEL FOUNDING EMPERORS: COMPARING CHAIRMAN MAO AND MING TAIZU* (2000).

<sup>17</sup> "For the leadership it meant that the Party and government should be more responsive to public opinion, and that 'the masses' should be given institutionalised means by which they could supervise, criticize and, to a limited extent, choose their leaders." JOHN GARDNER, *CHINESE POLITICS AND THE SUCCESSION TO MAO* 141 (1982). "But as good Leninists, China's leaders intended that the Party should remain in full control, that the extension of freedoms should be gradual, and that there should be no decline into 'anarchism.'" *Id.*

<sup>18</sup> See, e.g., *id.* at 141-72. As Fewsmith observes:

Without a basic consensus on the territorial limits of the state or on who is a citizen and without an adequately functioning bureaucracy, it seems impossible to develop the other characteristics that Linz and Stepan identified as necessary for successful democratic transition: rule of law (a Rechtsstaat), a 'free and lively' civil society, an institutionalized economic society, and a 'relatively autonomous' political society.

JOSEPH FEWSMITH, *CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION* 6 (2001) (citing Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, in CONSOLIDATING THE THIRD WAVE DEMOCRACIES: THEMES AND PERSPECTIVES, 14-33 (Larry Diamond et al. eds, 1997)).

law within the state and Party apparatus.<sup>19</sup> After Deng, China was judged from a constitutional perspective – and it was judged increasingly harshly,<sup>20</sup> or simply dismissed as a capitalist but totalitarian state.<sup>21</sup> “China and Russia represent a return of economically successful authoritarian capitalist powers, which have been absent since the defeat of Germany and Japan in 1945, but they are much larger than the latter two countries ever were.”<sup>22</sup> Moreover, the move to a constitutional institutionalization of state power in China after 1979 refocused the object of analysis – from a personality driven State-Party dictatorship to the development of state institutions under the constitution.<sup>23</sup> The CCP was deemed either increasingly irrelevant or an obstacle to democratization along Western lines.<sup>24</sup> For example, as Stanley Lubman wrote, “although they have continued to emphasize the importance of the role of law, at the same time they also insist on maintaining the dominant role of the CCP in Chinese society, and cannot resolve the contradiction between

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<sup>19</sup> However, one must be careful here. As in the West, the notion of rule of law can be a slippery concept, and quite malleable when invoked beyond its more general understanding. For example, the Chinese government (or the Party) can use the concept “rule of law” (法制) quite narrowly – in the sense of rule by law in its administrative applications, and only sparingly in the broad constitutional sense that I describe in Section II, *infra*. But that it is used, directly or indirectly, can be viewed as a significant advance, though one whose full development has yet to be realized.

<sup>20</sup> “What Deng wanted most urgently was to remove the impediments for the pursuit of rational economic policies by changing from the Maoist legacy, deradicalizing the ideology, downplaying . . . class struggle and abandoning the “storming approach” of conducting political campaigns.” Deng also “[Drove] the remnants of the Gang of Four out of power.” HSI-SHENG CHI, *POLITICS OF DISILLUSIONMENT: THE CHINESE COMMUNIST PARTY UNDER DENG XIAOPING, 1978-1989* 257 (1991). “All along, Deng never regarded the CCP as the cause of the turmoil in the Cultural Revolution but only as its victim. To Deng, the rejection of the Cultural Revolution approach would be sufficient to restore the party to its previous status of predominance in the Chinese polity.” *Id.* at 258. The judgments became harsher after 1989. See, e.g., PETER M. LICHTENSTEIN, *CHINA AT THE BRINK: THE POLITICAL ECONOMY OF REFORM AND RETRENCHMENT IN THE POST-MAO ERA* (1991).

<sup>21</sup> See, e.g., DAVID S. GOODMAN, *DENG XIAOPING AND THE CHINESE REVOLUTION: A POLITICAL BIOGRAPHY* (1994); CHINESE MARXISM IN FLUX, 1978-84: ESSAYS ON EPISTEMOLOGY, IDEOLOGY, AND POLITICAL ECONOMY (Bill Brugger ed., 1985).

<sup>22</sup> Azar Gat, *The Return of Authoritarian Great Powers*, *FOREIGN AFF.*, July – Aug. 2007, at 59, 66.

<sup>23</sup> Michael Sullivan, *The Ideology of the Chinese Communist Party Since the Third Plenum*, in *CHINESE MARXISM IN FLUX, 1978-84: ESSAYS ON EPISTEMOLOGY, IDEOLOGY, AND POLITICAL ECONOMY* 67 (Bill Brugger ed., 1985).

<sup>24</sup> Stanley Lubman, *Dispute Resolution in China After Deng Xiaoping: “Mao and Mediation” Revisited*, 11 *COLUM. J. ASIAN L.* 229 (1997).

these two policies.”<sup>25</sup> The state apparatus was criticized as both unresponsive to the will of the people and unconnected to the usual vehicle for accountability (free and fair popular elections). Viewed strictly from the perspective of the National Constitution and the State governmental apparatus, China effort to project itself on the global stage as a constitutional state was viewed as a failure.<sup>26</sup>

Are these criticisms inevitably correct and applicable in the post-1989 Chinese context? This article explores the question, suggesting a basis for articulation of a legitimizing constitutional theory for states organized on a State-Party model. Focusing on the evolution of State-Party constitutionalism in China since the end of the Mao Zedong era, Part II reviews the basic principles of current constitutionalism theory and its importance as a legitimating global ideology<sup>27</sup> against which state organization, and the actions of state officials, are judged. It starts from the premise that constitutionalism is itself an ideology with its own reference framework.<sup>28</sup> That ideological framework is important, not only as a powerful tool of analysis, but as a basis for making political judgments about the quality of state governance among the community of nations and, increasingly, within political communities. Constitutionalism is best understood as a system of classification for the purpose of judging the legitimacy of state governance systems as conceived and as applied, grounded in the fundamental postulate of rule of law governance and based on a system of values beyond the control of any individual for the limitation and bureaucratization of governmental power.<sup>29</sup> The basic premise of constitutionalism is to distinguish legitimate government from despotism or tyranny.<sup>30</sup> The distinguishing characteristic of modern constitutionalism is the privileging of a values system that both limit state power and provide the basis for applying that power.<sup>31</sup> The three important variations of

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<sup>25</sup> Lubman, *Bird in a Cage*, *supra* note 14, at 399.

<sup>26</sup> See Larry C. Backer, *The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the “Three Represents”)*, *Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 J. OF TRAN’L. L. & CONTEMP. PROBS 29 (2006) [hereinafter Backer, *The Rule of Law*].

<sup>27</sup> See the discussion in *supra*, text and accompanying notes.

<sup>28</sup> See Section II, *infra*.

<sup>29</sup> Bureaucratization is to be distinguished from bureaucratism, or “the high handed attitude of cadres toward the masses.” FREDERICK C. TEIWES, *POLITICS AND PURGES IN CHINA: RECTIFICATION AND THE DECLINE OF PARTY NORMS, 1950-1965* 198 (1993).

<sup>30</sup> See, e.g., Alan S. Rosenbaum, *Introduction*, in CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION 1, 4-6 (Alan S. Rosenbaum, ed., 1988). “In general, governmental institutions and officials who are permitted to operate legitimately or officially ‘above the law,’ will inevitably pursue their own agenda . . . . A democratic and just constitutional ‘rule of law’ . . . is supposed to prevent precisely this tyranny.” *Id.* at 5.

<sup>31</sup> See, e.g., Backer, *From Constitution to Constitutionalism*, *supra* note 9, at 113.



constitutionalism are identified and explored in the Introduction.<sup>32</sup> The interactions between these variations have played an important role in framing constitutionalist discourse since 1945. The oldest is nationalist constitutionalism, which no longer represents the only variation of constitutionalism. The government structures established by the American and French constitutions provide the best examples. They derive substantive value principally from within the polity. The second, transNational Constitutionalism, has emerged as a powerful force since 1945.<sup>33</sup> TransNational Constitutionalism is grounded in a constitutional values system derived from the common constitutional tradition of a community of states evidenced either in shared practices and values, customary international law norms or memorialized international rules in the form of treaties and conventions.<sup>34</sup> Since the 1970s, another powerful values system has emerged: theocratic constitutionalism. Theocratic constitutionalism is grounded in the embrace of the rule of law principle of state construction, but implemented on the basis of and through the rules system of a single religion.<sup>35</sup>

Post-Deng China may provide another variant of values systems within constitutionalism. To explore the issue it is necessary to examine the true context of Chinese constitutionalism – not as Westerners have come to understand its exposition but as the Chinese have attempted to construct it for themselves.<sup>36</sup> For that purpose, Part III very briefly examines the evolution of the State-Party model of governance from its origins in nineteenth century European Marxist theory to its reception in China in the 1920s and its modern transformation “under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of ‘Three Represents.’”<sup>37</sup> The objective is to provide context for the analysis of China’s constitutional framework to be tested against the normative groundings of nationalist or transNational Constitutionalism.

Part IV turns to the issue of the legitimacy of Chinese constitutionalism. It suggests that it is possible to theorize a State—Party model of state organization that remains true to the ideals of constitutionalism

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<sup>32</sup> See the discussion in *supra*, notes 20-24 and accompanying text.

<sup>33</sup> See, e.g., Backer, *God(s) Over Constitutions*, *supra* note 9, at 11.

<sup>34</sup> These include respect for human rights, process rights and a commitment to democratic rights of citizens. See Backer, *From Constitution to Constitutionalism*, *supra* note 9, at Part II.

<sup>35</sup> See, e.g., NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008); Larry C. Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 *IND. J. GLOBAL LEGAL STUD.* 85 (Winter 2009) [hereinafter Backer, *Theocratic Constitutionalism*].

<sup>36</sup> See, e.g., RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* (2002); Soli, *supra* note 2.

<sup>37</sup> See XIANFA, pmb. (1982) (China), available at <http://english.people.com.cn/constitution/constitution.html>.

grounded in the core postulate of rule of law governance.<sup>38</sup> The basis of contemporary Chinese State-Party constitutionalism requires a different approach to defining the written constitution. It must include both the document constituting the state and the document constituting the Party as equivalent components that together form a document comparable to National Constitutions in the West. It is also based on a different understanding of the character of the Communist Party – not as a political party or as a private actor but as an integral part of the institutional structure of government and, more importantly, as the holder of political citizenship.

Part V then sketches the contours of a constitutionalist State-Party. The basis of Chinese State-Party constitutionalism requires a preconception of constitutional understanding. Party and people frame the organization of the ‘political order, which occupies the paramount place within Chinese constitutionalism. Beneath it is the state and the apparatus of state organization – the government. People may participate in staffing the government, but the Party retains its role as the government of the political sphere. Chinese constitutionalism understood as state and party constitutionalism can serve as a basis for understanding the way in which rule of law governance is legitimately possible where the disciplinary focus of constitutional duty is focused not primarily on the state apparatus, but instead centers on the Party apparatus.

These insights produce substantial consequences for the way Chinese constitutionalism is understood and evaluated under global constitutionalist standards. The fundamental insight, one more readily recognized within China than outside of it, is the nature and structural effect of the

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<sup>38</sup> This represents a substantial development of the socialist law notions transposed from the Soviet Union and adopted by the CCP.

Taking an economic reductionist position, such [early Soviet] theorists argued that, since a commodity economy was the essential material condition for law, law would cease to exist as that commodity economy withered away. Since law was class-bound and conflict-ridden, Marxist theory precluded any idea of socialist (or proletarian) law. Meanwhile, law in the transition period, while a commodity economy still existed, was only a continuation of ‘bourgeois law.’

CARLOS WING-HUNG LO, CHINA’S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG’S ERA 4 (1995).

This changed with Stalin and the introduction of Socialist or class law, as opposed to capitalist or bourgeois law.

The new ‘socialist state’, proclaimed in the 1936 Constitution, was said to require a body of ‘socialist law’ totally different from (and allegedly superior to) bourgeois law: ‘Socialist law is not a further development of bourgeois law, but a new type of law that has grown out of the socialist revolution of the proletariat.’ Elements of Marxist critical theory were bent to serve an ideological purpose. That was the frame of reference subsequently adopted by the Chinese Communist Party.

*Id.* at 5.

“party in power” concept.<sup>39</sup> Taking Chinese theory at face value<sup>40</sup> it becomes clear that, at least since the time of Deng Xiaoping, the Chinese Communist Party has sought to attain a more refined institutionalization within the political order.<sup>41</sup> With that institutionalization has come a reliance on those mechanisms that constrain assertions of personal power through rule of law concepts. Rule of law provides an expression of collective governance. That collective space, in turn, serves as the site for democratic citizenship. That site is the Party itself, as an autonomous community operating within the overall framework of the Constitution and its values system. That community itself serves as a representative and proxy for the nation in two respects: (1) it is the site where political values are elaborated and protected, and (2) it serves as the body of individuals charged with the task of such elaboration and protection within both the political order and in its state institutions. It is in this sense that one can better understand the modern meaning of that old Marxist notion of Party as vanguard, and the way it has evolved from old Soviet era notions<sup>42</sup> – the Party itself is vanguard/guardian of fundamental substantive values of the political state.<sup>43</sup> It is in this sense as well that one can understand Party membership as the functional equivalent of political citizenship. The holders of political citizenship, Party members, serve within the Party as forces for social cohesion and the deployment of val-

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<sup>39</sup> The CCP is the party in power in China.

The CPC is a unified entity organized according to its program, constitution and the principle of democratic centralism. The Constitution of the Communist Party of China stipulates that any Chinese worker, farmer, member of the armed forces, intellectual and any advanced element of other social strata who has reached the age of 18 and who accepts the program and constitution of the CPC and is willing to join and work in one of the Party organizations, carry out the Party decisions and pay membership dues regularly may apply for membership in the CPC.

Structure of the State: The Party in Power, CHINA.ORG.CN, [http://www.china.org.cn/english/features/state\\_structure/64404.htm](http://www.china.org.cn/english/features/state_structure/64404.htm) (last visited Jan. 10, 2012).

<sup>40</sup> See Backer, *The Rule of Law*, *supra* note 26, at 29.

<sup>41</sup> [E]ven as he was making a bid for personal power, Jiang was conscious of both a demand and a need to stress democratization and institutionalization. Deng Xiaoping had sounded these themes in his justly famous 1980 speech ‘On the Reform of the Party and State Leadership System,’ but Deng’s own status as a revolutionary elder, the repeated conflicts over policy, and doubtless also Deng’s reflexive resort to personal decision making prevented implementation of his ideas.

FEWSMITH, *supra* note 18, at 164.

<sup>42</sup> For example, in the old Czechoslovak Communist Party, the the “vanguard role of the CPSU [was] usually claimed in similar terms; that is, greater political awareness uniquely qualifie[d] it to guide Communist construction in the interest of the people, even when contrary to their expressed desires.” Bernard A. Ramundo, *Czechoslovakia and the Law of Peaceful Coexistence: Legal Characterization in the Soviet National Interest*, 22 STAN. L. REV. 963, n.40 (1970).

<sup>43</sup> See the discussion in Section III, *infra*.

ues based rule of law substantive values and outside the Party in a fiduciary capacity to all people in the political community who are holders of social and economic rights, but who lack political rights.<sup>44</sup> Political citizenship, then, though limited, is open to those who would adhere to and further the political and rule of law values of the Party within the governance structures of the state established for that purpose.<sup>45</sup> Rule of law notions within the Party are then applied to make political citizenship available to all in exchange for adherence to the Party “line” (ie: the substantive political values on which the state was founded). This is in line with the ethos surrounding the Three Represents campaign.<sup>46</sup> Rule of law, then, resides within the Party architecture. It is from the Party architecture that rule of law concepts move into the governmental, social and economic spheres.

The Party as the polity, then, becomes the foundational framework of Chinese constitutionalism. For those who adhere to the view that political citizenship equally and horizontally dispersed among the people is a prerequisite for a values-positive constitutional state, this notion is both radically offensive and evidence of the anti-constitutional stance of the Chinese model. The creation of a hierarchy of political citizenship, with Party cadres assuming a leading role, lies at the heart of what people seeking fidelity to advanced western political models would view as a critical defect of the State-Party mechanism. These defects lie at the heart of a criticism of any argument suggesting that State-Party systems like that in China can ever attain constitutional legitimacy. The answer, of course, is not necessarily. Party as polity notions run counter to deeply held value systems at the heart of Western and transnationalist constitutionalism. But they do not necessarily run counter to constitutional notions grounded in deep rule of law notions in which democratic governance principles are indirect rather than direct and where those vested with primary political citizenship are themselves bound to normative values that enhance, if indirectly, democratic participation and popular welfare. These values are incompatible with Western notions, to be sure, but not, for that reason alone, incompatible with constitutional notions.

State organization, then, assumes a consequentialist role. It devolves from, and reflects, Party organization and the values it represents as an institutionalized, rule governed collective of the state’s political citizens. State organization, represented by the National People’s Congress system, is a legitimate arena for the participation of the people, for example,

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<sup>44</sup> See the discussion in Section IV, *infra*.

<sup>45</sup> This is not without difficulties in fact. See, e.g., Gilles Guiheux, *The Political “Participation” of Entrepreneurs: Challenge or Opportunity for the Chinese Communist Party?*, 73 SOC. RES. 219 (2006).

<sup>46</sup> See Backer, *The Rule of Law*, *supra* note 26, at 29.

through elections.<sup>47</sup> Under the paramount leadership of the Party, government can be opened to popular participation, even as participation in the political sphere is limited to members of the Party and centered on Party organization. To understand Chinese constitutionalism, one has to recognize that the Chinese Constitution exists as a combination of polity and governing ideology on the one hand and state apparatus on the other. The Chinese Communist Party serves as the institutionalization of the polity and the source of its substantive values. The government established under the National Constitution serves as the institutionalization of state power, within which the people may more directly participate under the guidance of the Party. The Party is the repository of political power; the government the repository of administrative power. Together they represent the whole of the Chinese constitutional order.<sup>48</sup>

Chinese constitutional analysis, then, ought to be grounded on both the National Constitution and the CCP Constitution, and its application of rule of law ideals within its value system as part of the constitutional ordering that serves as the foundation for the elaboration of state power under the National Constitution. This structure of power relationship between political collective and governmental organizations meant to institutionalize state power (within that collective) have significant values effects on the way in which Party, state and individuals relate. These include the reflection of the State-Party construct (1) in a division of the character of citizenship between economic and social citizenship, claimed by all persons, and political citizenship, which can be exercised through the Party, (2) in an understanding of political organization in which state power and its institutions are subordinate to political authority, (3) in an institutionalization of political authority within a collective that serves as the source and conduit of constitutional values to be applied by the holders of state authority, and (4) in a system in which Party elaboration of rule of law values is contingent on state and party self-discipline.

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<sup>47</sup> Cf. GERRY GROOT, *MANAGING TRANSITIONS: THE CHINESE COMMUNIST PARTY, UNITED FRONT WORK, CORPORATISM, AND HEGEMONY* (2003).

<sup>48</sup> That constitutional order, of course, significantly limits the political rights of all citizens, vesting direct political power in Party cadres and incidental representative selecting power in the general citizenry, who hold essentially social and economic citizenship rights. While these notions are highly problematic in the West, and rightly so within Western politico-cultural systems (See, e.g., Stijn Smismans, *New Governance – The Solution for Active European Citizenship, or the End of Citizenship?*, 13 COLUM. J. EUR. L. 595, 616 (2007)) that alone should not be a basis for judging the Chinese arrangement as illegitimate. For a more radical Western vision of citizenship and political participation, see, e.g., WILL KYMLICA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); CHARLES YOUNG ET AL., *MULTICULTURALISM: EXAMINING THE POLITICS OF DIFFERENCE* (1995); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

Chinese constitutionalism, when understood as a symbiosis of political and administrative power divided between state and party, can serve as a basis for understanding the way in which rule of law governance is legitimately possible where the disciplinary focus of constitutional duty is focused not primarily on the state apparatus but instead centers on the Party apparatus. Rule of law constitutionalism in China is better understood as State-Party constitutionalism, with a necessary focus on Party rather than State. But for all the focus on the party, it is a state that is being developed. This state is acquiring a governance apparatus true to the basic notions of constitutionalism – rule of law, accountability, and limited government. The unique features of the system lie in the role of the Party. That role remains constitutionalist to the extent that it, too, embraces both rule of law and institutionalization. But the Party does not serve merely as a supervisory overlay to the state system in a way that the religious establishment serves as an overlay in theocratic constitutionalist systems.<sup>49</sup> Instead, the Party also serves as the manifestation of the polity, and it is in this sense especially that its connection with constitutionalism is most felt.<sup>50</sup> With a transformation from a party of individuals to an institution representing the political citizenship of the nation, the Party retains its constitutionalist character, but only to the extent that it observes the same rule of law framework as that imposed externally on the state apparatus in its internal operations.

Constitutionalism in China enshrines the core value of popular power and accountability, as well as rule of law process principles, but in a way that separates political from administrative power under the umbrella of constitutional values. Popular sovereignty is expressed politically through the CCP and administratively through the government. The people hold the government directly accountable. The Party leadership holds the government indirectly accountable. The Party represents the people directly but may act only to further the fundamental substantive principles on which the state is founded. The people speak through the Party but act through the state. These are the fundamental ordering principle of Chinese constitutionalism. Organized in this way, it is possible to recognize structures in the organization of State-Party systems that are consonant with basic principles of constitutionalism even though the system's substantive values may be incompatible with the forms of expression valued in secular states and commonly invoked as proper models of constitutional states. Legitimated within its organizational parameters, the real work of Chinese constitutionalism can be undertaken. Chinese constitutional organization, then, can be measured against its own substantive

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<sup>49</sup> See Backer, *Theocratic Constitutionalism*, *supra* note 35, at 85, and the discussion in Section IV, *infra*.

<sup>50</sup> The intensity of that relationship is understood within China. “Therefore, distinguishing the status of Party and government officials is truly not that important.” Soli, *supra* note 1, at 535.

ideals and framework, which provide the normative standards to which the government of the state must be held. This is constitutionalism with Chinese characteristics.

## II. THE CONTOURS OF CONSTITUTIONALISM

Constitutionalism has come to be understood as a complex systemic ideology of the construction of governance.<sup>51</sup> It serves to classify governmental orders for conformity to key characteristics of form that determine the legitimacy of the constitutional system based on a fundamental postulate that governmental power is subject to rule of law limits derived from sources beyond the control of any one individual.<sup>52</sup> Constitutionalism rejects the idea that any systematization of governance through a written document styled a “constitution” can legitimate the state apparatus created thereby. It rejects the institutionalization of personal rule. At its most basic form, constitutionalism provides a means to erect a high wall between governance grounded in institutional values and centered on the common good and governance grounded in personal power of individual or ruling cliques centered on the perpetuation of personal or group power.

Constitutionalism serves as a basis for classifying the form of state systems of governance, distinguishing between tyrannies and other forms of governance.<sup>53</sup> Its object is twofold – to develop an ideal governance form and judge the legitimacy of a constitutional system against this ideal.<sup>54</sup> Constitutionalism is grounded on the fundamental postulate of rule of law. States ought to be organized to avoid tyranny or despotism by grounding state action in law and limiting the reach of such lawful state action on the basis of substantive values reflecting those of the political

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<sup>51</sup> See Backer, *From Constitution to Constitutionalism*, *supra* note 9, at 671, and notes 10-11 and accompanying text, *supra*.

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. 533 (1993); H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65 (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero & Steven Wheatley eds., 1993).

<sup>54</sup> See Charles M. Fombad, *Challenges To Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 44 (Winter 2007); Backer, *From Constitution to Constitutionalism*, *supra* note 9, at 671. See e.g., Kim L. Schepple, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296 (2003). For its application in this manner, see, e.g., Okoth-Ogendo, *supra* note 53, at 65-80; ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* (1999).

collective<sup>55</sup> for whose benefit the state apparatus operates.<sup>56</sup> Systems of personal rule, or rule based on sovereignty flowing downward from a monarch, though an important source of justification in powerful states in centuries past,<sup>57</sup> are no longer considered legitimate.<sup>58</sup> “By all accounts, democracy indeed seems to be on a global march.”<sup>59</sup> A critical component of legitimate constitutionalism is the provision of an independent

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<sup>55</sup> A political collective is understood in its modern sense as a group of people who organize and bind themselves to form a self-regulating community distinct from others, a community evidenced by a set of rules, a rule making structure and organs of governance to institutionalize the community’s understanding of its own autonomy. CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* 169-70 (2003). A political collective is composed of “a collectivity of individuals who share an understanding of what is public and what is private within that collectivity . . . . They must recognize what matters are indeed matters of public concern within that set of individuals.” *Id.* (emphasis added). I use the term “collective” to avoid debate between concepts of community and society (ie: *Gemeinschaft* and *Gesellschaft*) – a debate tied to notions of political sovereignty and the constitution of the conventional state system that saw its apogee in the twentieth century. See, e.g., FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY* (2001).

In speaking of the persistence of a political system, it is impossible not to imply at the very least that the members of the system show some minimal readiness or ability to continue working together to solve their political problems. Otherwise there could be no expectation of compliance with any authoritative allocation of values. This notion lies at the heart of that aspect of a system that I have been calling its political community.

DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 172 (1965).

<sup>56</sup> See, e.g., Radhika Coomaraswamy, *Uses and Usurpation of Constitutional Ideology*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 159-172 (Douglas Greenberg, et al. eds., 1993).

<sup>57</sup> For an example of a once well known modern exercise in legitimation of that form, see, e.g., MARQUIS H. ITO, *COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN* 30 (Chuo Daigaku ed., Baron Miyoji Ito trans., 2d ed., 1978) (1906).

<sup>58</sup> See, e.g., ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* (1988); GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* (1987). The modern template may be best understood in the efforts to reconstruct Japan on modern constitutionalist structures after 1945. See, e.g., Harold S. Quigley, *Japan’s Constitutions: 1890 and 1947*, 41 *AM. POL. SCI. REV.* 865 (1947); Sakae Wagatsuma, *Guarantee of Fundamental Human Rights Under the Japanese Constitution*, 26 *WASH. L. REV.* 145 (1951). This sentiment is most powerfully evidenced in the mass movements against the current political structures of states in North Africa and the Middle East, dubbed the Arab Spring, that have influenced political action there for more than a generation. See, ASEF BAYAT, *LIFE AS POLITICS: HOW ORDINARY PEOPLE CHANGE THE MIDDLE EAST* (2010). Cf. JOSEPH KOSTINER, *MIDDLE EAST MONARCHIES: THE CHALLENGE OF MODERNITY* 2-3 (2000). *But see* BERNARD LEWIS, *THE SHAPING OF THE MODERN MIDDLE EAST* 59 (1994).

<sup>59</sup> MEHRAN KAMRAVA, *DEMOCRACY IN THE BALANCE: CULTURE AND SOCIETY IN THE MIDDLE EAST* 1 (1998). (arguing prospects for democratic revolution in the Middle East were far from certain).



institution to review and elaborate constitutional doctrine.<sup>60</sup> Especially in the West, the rule of law postulate can be effectuated only through the institution of some sort of judicial mechanism to interpret and apply the rule of law system against all institutions of the state apparatus and between people and the institutions of the state.<sup>61</sup>

Beyond this institutionalizing and legitimating objective, constitutionalism can be grounded on any number of legitimating value systems, each competing with the others for the allegiance of the greatest number of states.<sup>62</sup> When the source of values is the transcendent genius of the nation itself, <sup>63</sup> it is understood as nationalist constitutionalism.<sup>64</sup> When

<sup>60</sup> See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004). For an older expression of this notion, see, e.g., Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, 4 J. POL. 183 (1942).

<sup>61</sup> See, e.g., François Venter, *The Many Faces of Constitutionalism—Contemporary Challenges*, in FIVE DECADES OF CONSTITUTIONALISM: REALITY AND PERSPECTIVES (1945-1995) 21 (1999); Louis Favoreau, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38-62 (Louis Henkin & Albert J. Rosenthal eds., 1990); Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC. INQUIRY 763 (2002). For a critique of this notion as applied to China, see Backer, *A Constitutional Court*, *supra* note 2, at 593.

<sup>62</sup> See, e.g., Backer, *God(s) Over Constitutions*, *supra* note 3, at 11.

<sup>63</sup> The legitimacy of this view originates with Rousseau. “As long as several men in assembly regard themselves as a single body, they have only a single will which is concerned with their common preservation and general well being. In this case, all the springs of the State are vigorous and simple and its rules clear and luminous.” Jean-Jacques Rousseau, *Of the Social Contract*, Book IV, Chapter 1, in 38 GREAT BOOKS OF THE WESTERN WORLD 387, 425 (Mortimer J. Adler, ed., 1952). This idea was well illustrated in Carl Schmitt’s critique of the Weimer Constitution.

Schmitt allowed for the possibility of using ‘constitution’ correctly to designate the liberal idea of a closed system of norms . . . . And he was anxious at the outset to emphasize that it is an existential decision, not some ultimate norm, which is the basis of a constitution. The Weimar Constitution, he said, is grounded on the will of the German people.

DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* 52 (1999).

“A constitution is no more than the more or less formalized expression of a particular state, and the state itself is no more than the institutionalized expression of the political collectivity of the people, an entity that is ‘existentially present.’” *Id.* at 51-52.

<sup>64</sup> Ernest A. Young, *The Trouble with Global Constitutionalism*, 38(3) TEX. INT’L L. J. 527 (2003) (“I want to suggest that ‘sovereignty’ in American law is intimately bound up with the basically procedural nature of our constitutional commitments: The American people expect that certain decisions affecting them will be made through specified constitutional processes by people who are accountable to them.”). See generally Jed Rubenfeld, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 79 N.Y.U. L. REV. 1971 (2004). For its application to non-Western constitutionalism, see, e.g., Noah Feldman & Roman Martinez, *A New*

the values are sourced in the consensus of the community of nations, understood as common constitutional traditions or as the expression of consensus in international conventional law or customary international law,<sup>65</sup> it is termed transnational constitutionalism.<sup>66</sup> Such values can be sourced beyond the control of individuals in a number of other increasingly important ways. Theocratic constitutionalism is on the ascendant,<sup>67</sup> and natural law constitutionalism also has its adherents.<sup>68</sup> These forms of state ordering are incompatible – they cannot exist simultaneously and co-equally within a single constitutional system except when ordered hierarchically.<sup>69</sup> That incompatibility is grounded in their similar roles as approaches to the fundamental ordering of political systems – a rule of law based governance structure grounded in limits on state power and popular accountability based on law.<sup>70</sup>

Structure and values are at the heart of constitutionalism. Rule of law encapsulates the structuring ideals of constitutionalism. “The general cohesive power of law, in its nondespotic and tyranny-restricting role, is termed in Anglo-American legal usage as the rule of law . . . . These

*Constitutional Order? Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 *FORDHAM L. REV.* 883 (2006).

<sup>65</sup> See, e.g., MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001).

<sup>66</sup> See, e.g., Backer, *God(s) Over Constitutions*, *supra* note 9, at 11.

<sup>67</sup> See, e.g., Feldman, *supra* note 35; Ran Hirschl, *The Theocratic Challenge To Constitution Drafting In Post-Conflict States*, 49 *WM. & MARY L. REV.* 1179 (2008). “Over the past few decades, principles of theocratic governance have gained enormous public support in developing polities worldwide.” *Id.* at 1179; Backer, *Theocratic Constitutionalism*, *supra* note 35.

<sup>68</sup> See, e.g., EDWARD S. CORWIN, *THE ‘HIGHER LAW’ BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955); H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* (1993).

<sup>69</sup> Any political order that derives its authority from essentially nonpolitical sources – that is, God – is subject more to the whims of divine interpretation than it is limited by earthbound constraints on the use of government or state power. The same would also appear to be the case for political orders, such as Marxism and communism, that derive their authority from supposedly inevitable historical processes.

Daniel P. Franklin & Michael J. Baun, *Conclusion*, in *POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 219, 221 (Daniel P. Franklin & Michael J. Baun eds., 1995).

<sup>70</sup> See Mark Gould, *Islam, the Law, and the Sovereignty of God*, *HOOVER INSTITUTE AT STANFORD UNIVERSITY*, Policy Review No. 149 (June 2008), available at <http://www.hoover.org/publications/policy-review/article/5693>; RANDALL PEEREMBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* (2002); Radhika Coomaraswamy, *Uses and Usurpation of Constitutional Ideology*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 159 (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliveiro & Steven Wheatley eds., 1993).

expressions refer to partly similar assumptions and legal prescriptions found in the various traditions referring to the state's structure, organization and operations."<sup>71</sup> The source of the classic Anglo-American understanding of "rule of law," that is, rule of law in states with strongly developed and integrated independent judiciaries, can be found in the writings of the A.V. Dicey.<sup>72</sup>

The rule of law is usually understood in two senses.<sup>73</sup> First, rule of law is embedded in mandatory systems to maintain firm limits on any individual's arbitrary use of state power. This is the idea of rule of law in its process aspect, limiting the use of state power only when grounded in legitimately enacted law. Second, rule of law is understood in its substantive aspect as vesting the state with a critical role as guardian of a set of foundational communally embraced substantive norms that are to be protected and furthered through the use of state power grounded in law.<sup>74</sup>

It is understood that "constitutionalism has one essential quality: it is a legal limitation on government."<sup>75</sup> Law assumes a critical role in the avoidance of personalism in governance; it is the means by which conduct norms and governance systems can be institutionalized in a manner that opens the system to the people and ensures accountability. "The common idea in the various concepts is that the state's bodies act according to the prescriptions of law, and law is structured according to principles restricting arbitrariness . . . . To be sure, no constitutional system can exist without the rule of law."<sup>76</sup> This rule of law ideal acquired universalist aspirations after 1945.<sup>77</sup> These concerns are bound up in notions of process – protections against arbitrary actions on the part of government or its servants. Many of these notions are now understood as an aspect of "rule of law."<sup>78</sup> In this sense, rule of law can be understood as a mandatory element of constitutional systems.

Process alone is not enough to protect a polity from itself.<sup>79</sup> Rule of law or limits as a foundational component of constitutionalism also has a substantive aspect. Academics sometimes speak of positive as well as

<sup>71</sup> SAJÓ, *supra* note 54, at 205.

<sup>72</sup> See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 1790-410 (1927).

<sup>73</sup> See, e.g., Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001).

<sup>74</sup> See Backer, *The Rule of Law*, *supra* note 26, at 29.

<sup>75</sup> CHARLES HOWARD McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 21 (1947).

<sup>76</sup> SAJÓ, *supra* note 54, at 205.

<sup>77</sup> See HANNAH ARENDT, *ON REVOLUTION* 145 (1977).

<sup>78</sup> See PEERENBOOM, *supra* note 36, at 126-87.

<sup>79</sup> See, e.g., Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT'L & COMP. L.J. 199 (1997).

passive constitutionalism associated with the vindication of certain norms. As Arthur Miller observes:

Thus, we should talk about constitutionalism in terms of what government should do, rather than what it cannot or should not do. We must tackle the challenge posed by Leon Duguit many years ago: ‘Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of powers cannot do certain things; second, there are certain things they must do.’<sup>80</sup>

The principles under which legality is constituted becomes of paramount importance within modern constitutionalism. Friedrich Hayack, for example, noted that all “power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right.”<sup>81</sup> For many, the focus is on democracy,<sup>82</sup> or the role of the judiciary.<sup>83</sup> In a sense, constitutionalism is inverted into its indicia, and the indicia assume the privileged place in constitutionalist analysis. Samuel Issacharoff speaks of “the role of constitutionalism in stabilizing democratic governance in . . . fractured societies . . . because of the limitations it imposes on democratic choice.”<sup>84</sup>

If rule of law provides the appropriate limits to the forms of constitutionalist governance, then values provide the specific principles used to limit the choices available to the polity and its representatives with respect to the use of governance power. “Constitutionalism is thus a written constitution per se surrounded by a cloak of unwritten principles, values, ideals, procedures and practices.”<sup>85</sup> However, not all values are

<sup>80</sup> Arthur S. Miller, *Myth And Reality In American Constitutionalism*, 63 *TEX. L. REV.* 181, 204 (1984) (reviewing DON PRICE, *AMERICA’S UNWRITTEN CONSTITUTION: SCIENCE, RELIGION, AND POLITICAL RESPONSIBILITY* (1983) and HEBERT McCLOSKEY, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* (1983) (*quoting in part, LEON DUGUIT, LAW IN THE MODERN STATE* 26 (H. Laski trans., 1919))).

<sup>81</sup> See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 181 (1960).

<sup>82</sup> See, e.g., CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001); BORIS DEWIEL, *DEMOCRACY: A HISTORY OF IDEAS* (2000).

<sup>83</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Edward Rubin, *Judicial Review and the Right to Resist*, 97 *GEO. L.J.* 61 (2008). For a comparative perspective, see, e.g., Miguel Schor, *Mapping Comparative Judicial Review*, 7 *WASH. U. GLOB. STUD. L. REV.* 257 (2008).

<sup>84</sup> Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 *TEX. L. REV.* 1861, 1861 (2004).

<sup>85</sup> Vasilij A. Vlasihin, *Political Rights and Freedoms in the Context of American Constitutionalism: A View of a Concerned Soviet Scholar*, 84 *Nw. U. L. REV.* 257, 258 (1989). But one should also note that in a few important jurisdictions, an unwritten

constitutionalist. The racist values of fascism,<sup>86</sup> the militarism of Imperial Japanese constitutionalism<sup>87</sup> and the despotism of “big man” African dictatorships grounded in some sort of values ideology<sup>88</sup> are not legitimately constitutionalist. The key to values in constitutionalism, like that of rule of law, is to avoid despotism or tyranny. It also provides the values to which the political culture aspires. “Aspirational constitutionalism defines a country, a nation, in terms of its future, its goals and its dreams. Other countries’ constitutions and constitutional examples can be used to express this aspirational sense and may be positively selected precisely in order to do this.”<sup>89</sup> Imitation appears to be a great avenue for realizing at least the form of constitutional aspiration. Imitation can serve both national and transnational constitutionalist objectives; the form of constitutional governance can serve a variety of different substantive value systems. “For example, many second and third-wave European democracies may have adopted the model of the Federal Constitutional Court of Germany precisely to demonstrate that they, too, aspired to realize the constitutional principles that the Constitutional Court had helped Germany achieve.”<sup>90</sup>

There is a strong sense that the values chosen ought to reflect the particularities of the political culture from which it arises,<sup>91</sup> especially as to moral or ethical norms.<sup>92</sup> Still, these substantive notions themselves are value laden and ambiguous.<sup>93</sup> Within nationalist and transnationalist constitutionalist discourse, there is a rough standard of values — most

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constitution can serve the same purpose. Unwritten principles, values and ideals, when combined with key documents of constitutional stature, can provide the functional equivalent of a modern system grounded in a central written instrument. ERIC BARENDT, *AN INTRODUCTION TO CONSTITUTIONAL LAW* 26-34 (1998). “The constitution is therefore very largely a written one. The point is that it is *uncodified*. It is a jumble of diffuse statutes and court rulings, supplemented by extra-legal conventions and practices.” *Id.* at 34. (*emphasis added*)

<sup>86</sup> A. JAMES GREGOR, *THE IDEOLOGY OF FASCISM: THE RATIONALE OF TOTALITARIANISM* 241-82 (1969).

<sup>87</sup> See JOHN M. MAKI, *GOVERNMENT AND POLITICS IN JAPAN: THE ROAD TO DEMOCRACY* 29 (1962).

<sup>88</sup> See, e.g., Ama Biney, *The Legacy of Kwame Nkrumah in Retrospect*, 2 J. PAN AFR. STUD. 129, 129-59 (Mar. 2008).

<sup>89</sup> Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296, 299 (2003).

<sup>90</sup> *Id.*

<sup>91</sup> See Daniel P. Franklin, Michael J. Baun, *Introduction: Political Culture and Constitutionalism*, in *POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 1, 6-7 (Daniel P. Franklin & Michael J. Baun, eds., 1995).

<sup>92</sup> John Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 465 (1991).

<sup>93</sup> See Backer, *The Rule of Law*, *supra* note 26, at 29; Okoth-Ogendo, *Constitutions Without Constitutionalism*, *supra* note 54, at 65-80.

centering on human rights and principles of limited government. Within other rising constitutionalist traditions the foundations of values are frameworked within the strictures of pronouncements of the divine will<sup>94</sup> — and to some extent much of the language of that will can be understood to overlap nationalist and internationalist constitutionalist concerns. However, implementation may be quite different.<sup>95</sup>

But the ultimate purpose of constitutionalism is to deploy its understanding of the boundary of appropriate governance construction as a basis for judging political governance systems either legitimate or illegitimate. That purpose has great significance. It serves as a mechanism for the international community in the regulation of the relations among states. It also serves as the articulation of political aspiration, forming the basis through which a polity can take action to reform or replace a particular framework of governance. Both intervention and revolution are at the foundation of constitutionalism in its internal relations function and in its domestic legitimacy function.<sup>96</sup> It is inevitable that there will exist a gap between the social-political values principles encased in constitutionalist systems and the operation and elaboration of such principles, as well as their placement within a legal framework. This will surely provide a basis for a nation to judge itself and to judge those who would be given the authority to assert political power.

### III. THE TRADITIONAL STATE-PARTY MODEL OF POLITICAL ORGANIZATION: FROM LENINIST RUSSIA TO POST-REVOLUTIONARY CHINA

“There are two books, the constitution giving me citizenship and the Party constitution giving me Party privilege.”<sup>97</sup>

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<sup>94</sup> See, e.g., Ran Hirschl, *Holy Glocalization: Constitutions and Sacred Texts in the ‘Non-Secular’ World*, 32(2): HARV. INT’L REV. 38 (2010); Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-Conflict States*, 49(4) WM. & MARY L. REV. 1179 (2008). Cf. Kang Xiaoguang, *Confucianization: A Future in the Tradition*, 73(1) SOCIAL RESEARCH 77 (2006).

<sup>95</sup> The Cairo Declaration emphasized both the similarities and differences between the approaches of transnational and Islamist constitutionalism. See Cairo Declaration on Human Rights in Islam, 5 Aug. 1990, available at <http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm>.

<sup>96</sup> These consequences were made apparent, for example, in the ways in which the international community and the Honduran people reacted to the removal of President Zelaya in June 2009. The international component of constitutionalism as a legitimating device and its application to the internal construction of national constitutionalism was at the heart of the reaction to the Honduran constitutional crisis in the wake of the removal. See, e.g., Doug Cassel, *Honduras: Coup d’Etat in Constitutional Clothing?*, ASIL INSIGHT 13 no. 9, July 29, 2009, 1-6, available at <http://www.asil.org/files/insight090729pdf.pdf>.

<sup>97</sup> YAN JIAQI & GAO GAO, *TURBULENT DECADE: A HISTORY OF THE CULTURAL REVOLUTION 7* (D. W. Y. Kwok ed. & trans., 1996) (quoting Mao Zedong).

Over the course of roughly the last century, the State-Party model of governance has provided the traditional opposite to constitutionalists governance. This section provides a short description of those characteristics of State-Party theory that has been at the center of that determination and the evolution of State-Party theory from its earliest application in Leninist Russia to its evolution during the period of the Cultural Revolution in China. It suggests the basis for an understanding of this theory as anti-constitutionalist. Certainly that was the case as State-Party theory was elaborated within the Soviet Union and its satellites (to disastrous long-term effect).<sup>98</sup> It also suggests the path to legitimate constitutionalism, though one very different from that which the West has embraced.

The starting point for an understanding of the origins of classical notions of the State-Party construct is Lenin's *THE STATE AND REVOLUTION*.<sup>99</sup> The book focuses on the relation between the socialist proletarian revolution and the state. The purpose of the publication was to correct the distorted applications of Marxism by the bourgeoisie and opportunists within the labor movement.<sup>100</sup> In Lenin's view, these groups "omit, obscure, or distort" the revolutionary aspects of Marxism which call for the overthrow of the state.<sup>101</sup> According to Engels, "the State is . . . a product of society at a certain stage of development."<sup>102</sup> As such, it serves as the product and manifestation of irreconcilable antagonism among societal classes.<sup>103</sup>

The state arises when and where these class antagonisms cannot be reconciled.<sup>104</sup> As such, the state might best be understood as an instrumentality of a hegemonic class rather than of the people in whose name sovereignty is asserted.<sup>105</sup> The creation of this order legalizes and perpetuates oppression by serving as the moderator of conflict between the classes. The state is also an instrument of exploitation in the service of subordination, the state of the bourgeoisie exists to keep the class antagonisms alive, though in check.<sup>106</sup> To maintain its special public power

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<sup>98</sup> For the famous over-argument of the case, see FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). See also JACQUES DERRIDA, *SPECTRES OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING AND THE NEW INTERNATIONAL* 127-30 (Peggy Kamuf trans., 1993).

<sup>99</sup> VLADIMIR LENIN, *THE STATE AND REVOLUTION*, *COLLECTED WORKS*, 25 §4, at 381-492 (1917), available at <http://www.marxist.net/lenin/staterev/index.html>.

<sup>100</sup> *Id.* at 390-406.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> According to Marx, Lenin notes "the state could neither have arisen nor maintained itself had it been possible to reconcile classes." *Id.*

<sup>106</sup> *Id.* at 418-37.

above that of society, the state must tax and issue state loans.<sup>107</sup> Because the state is run and dominated by the most powerful, economically dominant class, it can serve only as an instrument of exploitation of wage-labor by capital.<sup>108</sup>

Against this construction, there appears to be no compromise – no utility in the instrument over the long term for the benefit of mass movement revolutionary parties. To overcome this system of domination by the few in the name of the masses, Lenin would call the proletariat to take down the state and raise themselves within a different sort of collective venture.<sup>109</sup> Lenin rejects as opportunism calls for a stronger state in the service of the workers, which in hindsight is an ironic, yet insightful, description of the Soviet Union after 1929 under Stalin and his successors. As Lenin argued:

[T]he opportunism now prevailing that trains the members of the workers' party to be the representatives of the better-paid workers, who lose touch with the masses, 'get along' fairly well under capitalism, and sell their birthright for a mass of pottage, i.e., renounce their role as revolutionary leaders of the people against the bourgeoisie.<sup>110</sup>

The state is thus seen both as ultimately unnecessary and inimical to the attainment of the objectives of the Marxist revolutionary project. The question remains though: Once overthrown, ought the capitalist state be replaced with a socialist one? Here is the great ambiguity that has served as a source of opportunism for purported Marxists constructing states built on cults of personality in the name of "eventualism."<sup>111</sup> Lenin sug-

<sup>107</sup> *Id.*

<sup>108</sup> According to Lenin, "a democratic republic is the best possible political shell for capitalism, and therefore, once capital has gained possession . . . it establishes its power so securely, so firmly, that no change of persons, institutions or parties in the bourgeois-democratic republic can shake it." *Id.*

<sup>109</sup> There is thus a great tension within Leninist theory about the state and its relation to the revolutionary Marxist movement. There is a sense that the state is a representative construct, and that its utilization would pollute the revolutionary cause. Thus, for Lenin:

[A] state arises, a special power is created, special bodies of armed men, and every revolution, by destroying the state apparatus, shows us the naked class struggle, clearly shows us how the ruling class strives to restore the special bodies of armed men which serve it, and how the oppressed class strives to create a new organization of this kind, capable of serving the exploited instead of the exploiters.

*Id.* at 393-96.

<sup>110</sup> *Id.* at 406-10.

<sup>111</sup> By eventualism is understood the notion of a process moving collective governance from the forms of democratic bourgeois organization to some sort of a more intimate and less formal system of commune organization (and thus to communism). While the notion is essential to the transitional aspects of Marxist Leninist theory, it is also a point that can easily be subverted in the name of that



gests that once the proletariat has seized control of the state, it is expected that the apparatus of the state will wither away.<sup>112</sup> When the state at last “becomes the real representative of the whole society, it renders itself unnecessary.”<sup>113</sup> As such, revolutionary change requires a transitional period in which the forms of the former social and political order serve as the bridge to the attainment of fundamental transformation. It is in this transitional phase that there is a role for the state as a disappearing entity — as the framework through which the Communist Party, as a vanguard representative of the ultimate objective (no state) can bring it about. The Communist Party is understood as torchbearer — the vanguard element — guiding the proletariat through this process.<sup>114</sup>

The idea of the Party as vanguard, and its entanglement with the state, is central to the idea of transformation of governance. The notion then is of the state as instrument, the tool through which vanguard elements of society could work to make the state itself obsolete. It is in this sense that Lenin then draws on a variety of elements from 19th century Marxist theory and pre-Marxist theory to suggest the way in which vanguard parties would use the state as an instrument of its own destruction.<sup>115</sup> It is in this transitional sense that the party is in power and may temporarily utilize the state apparatus to its ultimate ends.<sup>116</sup> The emphasis was on the vanguard status of the Party and its consequential obligation to induce

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theory, and in the process subvert generations of European Western fellow travelers. See, e.g., JEAN PAUL SARTRE, *THE GHOST OF STALIN* (Martha H. Fletcher & John Kleinschmidt trans., 1968).

<sup>112</sup> LENIN, *supra* note 99, at 381-492. For a discussion of the concept that draws on the way the concept was transposed to Chinese theory before Deng Xiaoping, see Eugene Kamenka & Alice E.-S. Tay, *Marxism, Socialism and the Theory of Law*, 23 COLUM. J. TRANS'L L. 217, 242, 244 (1985).

<sup>113</sup> “The proletariat seizes from state power and turns the means of production into state property to begin with. But thereby it abolishes itself as the proletariat, abolishes all class distinctions and class antagonisms, and abolishes the state as state.” *Id.*

<sup>114</sup> The first act by which the state comes to represent the whole of society occurs when the coercive structure of the state is dismantled and reassembled by transferring the means of production from its traditional class bound owners to the vanguard elements of society in the name of all. *Id.*

<sup>115</sup> Describing the self-destruction of the state through “withering” as the government of persons is replaced by the administration of things, and by the conduct of processes of production. LENIN, *supra* note 99, at 381-492.

<sup>116</sup> Lenin notes that

[B]y educating the workers' party, Marxism educates the vanguard of the proletariat, capable of assuming power and leading the whole people to socialism, of directing and organizing the new system, of being the teacher, the guide, the leader of all the working and exploited people in organizing their social life without the bourgeoisie and against the bourgeoisie.

*Id.* at 406-10.

“right thinking” in a process that would obsolete both state and party as they merged with the people.

There is both difficulty and a danger during the transition because the vanguard assumes the rhetorical stance of the very class that it displaced. The Party thus runs the risk of transitioning from a vanguard into a class party like that it replaced instead of serving to oversee the transition from a state to a communist society.<sup>117</sup> The transitional nature of the post-bourgeoisie state might also permit the vanguard to resort to those mechanics of coercion that served as the basis for class subordination before the start of the revolutionary transformation.<sup>118</sup> Still, in striving for socialism, Lenin is convinced that as the masses transition from socialism to communism, the need for violence against people will vanish altogether as people become accustomed to observing the elementary conditions of social life without subordination.<sup>119</sup>

In a higher phase of communist society, after the enslaving subordination of the individual to the division of labor (and with it also the antithesis between mental and physical labor) has vanished, after labor has become not only a livelihood but life's prime want, after the productive forces have increased with the well-round development of the individual, and after all the springs of cooperative wealth flow more abundantly – only then can the narrow horizon of bourgeois law be left behind in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs.<sup>120</sup>

And indeed, for a while in the last century it appeared to some that Leon Trotsky's vision of a stateless world globalized within Communism was irresistible.<sup>121</sup>

History has evidenced the contradictions and tensions of this view, and the resulting trends in governance. Prominent among them were the

<sup>117</sup> This is essentially the route taken by the Russians and those in their thrall after 1917. SARTRE, *supra* note 87. This was also a great criticism of the Catholic Church in opposition to European Marxist Leninist States. See, e.g., FULTON J. SHEEN, COMMUNISM AND THE CONSCIENCE OF THE WEST 86-122 (1948).

<sup>118</sup> See, e.g., *id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at ch. V, § 4.

<sup>121</sup> As a later Chinese commentator noted:

The completion of the socialist revolution within national limits is unthinkable. One of the basic reasons for the crisis in bourgeois society is the fact that the productive forces created by it conflict with the framework of the national state. . . . The socialist revolution commences on the national arena, is developed further on the inter-state and finally on the world arena. Thus, the socialist revolution becomes a permanent revolution in a newer and broader sense of the word; it attains completion only in the final victory of the new society on our entire planet.

LI FU-JEN, REVOLUTIONARY TEACHER OF THE COLONIAL PEOPLES 151-55 (1994) (citing LEON TROTSKY, THE PERMANENT REVOLUTION (1930)), available at <http://www.marxists.org/archive/glass/1944/08/teacher.htm>).

relationship of party to state, of democracy to dictatorship, and of the proletariat to the party. In effect, Marxist-Leninist mass movement revolutionary governments were confronted with the same issue that all governments founded on a critical mass of assumptions face — how to preserve the character of the state against those who would turn away from the normative framework on which it is based without simultaneously betraying those principles. This problem plagues Western democracies as well. The stakes, even at the beginning, were high — namely the legitimizing basis of assertions of power by the Bolsheviks (and later by other communist mass movement parties). “If the dictatorship, on the other hand, frankly abolished proletarian democracy it would deprive itself of historic legitimacy, even in its own eyes.”<sup>122</sup> On the other hand, failure to limit the power of the masses to act could threaten the conceptual foundations of the state — the equivalent, perhaps, of permitting an electorate to adopt a form of governance that would fundamentally change the character of the state. This is a course of action that even Western democratic theorists find problematic.<sup>123</sup>

Following Lenin’s death, the choice that the Soviets made was to emphasize dictatorship, hierarchy, obedience and a monolithic state structure. As Deutscher wrote:

It would cease to be a proletarian dictatorship in the strict sense. Its use of that title would henceforth be based on the claim that it pursued a policy with which the working class, in its own interest, ought and eventually must identify itself, but with which it did not as yet identify itself. The dictatorship would then at best represent the idea of the class, not the class itself.<sup>124</sup>

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<sup>122</sup> See ISAAC DEUTSCHER, *THE PROPHET ARMED: TROTSKY 1879-1921* 422 (1968).

<sup>123</sup> See, e.g., JÜRGEN HABERMAS, *THE DIVIDED WEST* (2006). Vivian Curran has written brilliantly about the problem of the use of the forms of democratic and mass action to undo democratic structures and values in the context of fascist France and Germany. See, Vivian Groswald Curran, *Fear of Formalism: Indications From the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 CORNELL INT’L L. J. 101 (2002). Some constitutions have been structured to make it harder for forms of constitutional action to be used to subvert the constitutional order. Under German Basic Law, not only are some of the critical substantive value provisions subject to limits on amendment (see German Basic Law Sec. 78), but the German Federal Constitutional Court has also constructed a doctrine of unconstitutional constitutional provisions (ie: provisions that violate core principles of constitutional law). See the German Constitutional Court’s Southwest Case, reprinted with commentary in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1997).

<sup>124</sup> DEUTSCHER, *supra* note 122, at 422.

Totalitarianism served as the conceptual fig leaf over a dictatorship<sup>125</sup> that rejected basic constitutionalist assumptions — rule of law, popular sovereignty and the like — in favor of assumptions (embraced in equal measures by mid 20th century fascist regimes) of the merger of the individual into the mass and of the mass into the leadership of party.<sup>126</sup>

Instead of the state withering away, the Party became institutionalized within the state apparatus, and the government became an instrument through which Party power was asserted.<sup>127</sup> This created a state order overseen by a comfortable group of Party bureaucrats and the perpetuation of a totalitarian state organization under the rule of the Party in power: A Party that itself masked an aristocratic or feudal organization in which hierarchical power relationships were key. This failure was well documented, especially within the satellite states of the Soviet Union as it approached senility and oblivion.<sup>128</sup> The Chinese explained the notion as

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<sup>125</sup> For an interesting discussion of differences in the conception of totalitarian governments as dictatorships or regimes, in which both fascist and Soviet communist regimes fit, see ROSEMARY H. T. O'KANE, *PATHS TO DEMOCRACY: REVOLUTION AND TOTALITARIANISM* 113-65 (2004). O'Kane contrasts notions of totalitarianism as an ideologically autonomous State-Party bureaucratic construct with totalitarianism as a regime in which both ideology and the state serve as a façade and are sustained by a cult of personality. *Id.* 127-29 (citing to germinal work in the field: CARL JOACHIM FRIEDRICH & ZBIGNIEW BRZEZINSKI, *TOTALITARIAN DICTATORSHIP AND AUTOCRACY* (1965) and HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1958)). The differences between Friedrich and Brzezinski's institutionalism approach and Arendt's charismatic leader approach appear to capture the differences between authoritarian and totalitarian regimes. See, e.g., John H. Hallowell, *Plato and the Moral Foundation of Democracy*, in *PLATO: TOTALITARIAN OR DEMOCRAT?* 129 (Thomas Landon Thorson ed., 1963).

<sup>126</sup> See GREGOR, *supra* note 86.

<sup>127</sup> As Stalin made clear in the 1930s:

We are for the withering away of the state. But at the same time we stand for a strengthening of the proletarian dictatorship, which constitutes the most powerful, the mightiest of all governing powers that have ever existed. The highest development of governmental power for the purpose of preparing the conditions for the withering away of governmental power, this is the Marxian formula. Is this 'contradictory?' Yes, it is. But this contradiction is life, and it reflects completely the Marxian dialectic.

Julian Towster, *The Soviet Orbit: Union Of Soviet Socialist Republics*, in *EUROPEAN POLITICAL SYSTEMS* 568 (Taylor Cole ed., 1960) (citing JOSEPH STALIN, *VOPROSY LENINIZMA* 427 (1934)).

In the years that followed, he strongly emphasized this view, claiming in 1933 that increased governmental power was necessary to "put an end to remnants of the dying classes." By 1938 this increased power was deemed essential for the defense of the country, since the victory of socialism in the U.S.S.R. could not be considered final as long as it was surrounded by hostile states." *Id.*

<sup>128</sup> The Czechoslovak example was particularly well understood in the West. According to Czechoslovak statutes, the foundation of the Party's internal life was "inner-Party democracy" and its cornerstone was "democratic centralism." "Lenin's

one of democratic dictatorship grounded in class conflict — democratic representation through the Party for revolutionary elements, from its core in worker-peasant interests, and dictatorship for counterrevolutionary class elements, usually identified as feudal or bourgeois classes.<sup>129</sup>

The difficulty of democratic dictatorship wasn't necessarily in the fact of Party leadership, or in the suspension of proletarian democracy under the tutelage of the Party. The problem arose because even within the Party there was virtually no space for the expression of proletarian democracy in any form and the totalitarian turn in Communism had been criticized as a perversion of the original idea of Party and state.<sup>130</sup> Trotsky, the State-Party's author and also one its most prominent victims, most clearly described the consequences of institutionalizing dictatorship, contributing to a questioning of the legitimacy of State-Party systems as unrepresentative of the people from whom they ostensibly derived their authority.<sup>131</sup>

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and Stalin's bolshevik principle of democratic centralism," said Gottwald, "offers a reliable guidance on how to build the Party and how to shape the mutual relationship of its organs on all levels." [Rudé právo, December 8, 1951]. Copying Soviet rules, the KSĚ statutes refer to it as "the guiding principle of the organizational structure of the Party" and use an exact translation of the Russian formula to spell out its four basic points: (a) election of leading Party organs, from lowest to highest; (b) periodic accountability of elected organs to the organizations which elected them; (c) strict Party discipline and subordination of the minority to the majority; and (d) the unconditionally binding character of the decisions of higher organs on lower organs.

At face value, these four elements of democratic centralism are compatible with the concepts of democracy. In theory, their use would not impair the democratic character of the Party embracing them. But, in adopting the Soviet formula, communist leaders of Czechoslovakia absorbed simultaneously the body of dictatorial usages and practices that have grown around it in its native Russian habitat and distorted the formula's original meaning. Consequently, the gap between the theory and the practice of democratic centralism is almost as wide in Czechoslovakia as it is in the country of its origin. This can be illustrated by taking the four basic ingredients of democratic centralism and comparing their democratic phraseology with actual Party conditions.

EDWARD TABORSKY, COMMUNISM IN CZECHOSLOVAKIA 1948-1960 68-69 (1961).

<sup>129</sup> See STUART R. SCHRAM, THE POLITICAL THOUGHT OF MAO TSE-TUNG 78-79 (1963); YIJANG DING, CHINESE DEMOCRACY AFTER TIANANMEN 4-6 (2002).

<sup>130</sup> See GEORGE ORWELL, ANIMAL FARM (1945).

<sup>131</sup> As Deutscher trenchantly noted:

When Trotsky now urged the Bolshevik party to 'substitute' itself for the working classes, he did not, in the rush of work or controversy, think of the next phases of the process, although he himself had long since predicted them with uncanny clear-sightedness. 'The party organization would then substitute itself for the party as a whole; then the Central Committee would substitute itself for the organization; and finally a single dictator would substitute himself for the Central Committee.' The dictator was already waiting in the wings.

DEUTSCHER, *supra* note 122, at 435.

From a constitutionalist perspective, the emphasis moved from the people to the dictatorship, as Soviet inspired political systems sought to “harden themselves monstrously into their cadaverous rigor.”<sup>132</sup> So, by the 1960s all that was left was the state as a governance apparatus of the Party, and an internal Party structure that emphasized centralist elements and little by way of democratic ideology. Law, and rule of law, were subsumed within “politics” and made to serve as an instrument of the will of the people, as expressed through the State-Party. The ideology of the system itself suggested that law, like the state, served only as an instrument of higher order values — politics and economics.<sup>133</sup> Law, like the state system, would eventually wither away, but until then would remain the tool for expressing the economic and social structure of society.<sup>134</sup>

That formulation of law itself might produce a deviation from founding ideals and has been the object of criticism.<sup>135</sup> The bureaucratic corporatism of Stalin and Castro, in which party and state were conflated in a manner that emphasized the dictatorship, even within the party structure, was deeply incompatible with constitutionalist notions. However, through the 1980s, that was a point of pride in those states.<sup>136</sup> As Herbert Marcuse said:

It involves a sweeping condemnation of the social world of the mass democratic capitalist countries, and points out that under conditions of late industrial society, the decline of the individual, the penetration of privacy, the manipulation of public opinion, the end of genuine culture, and even ideological transcendence, are established ‘either by terror, by the standardizing trends of ‘mass culture’ or by a combination of both.’<sup>137</sup>

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<sup>132</sup> DERRIDA, *supra* note 98, at 105.

<sup>133</sup> For a discussion of the concept of law within the Soviet Union, *see, e.g.*, PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 183-202 (1999); WILLIAM BUTLER, *SOVIET LAW* (1987).

<sup>134</sup> *See, e.g.*, CHRISTINE SYPNOWICH, *THE CONCEPT OF SOCIALIST LAW* (1990). “The three conceptions of law in the Marxist tradition, despite their differences, all share a commitment to the doctrine of the withering away of law and state: the source of law lies in relationships of conflict . . . .” *Id.* at 23.

<sup>135</sup> “In the absence of legality, it is a repressive extra-legalism that will regulate socialist society, either nakedly, or masquerading as law.” *Id.* at 27.

<sup>136</sup> *See, e.g.*, FIDEL CASTRO RUZ, *WAR, RACISM AND ECONOMIC JUSTICE: THE GLOBAL RAVAGES OF CAPITALISM* (Alexandra Keeble ed., 2002); FIDEL CASTRO RUZ, *CAPITALISM IN CRISIS: GLOBALIZATION AND WORLD POLITICS TODAY* (David Deutschmann ed., 2000).

<sup>137</sup> ANDREW ARATO, *FROM NEO-MARXISM TO DEMOCRATIC THEORY: ESSAYS ON THE CRITICAL THEORY OF SOVIET-TYPE SOCIETIES* 26 (1993) (citing HERBERT MARCUSE, *SOVIET MARXISM* 197 (1958)).

These ideas were particularly well developed in the African context.<sup>138</sup> “The state is conceived as the most effective agency for effecting the nation’s will, a will that can only become conscious via an explicit and exclusive political ideology.”<sup>139</sup> Not just conscious via ideology — but conscious through the channeling of popular will by a “leader,” for that consciousness required a “big man” to activate it. The archetypical example was Kwame Nkrumah of Ghana, who merged traditional African tribal traditions with Leninist vanguard traditions.<sup>140</sup> Like Stalin and others, the notion of democratic centralism was manipulated to emphasize centralism and marginalize democratic elements, even within the systems of internal party governance. Democratic centralism in Africa was viewed as the fig leaf covering descent into authoritarian rule.<sup>141</sup> “Internal to this thinking was the belief that any arrest or obstruction in the implementation of the plan was the result of sabotage, imperialism, or neo-colonial forces at work seeking to overthrow the government.”<sup>142</sup> The consequence was the creation of states that might work well within the theoretical models on which they were constructed, but were also fundamentally anti-constitutionalist. In the first decades of African national liberation after the Second World War it was common for states to adopt “‘techniques of suppression’ to achieve not only unanimity but also the dominance of the government over the opposition and the state over the entire society.”<sup>143</sup>

Still, nothing delegitimizes a political framework like failure. This was particularly true in Africa<sup>144</sup> and in China.<sup>145</sup> By the 1980s, the contradictions of State-Party governance and proletarian democracy as practiced

<sup>138</sup> ARISTIDE R. ZOLBERG, *CREATING POLITICAL ORDER: THE PARTY STATES OF WEST AFRICA* 1-2 (1985).

<sup>139</sup> GREGOR, *supra* note 86, at 369.

<sup>140</sup> ALI MAZRUI, *NKRUMAH’S LEGACY AND AFRICA’S TRIPLE HERITAGE BETWEEN GLOBALIZATION AND COUNTER-TERRORISM* (2000).

<sup>141</sup> *Id.* “Freedom and authority are often thought of today as being in opposition to one another, and we frequently hear the modern dictatorships referred to as ‘authoritarian’ . . . The totalitarian dictatorship is the embodiment not of authority but of naked power – it repudiates the demands of reason, justice, and God.” John H. Hallowell, *Plato and the Moral Foundation of Democracy*, in *PLATO: TOTALITARIAN OR DEMOCRAT?* 129, 137 (Thomas Landon Thorson ed., 1963). *See also*, AMOS PERLMUTTER, *MODERN AUTHORITARIANISM* 24-28 (1981).

<sup>142</sup> Biney, *supra* note 88, at 143.

<sup>143</sup> *Id.*

<sup>144</sup> *See* MARTIN MEREDITH, *THE STATE OF AFRICA: A HISTORY OF FIFTY YEARS OF INDEPENDENCE* (2006).

<sup>145</sup> If religious wars led to the notion of tolerance in the West, the tragedies of factional fights during the Cultural Revolution resulted in the idea of tolerance in China . . . . [T]he separation of the political economy from orthodox ideology, in particular, the separation of politics from the economy, facilitated a limited pluralist development in China.

BAOGANG HE, *THE DEMOCRATIZATION OF CHINA* 164 (1996).

in Soviet or African style State-Party governmental apparatuses became increasingly ridiculed as anachronistic. The attacks became more pronounced after the collapse of Soviet style Marxist-Leninist political organization and the embrace of constitutionalism by Russia and the states of the old Soviet Empire.<sup>146</sup> Either way, the relation between state and party was defined in terms of ‘politics’ and ‘power,’ rather than ‘legal’ and ‘systemic’ terms.<sup>147</sup>

The rules of constitutionalism would have necessarily been rejected as a disguised means of privileging class elements. In their place would be substituted a universal values based program of governance meant to overturn the current conceptions of state governance and provide a new framework, or language, for understanding political reality. “A world army of the revolutionary proletariat — that is what now stands for communism, and, at the Congress just ended, received organizational form and a clear, precise and detailed programme of action.”<sup>148</sup> Constitutionalism is ultimately rejected in favor of a direct application of rule through conflation of law and politics. “As a state philosophy, Marxism-Leninism presents itself as an all-inclusive system, in which all things are held to be dialectically interrelated, so that a mistaken idea in any one field (including law, or even natural science) must ultimately lead to mistaken views in every other field, including politics.”<sup>149</sup>

The anti-constitutionalism is apparent — not only in its totalitarianism, an easy target, but also in its straightforward transition from a dictatorship of a vanguard party to the personal dictatorship of the leader of the vanguard party. “First and foremost, there is an ideology of totalitarianism, a collection of reasoned vindications in support of a type of society minimally characterized by a mass movement of solidarity animated by a specific *Weltanschauung* (ie: “rule by a single party hierarchically organized under the charismatic or pseudocharismatic rule of a leader in an

<sup>146</sup> Thus, for example, Derrida insightfully suggested:

Now, as one can see foreshadowed, it seems, everywhere in the world today, the structure of the party is becoming not only more and more suspect (for reasons that are no longer always, necessarily, ‘reactionary,’ those of the classical individualist reaction) but also radically unadapted to the new — tele-techno-media — conditions of public space and political life, of democracy, and of the new modes of representation (both parliamentary and non-parliamentary) that they call up.

DERRIDA, *supra* note 98, at 102.

<sup>147</sup> Daniel L. Nelson, *Introduction: After Authoritarianism*, in *AFTER AUTHORITARIANISM: DEMOCRACY OR DISORDER?*, vii (Daniel N. Nelson ed., 1995) (arguing authoritarianism “share[s] indelible markings that denote an elite’s domination of society through state control”).

<sup>148</sup> VLADIMIR LENIN, *The Second Congress Of The Communist International*, in *COLLECTED WORKS 270-71* (Julius Katzer ed., 1977).

<sup>149</sup> Maimon Schwartzchild, *Variations on an Enigma: Law in Practice & Law on the Books in the USSR*, 99 *HARV. L. REV.* 685, 685-86, n. 15 (1986).



institutional system that provides for state monopoly of communication, coercion and economic control”).<sup>150</sup> That ideology of charismatic leadership, however clothed, is the abyss that separates such systems from constitutionalist legitimacy; the issue of institutional government or even of party plays only a supporting role.

It was both the tentativeness of the state apparatus, as well as its characterization as tool rather than institution, that post-revolutionary China embraced for long periods after 1949 and more intensely between the late 1950s and late 1970s. “Maoism, the ideological engine that drove CCP rule since 1949, insisted that policy innovations be tentative and that implementation be adjusted to reflect specific local conditions; its imprint on legislative drafting remains strong.”<sup>151</sup> In any case, this very brief excursus through the framework of State-Party conception serves to make a point critical to the analysis that follows: that the emphasis on the State-Party form of governance placed heavy emphasis on the state portion of the relationship. More importantly, the party aspect of the State-Party construct suggested cover for a dictatorship — the privileging of a Praetorian element in the state whose privileged position was dependent on obedience to the leader. Through a perversion of the original notion of democratic centralism (where the emphasis shifted from democratic to centralism), this dictatorship could present itself as democratic while asserting authority through a tyrant.<sup>152</sup> What was institutionalized was power in the hands of an individual and his retainers; what was bureaucratized was the system of exploitation of theory in the service of the few, without law and without limits on the discretion of the purported servants of party and state.

It had never occurred to Marxists to reflect on whether it was possible or admissible to try to establish socialism regardless of or against the will of the working class. They simply took that will for granted. For the same reason it seemed to the Bolsheviks as clear as daylight that the proletarian dictatorship and proletarian (Soviet) democracy were only two complementary and inseparable aspects of the same thing . . . Now, then, a conflict arose between the two aspects of the Soviet system.<sup>153</sup>

Historically caught up in the contradictions of mass movement revolutionary parties, the Soviet response set the model, which was followed for

<sup>150</sup> GREGOR, *supra* note 86, at 361; ARENDT, ON THE ORIGINS OF TOTALITARIANISM, *supra* note 125, n. 140.

<sup>151</sup> Lubman, *Bird in a Cage*, *supra* note 14 at '384-85.

<sup>152</sup> YIJANG DING, CHINESE DEMOCRACY AFTER TIANANMEN 5 (2002). Ding explains the importance of the centralism portion of democratic centralism during the Mao Zedong period and suggests that democratic movements appeared to flow from the top down that “always resulted in the strengthening of the absolute leadership of the party centre and the supreme leader.” *Id.* at 6.

<sup>153</sup> DEUTSCHER, *supra* note 122, at 421-22.

several generations throughout the Marxist-Leninist world.<sup>154</sup> That response also effectively served to reject the possibility of constitutionalist legitimacy as a basis of state, party or national legitimacy. For a long time this sort of rejection — as theory and practice — did not matter. However, things change. To gauge the nature and profundity of that change, its potential and its actuality, it is necessary to turn to the development of Chinese governance theory over the last thirty years.

#### IV. MOVING TOWARD A NEW MODEL OF THE STATE-PARTY: FROM DENG XIAOPING TO HU JINTAO, AN EVOLVING IDEOLOGICAL CONSTRUCTION

Like constitutionalism, State-Party governance theory has evolved. In China particularly, the push towards what the CCP refers to as scientific development in the political field<sup>155</sup> has produced a great leap in the sophistication of the concept. This section describes the form of the transformation that is occurring in China, a transformation that provides a basis for its increasing conformity to modern global constitutionalist values. For China, transformation required overcoming the problems and limitations of the Soviet approach to post revolutionary mass movement proletariat democracy. It suggests that, unlike the ossification that resulted from the Stalinist settlement of Marxist-Leninist governance in Soviet dominated states, the Chinese have been able to fashion, over the course of the last thirty years, the foundations of a different approach to the great fundamental contradiction of post revolutionary governance — the legitimation of party leadership in governance in a proletariat mass democracy organized along traditional lines in a state organized under law. Understanding this conceptual transformation is the key to understanding both the emergence of a post-Mao Zedong conception of the relationship between state, Party and government, and the organization of that relationship within a rule of law framework.

Much more than an embrace of rule of law and a constitutionalist *Weltanschauung* is at stake in this enterprise. The shift from a revolutionary mass movement denominating a “Party” to a governing apparatus at the heart of a state and nation also denominated “Party” has taken over half a century. The contours of that change are becoming clearer. There is now a growing gulf between the self-conception of the CCP as a revolutionary band well outside any form of legitimate power and the immense

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<sup>154</sup> See, e.g., FRANZ SCHURMANN, *IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA* (1968).

<sup>155</sup> For a discussion of scientific development, see, e.g., Joseph Fewsmith, *Promoting the Scientific Development Concept*, CHINA LEADERSHIP MONITOR, Summer 2004, <http://www.hoover.org/publications/clm/issues/2904171.html>. For its most recent application in Chinese governance theory, see Hu Jintao, Report at 17th National Congress of the Communist Party of China (Oct. 15, 2007), available at [http://news.xinhuanet.com/english/2007-10/24/content\\_6938749.htm](http://news.xinhuanet.com/english/2007-10/24/content_6938749.htm).

political movement overseeing a state apparatus as it seeks to maintain its role as the supreme embodiment of political authority. The movement from a conception of Party within, rather than outside the state, without the embrace of the individualist turn of the Soviet model, suggests that the CCP has chosen a different and, in the view of this author, plausible path inherent in Marxist-Leninist theory at its inception more than a century ago. Anti-constitutionalism was the status quo in 1979,<sup>156</sup> by 1981 the theoretical framework pointed to something different.<sup>157</sup> Twenty years later a constitutionalist State-Party could be discerned.<sup>158</sup> From this “something different,” it may be possible to discern the foundations of a unique developing theory of governance.

To understand this fundamentally important change at the level of theoretical possibility, it is necessary to journey from the nascent State-Party framework fashioned by the newly institutionalized worker party state under Mao Zedong, through the vast consolidation and deepening of some of the critical elements lying quietly within that Maoist framework articulated by Deng Xiao Ping and Jiang Zemin. Lastly, it requires an appreciation of the current efforts to put this together and implement a theory through the current (but by no means complete) “elaboration of scientific development” as the legitimating principle and *Ba rong ba chi* (八荣八耻)<sup>159</sup> as the politico-ethical principles articulated by Hu Jintao.

The Mao Zedong era represents a formative period in the development of contemporary Chinese political thought. Its great importance to the development of Chinese political theory as well as its effects on what

<sup>156</sup> It could be well illustrated by the ideological line — the ‘two whatevers.’ The ‘two whatevers’ refers to the statement that “we will resolutely uphold whatever policy decisions Chairman Mao made, and unswervingly follow whatever instructions Chairman Mao gave.” This statement was contained in a joint editorial, entitled “Study the Documents Well and Grasp the Key Link.” It was printed on February 7, 1977 in *Renmin Ribao* (People’s Daily), the journal *Hongqi* (Red Flag) and *Jiefangjun Bao* (Liberation Army Daily). The People’s Daily version is available at <http://english.peopledaily.com.cn/dengxp/vol2/note/B0180.html>.

<sup>157</sup> Deng Xiaoping declared:

We should criticize wrong ideologies whether they are Left or Right. Emancipation of the mind, too, means opposing both Left and Right ideologies. The call by the Third Plenary Session of the Eleventh Central Committee for emancipating our minds was directed at the ‘two whatevers,’ and the emphasis was on correcting Left errors. Later a Right deviation emerged that must, of course, also be corrected.

Deng Xiaoping, *On Opposing Wrong Ideological Tendencies*, March 27, 1981, 2 *SELECTED WORKS OF DENG XIAOPING* (1975-82), available at <http://english.people.com.cn/dengxp/vol2/text/b1500.html>.

<sup>158</sup> PEERENBOOM, *supra* note 36.

<sup>159</sup> See Larry Catá Backer, *Ideological Campaigns and the Creation of a “Higher Law” in China: “Ba rong, ba chi” or the “Eight Honors, Eight Disgraces,”* LAW AT THE END OF THE DAY (Aug. 6, 2006), <http://lcbackerblog.blogspot.com/2006/08/ideological-campaigns-and-creation-of.html>.

would become contemporary constitutional theory cannot be underestimated. Mao Zedong developed his thought during a time of great dynamism in the history of China and the CCP; it was also a time that largely marked the CCP as an outsider. The CCP was not merely a vanguard party, but for a long time it was a revolutionary party. Even after the end of the civil war, the CCP continued to think of itself as outside the apparatus. Zhu Soli explained: “Despite the many political differences between the CCP and its former arch-rival, the Nationalist Party (known as the Guomindang or GMD) . . . the CCP never used the GMD’s often deployed concept ‘State-Party.’”<sup>160</sup> However, the CCP, like its GMD counterpart, also inherited the almost century old intellectual tradition of the separation between state, as governmental apparatus, and a political apparatus that must necessarily exist outside the administrative apparatus of government. The “CCP inherited the political tradition, initiated by Sun Yat-Sen and pursued by the GMD, comprised of a ‘party construction of the state,’ ‘party rule of the state,’ and ‘party above the state.’”<sup>161</sup> This founding idea, when combined with Marxist-Leninist theory, serves as the bedrock on which both the Maoist (leftist) and Dengist (rightist) conceptions of the relationship between the political and ministerial aspects of state organization are built.

It was the process of moving from an outsider to an insider conceptualization of the CCP’s position within China that produced a large measure of dynamism in the relations of CCP to state and nation.<sup>162</sup> This was a

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<sup>160</sup> Zhu Soli, *Political Parties in China’s Judiciary*, 17 DUKE J. COMP. & INT’L L. 533, 534 (2007).

<sup>161</sup> *Id.*

<sup>162</sup> This dynamic started well before the end of the Mao Zedong era. Deng Xiaoping noted the consequences of moving from outside to inside leadership on the constitution of the CCP:

Being the party in power can also easily breed conceit and self-complacency among the membership. Some Party members become puffed up over the smallest success in their work, looking down on others—particularly the masses and non-Party people, as though the mere fact of being a Party member puts one head and shoulders above non-Party people. Others, fond of showing off their positions as leaders, stand over the masses and order them about and are reluctant to consult them when matters arise. This, in fact, represents a tendency towards narrow sectarianism, an extremely dangerous tendency which could lead to absolute isolation from the masses.

In view of this situation, the Party must constantly be on the alert to combat subjectivism, bureaucratism and sectarianism and must keep up our guard against the danger of becoming divorced from reality and the masses. Therefore, apart from strengthening the ideological education of its members, the Party has an even more important task, namely, to strengthen the Party’s leadership in every way and to make appropriate provisions in both the state and the Party systems for strict supervision over Party organizations and members.

1 DENG XIAOPING, *Report on the Revision of the Constitution of the Communist Party of China, September 16, 1956*, in *SELECTED WORKS OF DENG XIAOPING (1938-1965)*, available at <http://english.peopledaily.com.cn/dengxp/vol1/text/a1280.html>.

period of, perhaps justified, paranoia.<sup>163</sup> “[T]he perception of party leaders, Mao in particular, that hostile forces remained in China long after the civil war was over caused a fluctuation between periods of transformation and consolidation but inhibited the onset of adaptation.”<sup>164</sup> Yet that paranoia might as easily have been generated by threats to Mao’s power in the Party and his efforts at personality cultism<sup>165</sup> than of threats to the Party’s position within the Chinese political system.<sup>166</sup> This was a period of great emphasis on dictatorship, hegemonism and de-institutionalization, leading through the Cultural Revolution.<sup>167</sup> The focus was on political and ideological problems and not on institution building, especially after the Great Leap Forward.<sup>168</sup>

The rise, fall and resurrection of Pen Zhen, ultimately one of the critical contributors to China’s 1982 constitution, is a metaphor for the

<sup>163</sup> The case of Wang Shwei is illustrative. *See, e.g.,* MERLE GOLDMAN, *LITERARY DISSENT IN COMMUNIST CHINA* (1967).

<sup>164</sup> BRUCE J. DICKSON, *DEMOCRATIZATION IN CHINA AND TAIWAN: THE ADAPTABILITY OF LENINIST PARTIES* 70 (1997).

<sup>165</sup> When Mao saw Edgar Snow after the Cultural Revolution he confessed that the Chinese people had probably gone too far in attributing magical power to his Thoughts, but then he added that there are times when there is a need for a personality cult, and that in human affairs one thing that will always exist is ‘the desire to be worshipped and the desire to worship.’  
LUCIAN W. PYE *MAO TSE-TUNG: THE MAN IN THE LEADER* 12 (1976). *See also* JIN QIU, *THE CULTURE OF POWER: THE LIN BIAO INCIDENT IN THE CULTURAL REVOLUTION* 54-61 (1999).

“In a real sense, the Cultural Revolution was Mao’s personal assault on the political institutions he and his comrades had created and institutionalized beginning in 1949.”  
*Id.* at 16

<sup>166</sup> The convergence of both came into the open in the years after Mao Zedong’s death and before the return of Deng Xiaoping, illustrated in the controversial “two whatevers.” HSI-SHENG CHI, *POLITICS OF DISILLUSIONMENT: THE CHINESE COMMUNIST PARTY UNDER DENG XIAOPING, 1978-1989* 3 (1991). For a discussion of the two whatevers, *see supra* notes 156-57.

<sup>167</sup> *See, e.g.,* LOWELL DITTMER, *LIU SHAOQI AND THE CHINESE CULTURAL REVOLUTION* (1998).

<sup>168</sup> Some of our current systems and institutions in the Party and state are plagued by problems which seriously impede the full realization of the superiority of socialism. Unless they are conscientiously reformed, we can hardly expect to meet the urgent needs of modernization and we are liable to become seriously alienated from the masses.

Deng Xiaoping, *On the Reform of the System of Party and State Leadership, August 18, 1980*, in 2 *SELECTED WORKS OF DENG XIAOPING* (1975-82), available at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1460.html>.

Besides leading to over-concentration of power in the hands of individuals, patriarchal ways within the revolutionary ranks place individuals above the organization, which then becomes a tool in their hands. Patriarchal ways are an antiquated social phenomenon which has existed from time immemorial and has had a very damaging influence on the Party.

*Id.*

approaches to party, state and law in China through the early 1980s. As Pitman Potter wrote:

The rehabilitation of Peng Zhen in 1979 after twelve years of disgrace and his subsequent rise to become one of the dozen top Party leaders and chairman of the National People's Congress Standing Committee represent one of the most significant turnabouts in the political history of the People's Republic of China.<sup>169</sup>

Stanley Lubman perhaps most pithily describes the “great leap” into Chinese Constitutionalism in the post-Mao Zedong era. He posited that the 1982 Constitution was a reform that “has brought a fundamental new orientation toward governing China that has generally been followed, in which formal legislation has become the major framework for the organization and operation of the Chinese government”.<sup>170</sup>

The extraordinary innovation represented by the 1982 Constitution was grounded in two decisions made by the CCP in the late 1970s. The first was to separate the Party apparatus from the State. The second was to formalize the relationship of apparatus — both State and Party — to law. Under this great ideological (and to use the language of Chinese theory — scientific) advance, both state and Party were to be grounded in rule beyond the whim of individuals under the reorientation of the post 1979 era. The values of the rules based system were to be developed and protected by the Party, and applied by the state apparatus. Both of these notions were expressed in the constitutions of the Nation<sup>171</sup> and of the CCP,<sup>172</sup> and in the formulation of the ideological foundations of the new political State-Party construct.

The first of the two great principles came early and explicitly from Deng Xiaoping. They were not well understood at the time — the contours of a constitutionalist framing within State-Party context was outlined by Deng Xiaoping in 1986. Separation of Party from government,

<sup>169</sup> Pitman B. Potter, *Peng Zhen: Evolving Views on Party Organization and Law*, in CHINA'S ESTABLISHMENT INTELLECTUALS 21 (Carol Lee Hamrin & Timothy Cheek eds., 1986).

<sup>170</sup> Lubman, *Bird in a Cage*, *supra* note 14, at 384. He elaborated:

Under Mao, policy alone as articulated and applied by the Chinese Communist Party had directed and guided the entire Chinese State-Party, and legislation had been used only formalistically to declare policy. It was imprecise, exhortational, tentative, and subject to unlegislated revision. The Constitution that was adopted in 1982 recognized promulgated laws enacted by the legislative organs of the state as the appropriate vehicles both for defining and implementing policy rather than CCP policy directives, even though the implementation of legislation still depends on CCP policies and changes in them.

*Id.*

<sup>171</sup> XIANFA, *supra* note 37.

<sup>172</sup> Constitution of the Communist Party of China (2002), available at <http://www.idcpc.org.cn/english/cpcbrief/constitution.htm> [hereinafter Constitution of the Communist Party of China].

that is, of politics from administration, would provide the basis for separation of powers governance. This separation of powers doctrine differs significantly from that understood in the West, which is grounded in separation *within* government of the executive, legislative and judicial functions. As Deng Xiaoping stated: “The last time I talked with some comrades about economic work, I called their attention to the necessity of reforming the political structure, including the need to separate the functions of the Party and the government and to delegate powers to lower levels.”<sup>173</sup> The State apparatus, the government, deals with the problems of oversight of the population. Deng Xiaoping continued:

While we are correcting unhealthy tendencies and cracking down on crime, we must leave matters that fall within the scope of the law to judicial institutions; it is not appropriate for the Party to concern itself with such matters. The Party should concern itself with inner-Party discipline, leaving legal problems to the state and the government.<sup>174</sup>

The Communist Party deals with the oversight of the government. Deng Xiaoping further stated:

We uphold the Party’s leadership, but the problem is whether the Party is doing a good job of leading. It should give effective leadership and not intervene in too many matters. The Central Committee should take the lead in this regard. What I am proposing will not weaken the Party’s leadership. On the contrary, its leadership will be weakened if it tries to take responsibility for too many areas.<sup>175</sup>

Rule of law issues are inextricably linked to State-Party governance. “If the Party intervenes in everything, it will not help the people understand the importance of the rule of law. This is a question of the relations between the Party and the government, of the political structure of the country.”<sup>176</sup> Critical to the first principal of separation of government from Party is the need to consolidate and institutionalize Party leadership in a system that leaves room for a state apparatus. That institutionalization was not grounded in the governmental role of the Party but in its institutional leadership (ie: political) role. That leadership role is a critical construct that is easy to misunderstand. No longer merely exerting bare-knuckle direct control of all activity, the leadership suggested is ideological and political.<sup>177</sup> The CCP is to provide a model for the society it

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<sup>173</sup> DENG XIAOPING, *Help The People Understand The Importance Of The Rule Of Law*, in *SELECTED WORKS OF DENG XIAOPING*, available at <http://web.peopledaily.com.cn/english/dengxp/vol3/text/c1540.html>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Deng Xiaoping explained, “it is time for us to distinguish between the responsibilities of the Party and those of the government and to stop substituting the

is seeking to lead to socialist modernization,<sup>178</sup> and ultimately to “the realization of communism.”<sup>179</sup> The CCP also creates the source of those political values through which state action can be understood, applied and interpreted. In this context, Deng’s emphasis on both the Four Cardinal Principles<sup>180</sup> and the separation of government from Party becomes more understandable. The government is to serve the people in their everyday affairs, but the Party is to serve the state by providing it with the values system critical to a proper application of the rule of law through which it is to operate.

The second of the great post-Mao principles was realized through the adoption of a constitutional framework for the governance of state and Party. The principle of constitutionalization in China might best be understood as bifurcated, and in that bifurcation it reflects the political organization of society. As such, though it borrowed the form of constitutionalization of the government sector from the West, it added the Party layer to form a complete constitutional system. It focused both on rule of law institutionalization of the state apparatus (through a Western style constitution model framework) combined with a similar institutionalization of Party organization through its own constitution. In that context, it is important to understand the constitutional system as being compromised of two documents — the Chinese Constitution of 1982 and the constitution of the CCP, the party in power. The former lays out the organization of the state and the relationship between the state apparatus and the party in power, which remains the holder of supreme collective

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former for the latter . . . .” Xiaoping, *On the Reform of the System of Party and State Leadership*, *supra* note 168.

<sup>178</sup> In 1987, Deng Xiaoping understood socialist modernization as representing the objective of “achiev[ing] a comparatively comfortable standard of living by the end of the century, and to approach the standard of moderately developed countries in another 30 to 50 years after that. To attain these two goals, we need . . . a peaceful international environment and political stability.” Deng Xiaoping, *We Must Carry Out Socialist Construction in an Orderly Way Under the Leadership of the Party*, March 8, 1987, in 2 *SELECTED WORKS OF DENG XIAOPING (1975-82)*, available at <http://english.peopledaily.com.cn/dengxp/vol3/text/c1690.html>.

<sup>179</sup> “The realization of communism is the highest ideal and ultimate goal of the Party.” Constitution of the Communist Party of China, *supra* note 172, at Para. 1.

<sup>180</sup> The four cardinal principles consist of (1) the leading role of the CCP; (2) adherence to socialism; (3) dictatorship of the proletariat; and (4) adherence to Marxist/Leninist/Mao/Deng Xiaoping/3 Represents Thought. See XIANFA, *supra* note 37, at Preamble (“The basic line of the Communist Party of China in the primary stage of socialism is to lead the people of all ethnic groups in a concerted, self-reliant and pioneering effort to turn China into a prosperous, strong, democratic, culturally advanced and harmonious modern socialist country by making economic development the central task while upholding the Four Cardinal Principles and the reform and opening up policy.”).



political authority.<sup>181</sup> The constitution is meant to provide both a framework for devolution of inferior governmental power to an apparatus of state organizations and for establishment of superior political authority in the Communist Party apparatus. The latter organizes and institutionalizes the manifestation of political authority within the nation. The power is collective, corporate and expressly bound by rules and norms that give character to that polity. What distinguishes both from vanguard party governance prior to 1979 was the use of law as a mechanism of institutionalization and a bureaucratization of political power.<sup>182</sup> This difference is crucial from a constitutionalist perspective; the move from politics unbounded to a legally binding governance framework represents a crucial step toward the adoption of a rule of law framework for the organization of political power. This, of course, is the critical presumption of constitutionalist states.<sup>183</sup>

The Chinese state constitution attempts to establish the context in which these two aspects of government coalesce — the formal institutions of the government of the state (elaborated in the 1982 Constitution) and the oversight role of the CCP (elaborated through the CCP Constitution). The Constitution carefully develops the overlap between State and Party. Western commentators tend to focus more on those parts of the constitution most like their own — the sections dealing with the formal organization of the state. They tend to be blind to those portions of the constitution that open a window on the other important aspect of government — the relation of government and CCP. Put differently, they remain blind to the relationship between institution and ideology. The constitutional role of the Communist Party as the source of political values and the guardian of those values as applied by the state apparatus is embedded in the Constitution.<sup>184</sup> The CCP can be said to be subject to the Constitution, but as a constitutional *subject*, rather than a constitutional *object*. The CCP binds itself to the Constitution because, in effect, the Constitution could not be effectuated unless it reflected the governing political line of the CCP. It is in this sense that one can understand the relationship of the rule of law provisions of the Chinese Constitution<sup>185</sup> and those of the CCP Constitution: “The Party must conduct its activities within the framework of the Constitution and other laws. It must see to it that the legislative, judicial and administrative organs of the state and the

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<sup>181</sup> See Backer, *The Rule of Law*, *supra* note 26, at 29.

<sup>182</sup> For an analysis of current Chinese scholarly discussion of institutionalization and bureaucratization of politics, *see, e.g.*, Backer, *A Constitutional Court*, *supra* note 8, at 593.

<sup>183</sup> See Backer, *From Constitution to Constitutionalism*, *supra* note 9, at 671.

<sup>184</sup> XIANFA, *supra* note 37, at pmbl.

<sup>185</sup> *Id.* at art. 5.

economic, cultural and people's organizations work with initiative and independent responsibility and in harmony."<sup>186</sup>

The State itself can be considered complete only when the formal state apparatus is joined with the CCP apparatus, both under the rule of law framework expressed in the Chinese Constitution and as reflected in the CCP Constitution. This relationship expresses the meaning of the division of authority between State and Party that Deng conceived.<sup>187</sup> For the West, this is difficult to grasp. It is impeded by Western conceptual limitations on the meaning and character of parties and their connection with state institutions and political power. Yet from the Chinese perspective, the division between State and Party might be viewed as equivalent to the separation of powers notion in western constitutionalism.<sup>188</sup> Administrative power rests with the state and its institutions — limited by and exercised through rule of law. Political power, protection of the values inherent in the constitutional framework and the values on which the nation is organized rests with the CCP. The Party may not directly exercise administrative authority — that is a function of the NPC and is exercised according to law.<sup>189</sup> The interpretation and preservation of the Constitution and its values rests with the CCP and its organs.

On this basis, it is easier to understand the CCP's own understanding of 'rule of law' as a hybrid concept:

Ruling the country by law means that the broad masses of the people, under the leadership of the Party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, economic and cultural undertakings and social affairs, and see to it that all work by the state proceeds in keeping with law, and that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader.<sup>190</sup>

This requires a fusion of the outward and inward institutional manifestations of power within China.<sup>191</sup> It is only within this context that the

<sup>186</sup> Constitution of the Communist Party of China, *supra* note 172, at General Program.

<sup>187</sup> DENG, *supra* note 173.

<sup>188</sup> See SAJÓ, *supra* note 54, at 69-102.

<sup>189</sup> JIANG JINSONG, *THE NATIONAL PEOPLE'S CONGRESS OF CHINA* 256 (2003).

<sup>190</sup> Jiang Zemin, General Secretary of the Communist Party of China, Hold High the Great Banner of Deng Xiaoping's Theory for an All-Round Advancement of the Cause of Building Socialism with Chinese Characteristics Into the 21st Century, Report Delivered at the 15th National Congress of the Communist Party of China (Sept. 12, 1997), available at <http://www.china.org.cn/english/features/45607.htm>.

<sup>191</sup> Thus, Jiang Zemin noted:

The Party has led the people in drawing up the Constitution and other laws, to which it confines its activities. In ruling the country by law, we can unify the

elaboration of the foundational organizing values of the political and administrative powers of the nation — Sange Daibiao (三个代表, roughly translated to the Three Represents) — assume their importance for Chinese constitutionalism and the advancement of a rule of law culture in China.<sup>192</sup>

Sange Daibiao (“the CCP has always represented the most advanced productivity and culture in China, as well as the most fundamental interests of the majority of the Chinese people”<sup>193</sup>) is meant to reaffirm the position of the CCP as the supreme collective instrumentality of political authority bounded by a popular welfare maximization constraint.<sup>194</sup> “While Deng Xiaoping had interpreted socialist tenets to suit current conditions, Jiang Zemin saw in the Party a vehicle of social, economic and cultural progress. This was reflected in his call for the implementation of the ‘Three Represents.’”<sup>195</sup>

Among the more important elements of Sange Daibiao was the form of its incorporation. Sange Daibiao was not articulated as political theory but was concretized and given an institutional framework as and within law. One of the great developments captured by Sange Daibiao was the opening of CCP membership to broader elements of society.<sup>196</sup> It provided a conceptual basis for the extension, at least as a theoretical matter, of Party membership to merchants. The price they paid was simple — embrace the ideological limits of Chinese Marxist Leninist Mao thought, Deng Xiaoping theory and Sange Daibiao and in return receive Party membership and extended prosperity.<sup>197</sup> Still, the process has been uneven and bound up in general controversies over the direction of the scientific development of political values frameworks in China. Party membership by merchants was first welcomed in the 1980s and then prohibited in the years leading to the difficulties of 1989 that culminated in the Tiananmen Square protests and subsequent repression. Merchant

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adherence to Party leadership, the development of people’s democracy and do things in strict accordance with the law, thus ensuring, institutionally and legally, that the Party’s basic line and basic policies are carried out without fail, and that the Party plays the role of the core of leadership at all times, commanding the whole situation and coordinating the efforts of all quarters.

*Id.*

<sup>192</sup> See Backer, *The Rule of Law*, *supra* note 26, at 60-61.

<sup>193</sup> *Hu Jintao Visits County to Promote Ideological Campaign*, PEOPLE’S DAILY ONLINE (China), Nov. 18, 2008, available at <http://english.people.com.cn/90001/90776/90785/6535378.html>.

<sup>194</sup> See FEWSMITH, *supra* note 18, at 229.

<sup>195</sup> Raviprasad Narayanan, *The Politics of Reform in China: Deng, Jiang and Hu*, 30 STRATEGIC ANALYSIS 329, 335 (2006), available at [http://www.idsa.in/system/files/strategicanalysis\\_rnarayanan\\_0606.pdf](http://www.idsa.in/system/files/strategicanalysis_rnarayanan_0606.pdf).

<sup>196</sup> *Id.* at 336-38.

<sup>197</sup> See Jia Hepeng, *The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalists?*, 24 THE CATO J. 261, 268-69 (2004).

membership was controversial because of its connection with corruption (ie: the use of Party membership for economic gain). By the early 1990s the policy was again reversed and membership was reopened and institutionalized by Jiang Zemin through Sange Daibiao — ironic in light of the efforts by a younger Jiang to prohibit such membership.<sup>198</sup>

That this change was profound is gleaned from the difficulty of transposing this notion in the face of resistance from members of the CCP who were more heavily invested in the old vanguard and revolutionary outsider presumptions of less well-developed Party lines from the 1940s and 1950s.<sup>199</sup>

For instance, in March 2001, the leftist journal *Quest for Truth* (Zhenli De Zhuiqiu) published a harsh attack on Li Junru, Vice President of the Central Party School and one of the creators of Jiang's Sange Daibiao. The article asked sharply, "Is not this sort of party (ie: one — that would admit capitalists) metamorphosing from being the vanguard of the working class into a 'whole people's party?'"<sup>200</sup>

This might well be the direction in which a rule of law based institutionalized Party framework is heading. Hu Jintao has broadened this approach to reach deeper into Chinese society. "Whereas the red-expert dichotomy had a zero sum quality during the Maoist era, by the late 1980s new recruits were expected to be young, educated, and politically stalwart. In addition, greater attention was given to recruiting 'workers on the front line of production,' whether in industry, agriculture, or technological fields."<sup>201</sup>

Hu furthered the institutionalization and depersonalization (at least as a formal matter for the moment) of Party ideological leadership over state and nation interests in Sange Daibiao. With the introduction of the "scientific concept of development" Hu sought to refine the emerging ideology of rule of law as State separation from Party and the Party's role in governance.<sup>202</sup> The principles of scientific development, unveiled in 2003, are meant to stress the importance of deep progress to sustain the economic revolution in China (that is, to try to keep it truer to its political roots in Marxist Leninist Mao Thought and especially Deng Xiaoping

<sup>198</sup> See DICKSON, *supra* note 164, at 150.

<sup>199</sup> See *id.* at 149-51.

<sup>200</sup> Joseph Fewsmith, *Is Political Reform Ahead? – Beijing Confronts Problems Facing Society – and the CCP*, CHINA LEADERSHIP MONITOR, Summer 2001, [http://media.hoover.org/sites/default/files/documents/clm1\\_JF.pdf](http://media.hoover.org/sites/default/files/documents/clm1_JF.pdf) (citing Huang Rutong, "Jiujing yao jiancheng yige shenme dang?" [What sort of party are we trying to construct after all?]) (Chinese trans. in original article), ZHENLI DE ZHUIQIU, March 2001, at 16-19).

<sup>201</sup> DICKSON, *supra* note 164, at 149.

<sup>202</sup> *Communist Party of China to Amend Party Constitution*, PEOPLE'S DAILY ONLINE, Sept. 17, 2007, [http://news.xinhuanet.com/english/2007-09/17/content\\_6741184.htm](http://news.xinhuanet.com/english/2007-09/17/content_6741184.htm).

Theory).<sup>203</sup> “It stresses people-centered development that is comprehensive, coordinated and sustainable.”<sup>204</sup>

The “scientific development” concept flows naturally from the principles of the Three Represents – especially with respect to economic development.<sup>205</sup> It suggests a certain dynamism in the evolution of Marxist Leninist principles and the construction of governance.<sup>206</sup> Indeed, it might be thought to have been implicit in that campaign. Thus the Chinese Communist Party was careful to describe it in terms that resonate with prior developments: “It refers to coordinated development between urban and rural areas, among different regions, between economic and social development, between the development of man and nature, and between domestic development and opening up to the outside world.”<sup>207</sup> Dynamism is important for constitutionalism, because it makes it possible to avoid rigidity in the normative structure of either government or Party.<sup>208</sup>

If scientific development suggests the dynamic element of Chinese substantive constitutionalism, the equally potent notion of H”armonious Society” provides its object.<sup>209</sup> Harmonious Society is meant to define the key elements of the obligations of State and Party to society. If Three

<sup>203</sup> These were formally institutionalized as constitutional principles in China’s Constitution. See XIANFA, *supra* note 37, at pmb1.

<sup>204</sup> *Id.*

<sup>205</sup> “The “[T]hree [R]epresents’ important thought has enriched the ideology concerning the harmonious development of socialist material civilization, political civilization and spiritual civilization.” *Three Represents: Guiding Ideology Requires Long-Term Adherence*, NEWS OF THE COMMUNIST PARTY OF CHINA, Sept. 23, 2004, <http://english.cpc.people.com.cn/66106/4480431.html>.

<sup>206</sup> *Id.* Thus, for example, the description of the Three Represents in scientific development terms:

The important thought of the ‘[T]hree Represents’ is the latest achievement of the localization of Marxism . . . . It is an expression of emancipation of the mind, seeking truth from facts and keeping pace with the times, the most distinctive theoretical quality of the ‘[T]hree [R]epresents’ important thought, as well as the most distinctive theoretical quality of Marxism.

*Id.*

<sup>207</sup> See *Communist Party of China to Amend Party Constitution*, *supra* note 202.

<sup>208</sup> This is not a radical idea.

There are three important criteria for judging the soundness of a country’s political system or structure and of its policies. First, whether the country is politically stable; second, whether the system and policies help to strengthen unity among the people and to raise their living standards; and third, whether the productive forces keep developing.

Deng Xiaoping, *How to Judge the Soundness of a Country’s Political System*, March 27, 1987, in 2 *SELECTED WORKS OF DENG XIAOPING (1975-82)*, available at [http://www.cpcchina.org/fastfacts/2010-10/25/content\\_11454984.htm](http://www.cpcchina.org/fastfacts/2010-10/25/content_11454984.htm).

<sup>209</sup> While Deng Xiaoping proposed ‘The Four Cardinal Principles’ and Jiang Zemin came up with “Three Represents” which legitimized the inclusion of capitalists and private entrepreneurs in the Communist Party, Hu advocates

Represents established the framework, then the “Harmonious Society” concept established the context of the obligations of the Party and state apparatus to the people and the broader more general framework of social order. The concept of “Harmonious Society” suggests the relationship between the Party and people through the State. Its core values are rooted in social equality,<sup>210</sup> in contrast to the notions of political equality inherent in the leadership role of the Party and its institutional apparatus. Indeed, in the explanation of the Resolution on Harmonious Society, the Party “stresses that the CPC’s role as the core leadership is critical for building a harmonious socialist society. The principle that the Party is organized for the people and exercises power on behalf of the people must be adhered to.”<sup>211</sup> The building of that society embodies the relationship between Party, people, government and State. The people are sovereign and exercise political rights through the Party.<sup>212</sup> The Party

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building a ‘harmonious society.’ He understands that the days are gone when the party can maintain political stability with the muzzle of a gun.

Pin Ho & Wen Huang, Opinion, *Hu Jintao: The Mysterious Man Behind China’s ‘Harmonious Society,’* CHRISTIAN SCIENCE MONITOR, Apr. 15, 2010, available at <http://www.csmonitor.com/Commentary/Opinion/2010/0415/Hu-Jintao-the-mysterious-man-behind-China-s-harmonious-society/%28page%29/2> (“In China, the word harmony consists of two characters, amicable and accord. It originates from the Confucian ideology that Harmony is the most precious thing, preceding all priorities. Hu interprets it as no self-initiated disruptive attempts or to be exact, no major changes.”).

<sup>210</sup> This was made clear in the 2006 commentary to the introduction of the ‘Harmonious Society’ concept, marked by a four day program at the annual plenary session of the Chinese Communist Party’s Central Committee, devoted substantially to implementation of the concept. “This is the first time in 25 years after late paramount leader Deng Xiaoping launched economic reforms that the party Central Committee will devote an annual plenum to social equality.” Wu Zhong, *China Yearns for Hu’s ‘Harmonious Society,’* ASIA TIMES ONLINE, Oct. 11, 2006, <http://www.atimes.com/atimes/China/HJ11Ad01.html>.

<sup>211</sup> *China Publishes ‘Harmonious Society’ Resolution,* CHINA.ORG.CN, Oct. 19, 2006, <http://www.china.org.cn/english/2006/Oct/184810.htm>.

<sup>212</sup> It is important at this point to define explicitly to the idea of democratic dictatorship. It was articulated by Mao Zedong in his *On the People’s Democratic Dictatorship, June 30, 1949,* SELECTED WORKS OF MAO ZEDONG, available at [http://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4\\_65.htm](http://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm). Its essence is the idea that the people are understood as divided between vanguard elements, who may practice democracy and others, against whom dictatorship is necessary. In describing these classes, Mao Zedong wrote:

Who are the people? At the present stage in China, they are the working class, the peasantry, the urban petty bourgeoisie and the national bourgeoisie. These classes, led by the working class and the Communist Party, unite to form their own state and elect their own government; they enforce their dictatorship over the running dogs of imperialism – the landlord class and bureaucrat-bourgeoisie, as well as the representatives of those classes, the Kuomintang reactionaries and their accomplices – suppress them, allow them only to behave themselves and not to be unruly in word or deed. If they speak or act in an unruly way, they will be

itself represents, through its institutionalization, a microcosm of the organization of the people into a national community. It is a collective exercising collective political rights according to its own normative principles. The social organization of the State, and its normative values developed under the leadership of the Party, is the object of government (the State apparatus). Government devotes itself to the welfare of the people by implementing the political and normative framework developed through the political leadership of the Party. The people may directly participate in the work of the government through the National People's Congress system, ensuring appropriate implementation of social equality norms (developed under the leadership of the Party) through the legislative, administrative and judicial power of the State. Rule of law society, within this constitutional framework, then, acquires a meaning on several different levels. At the political level, it obligates the Party to exercise its leadership authority collectively, under rules stabled for its operations and subject to the normative framework it has developed founded on concepts of social equality. At the social level, it obligates the government to apply those normative values in the exercise of its own power, subject to a mechanism for popular accountability through the National People's Congress.

It is possible, then, to understand the notions of H"armonious Society" as sitting atop Three Represents, at least as a matter of theory. The Party represents the social body of the State and its people, Harmonious Society is the broad statement of the obligations of the leadership of the Party to the people and the State. The Party's obligation is critically important — grounded on the sort of popular welfare principles that are not that distinct, theoretically, from those of Western constitutions. It is also recognized as looking toward normative Confucian values.<sup>213</sup> It may remain true to certain constants of Chinese political philosophy,<sup>214</sup> now fused

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promptly stopped and punished. Democracy is practiced within the ranks of the people, who enjoy the rights of freedom of speech, assembly, association and so on. The right to vote belongs only to the people, not to the reactionaries. The combination of these two aspects, democracy for the people and dictatorship over the reactionaries, is the people's democratic dictatorship.

*Id.*

The idea of popular sovereignty is always limited by the idea that such authority can be made available only to the community of believers. The Three Represents was powerful precisely because it sought to expand the group of people who could be included in the democratic camp.

<sup>213</sup> See, e.g., John P. Geis II & Blaine Holt, *Harmonious Society: Rise of the New China*, STRATEGIC STUD. Q., Winter 2009, at 75, available at <http://www.au.af.mil/au/ssq/2009/Winter/Winter09.pdf>. An interesting and useful measure of the enduring importance of harmony in China can be found in WILLIAM A. P. MARTIN, *THE CHINESE: THEIR EDUCATION, PHILOSOPHY, AND LETTERS* 125-53 (1881) ("Remarks on the Ethical Philosophy of the Chinese," the essay was originally published in 1862).

<sup>214</sup> See, e.g., WILLIAM S. A. POTT, *CHINESE POLITICAL PHILOSOPHY* (1925).

with the normative values of Chinese socialism. As in the West, thought, there are notable gaps between the ideal state described in text and implementation.<sup>215</sup>

Hu made clear the relationship between Jiang's "Sange Daibiao" and his "scientific development" concepts.<sup>216</sup> The fundamentals are clear enough. The CCP serves in a representative capacity, but in that capacity is bound to a specific set of norms beyond which it may not venture. The CCP stands as vanguard party, embodiment of political citizenship and custodian of the values that make governance legitimate. The CCP's position is dynamic, — and requires demonstration of a constant commitment, in direct and physical terms, to the welfare of the people if the CCP means to retain its position as the legitimate representative of the people above the state apparatus created through the constitution.

The staging of this reinforcement/education campaign took the form of a trip carefully planned for its symbolism. "Ansai, a county subordinate to Yan'an City, is Hu's site for the on-the-spot study of the ideological drive. Yan'an served as the capital for the CPC-led revolutionary base during the 1930s-40s, before the Party took over the power in 1949."<sup>217</sup> The discussion was not conducted at the level of high theory — but in the language of participation and wealth creation. "While talking with villagers in Hougoumen, Ansai County, Hu said the new policies, based on a practice of the Scientific Concept of Development, would bring substantial benefits to farmers by allowing them to lease their rights to contract cultivated land and forests."<sup>218</sup>

That conflation of Party, theory and wealth creation was centered on the efforts of local Party officials. "During his stay . . . Hu learned about new progress made by the leadership of the village's Party branch. The villagers have had their income remarkably increased and their living standards much improved, Hu was told."<sup>219</sup> The most interesting element, at least at the level of local Party governance, was the identification of a new method for improved accountability by local Party officials within the local state governance structures, the Party Member Promise System. The Party Member Promise System is a form of Party discipline that reflects a rules bound orientation at the lowest level of Party operation. The story continued:

All the village cadres and applicants for Party membership are required to make the promise, according to Yang Fengqi, head of the

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<sup>215</sup> "In China, the term is sometimes used ironically as a verb to describe Web sites that suddenly disappear, "harmonized away," and officially as a goal, a "harmonious society." *What Hu and Obama Will Discuss*, CHINA DIGITAL TIMES, Jan. 18, 2011, <http://chinadigitaltimes.net/china/harmonious-society/>.

<sup>216</sup> *Hu Jintao Visits Country to Promote Ideological Campaign*, *supra* note 193.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*



village's Party branch. Hu called the Party Member Promise System a good way to help Party members and cadres display their exemplary role. 'We must do what we have promised to do by actions' he stressed.<sup>220</sup>

Grass roots Party organization has become an important component of governance reforms. As Hu made clear at the lowest levels of Party organization, this is necessary given the implications on the scientific development of Sange Daibiao. It is critically important, for that purpose, that the lowest levels of Party organization reflect a commitment to the most refined development of Party governance theory. That requires special measures.

As Hu symbolically noted, the success of the last decade's drive toward deepening a system of normative social and political values under the representative guardianship of the CCP will depend very much on buy-in from all social sectors. The masses are most willing to concede political citizenship to the CCP and its cadres, and to satisfy themselves with social and economic citizenship rights, as long as there are strong and effective methods of accountability and there is satisfaction the CCP is doing its duty – including self-policing.

The buy-in from senior party officials may depend on the reliability of the development of another facet of Chinese democracy within the CCP. This relationship is well understood even at the level of popularizing the ideas of the campaign to rank and file Party members. The stress is on forward movement and pragmatism geared toward the principal object of Party and State apparatus – deep popular development. Specifically:

All the Party members are required to stick to the policies of reform and opening up, advance scientific development, promote social harmony and strive together for new victories in the process of building a well-off society in an all-round way, the meeting said. The meeting also called on all Party members to understand the new requirement of the country's development and the new expectation of the people to draw guidelines and policies adapted to the times and the people.<sup>221</sup>

The CCP is quite aware of the necessity for building governance capabilities.

Of the series of major strategic ideas and theoretical and innovative new achievements released since the Sixteenth CCP National Congress, the most vital and crucial is the overall blueprint, or layout, for Party building. The blueprint includes hallmarks to stress not only the stepping-up of Party building in an holistic way, but it also takes hold of "key points" and "motifs" in the process of Party building. Namely, it is

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<sup>220</sup> *Id.*

<sup>221</sup> See *Communist Party of China to Amend Party Constitution*, *supra* note 202.

focused on the enhancement of its governing capacity, and takes the increase of Party members' as the motif.<sup>222</sup>

Still, the objective of progress requires the Party to get its own conceptual house in order. As recent commentary has suggested, Party building is still subject to intense competition among factions within the Party. Some of it is part of the formal framework of public debate. For that purpose, it seems the Party has entertained at least a limited public debate over the form of future reform.<sup>223</sup> On the other hand, Willy Lam has suggested the nature of some of the factional fighting conflates personal influence and political agendas.<sup>224</sup> He notes the conservatism of the theory of scientific development, its placement (as the third of the "four insistences" campaign, the relation of that campaign to Hu's efforts to solidify his power and his faction's hold upon the governing machinery of the Party), and (from my perspective) the fairly audacious efforts to overlay Deng Xiaoping's Four Cardinal Principles with the interpretive trope of the four insistences.<sup>225</sup>

The caution in Hu's moves, perhaps more cautious and institutional than similar moves by his predecessors, may suggest at least a limited headway towards institutional "rule of law" within the Party. Chinese constitutional law theorists, as well as some critical actors within the CCP, have begun to note that the cultivation of an intra party democracy is a necessary key to political progress in China.<sup>226</sup> To the extent that, as Lam suggests, Hu pushes forward on that front, there may also be progress on a broader basis. I am less inclined to believe in the sort of "western style" possibilities of the "thought liberation" portion of the "four insistences." Such liberation must be understood as possible only within the normative framework of Chinese political theory — Marxist Leninist Mao Thought, Deng Xiaoping Theory and the important thought of the Three Represents, to which some or all of the four insistences may be added. To decontextualize thought liberation is to set the reforms up for failure because of an incorrect perspective employed at the start. In the context of Chinese constitutional norm development, it seems that the third and fourth of the four insistences (the scientific concept of development and

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<sup>222</sup> See *CPC's New Headway With Its Party Building Concept*, NEWS OF THE COMMUNIST PARTY OF CHINA, Apr. 20, 2007, <http://english.cpc.people.com.cn/66102/5640924.html>.

<sup>223</sup> Joseph E. Lin, *Central Party School Scholar Discusses Limited Party-Government Separation*, CHINA BRIEF, Sept. 19, 2007, available at [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews%5Btt\\_news%5D=4416&tx\\_ttnews%5BbackPid%5D=197&no\\_cache=1](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=4416&tx_ttnews%5BbackPid%5D=197&no_cache=1).

<sup>224</sup> Willy Lam, *Limited Reforms: Status Quo at the 17th Party Congress*, CHINA BRIEF, Sept. 19, 2007, available at [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews%5Btt\\_news%5D=4418&tx\\_ttnews%5BbackPid%5D=197&no\\_cache=1](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=4418&tx_ttnews%5BbackPid%5D=197&no_cache=1).

<sup>225</sup> *Id.*

<sup>226</sup> See, e.g., Backer, *The Rule of Law*, *supra* note 26.

social harmony) are likely to be far more important than the first two (thought liberation and reform and an open door policy). Scientific development, then, grounded on principles of social equality, should not be underestimated either for its importance in the development of Chinese political constitutional theory or as a mechanism for the constitutionalization of CCP governance.”<sup>227</sup> They do not merely serve as a means of formalizing Hu Jintao’s stamp on Party governance, in a manner similar to that of his predecessor, and the incorporation of the Three Represents theory into the normative structure of Communist Party governance,<sup>228</sup> but also serve to regularize principles of governance that, when fully implemented, can produce a functioning rule of law state, though one whose political choices and organization will be quite distinct from those of the West.

This long road through the most important political principles of the CCP leads us back to the constitutional project. Constitutionalism in China requires a simultaneous understanding of both the State and Party governance apparatus. It imposes on the Party a set of principles applicable to its own internal organization that are analogous to the rule of law principles on which the State government is organized. To the extent that “the scientific concept of development” serves as a formal platform for legitimacy to govern all social sectors, the CCP may continue to serve in fact as well as in name as the “party in power” of the Chinese State’s apparatus. This will require continuous efforts to absorb leading elements of Chinese society, and to assimilate them to the political values culture of the CCP, as well as to articulate those values in a way that accords with the aggregate interests of all sectors. For that purpose, Hu Jintao’s scientific concept of development is well positioned to serve as a basis for governance. The trick will be to see if the Party’s bureaucracy is as adept in developing its praxis as the intellectual organs of the Party are in recognizing problems and shaping theoretical approaches to its solution. It is easy enough to herd intellectuals and frame programs.; The Chinese political apparatus has become quite successful at this. Success is

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<sup>227</sup> The public organ of the CCP recently announced what had been rumored for some time – proposed amendments to the Chinese Communist Party Constitution. *Communist Party of China to Amend Party Constitution*, *supra* note 202. The amendment was adopted at the Seventeenth National Congress on October 15, 2007. *17th National Congress of the Communist Party of China – Planning China’s Next 5 Years*, CHINA.ORG.CN, available at <http://www.china.org.cn/english/congress/225859.htm>. Regarding the context of the amendment’s adoption:

The amendment should be made ‘under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thoughts of ‘Three Represents,’ and to reflect the major strategic thoughts the CPC Central Committee has set forth since the 16th CPC national congress was held (in 2002), such as the scientific concept of development,’ said the meeting.

*Communist Party of China to Amend Party Constitution*, *supra* note 202

<sup>228</sup> See Backer, *The Rule of Law*, *supra* note 26.

marked by operations at the level of contact with the governed – from rural peasants to important industrialists and the foreign community, whose involvement is not to be lightly dismissed. If the party cannot practice what it preaches, it will lose its mandate. The highest levels of the Party understand this:

They include, among others, unfolding activities to educate the CCP members in retaining their advanced character, pushing ahead the building or development of the study-type political party, going in for the inner-party democratic construction, developing inner-party democracy, improving the CCP members' conduct and building a clear government, still bettering the Party's leading and governing methods, and further improving the inner-Party supervision.<sup>229</sup>

Whether this understanding can be naturalized among the lowest level cadres is another matter.

Hu Jintao's Report to the Seventeenth Party Congress in 2007 elaborated these themes.<sup>230</sup> Hu made reference to the importance that political restructuring, based on increased economic and social development, has on the overall reform of the political process so as to be more inclusive of the people.<sup>231</sup> To achieve political development under socialism with Chinese characteristics, Hu Jintao called on the people and Party of China to "integrate the leadership of the Party, the position of the people as masters of the country, and the rule of law."<sup>232</sup> This includes maintaining the features and advantages of the socialist political system while defining institutions, standards and procedures for socialist democracy to provide the political and legal guarantees needed to ensure the lasting stability of both the Party and the country.<sup>233</sup> Hu Jintao traced the objectives under which these goals could be achieved. They include: (1) Expanding the people's democracy and ensuring that they are masters of the country; (2) Developing primary-level democracy and ensuring that the people enjoy democratic rights in a more extensive and practical way; (3) Comprehensively implementing rule of law as a fundamental principle and speed up the building of a socialist country under the rule of law; (4) Expanding the patriotic united front and uniting it with all forces that can be united; (5) Accelerating the reform of the administrative system and building a service-oriented government; and (6) Improving the mecha-

<sup>229</sup> *CPC's New Headway With Its Party Building Concept*, *supra* note 222.

<sup>230</sup> See Hu Jintao, General Secretary of the Community Party of China, Report at 17th National Congress of the Communist Party of China, Oct. 15, 2007, *available at* [http://news.xinhuanet.com/english/2007-10/24/content\\_6938749.htm](http://news.xinhuanet.com/english/2007-10/24/content_6938749.htm).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

nism of restraint and oversight and ensuring that power entrusted by the people is always exercised in their interest.<sup>234</sup>

With regard to the first objective, above, Hu Jintao called for the improvement of socialist democracy through the improvement of democratic institutions to guarantee the people's rights to be informed, to participate, to be heard and to oversee the actions of the government. Within this movement, the goal is to turn the Party's propositions into the will of the state via legal procedures. In addition, the effort also centers on ensuring greater transparency and public participation in building scientific and democratic decision-making functions.<sup>235</sup>

The second objective calls for Party leadership to aid the people to become "masters of the country" as they exercise their democratic rights in accordance with the law. With respect to the third, the Party was instructed to have organization at all levels and Party members at all levels are to act under the Constitution and the laws and must take the lead in upholding the authority of the Constitution and laws.<sup>236</sup> Since it is the Party who in the end guides and determines the law, this method serves to help keep the Party in control of both lawmaking and law enforcement. Hu Jintao also called on the Chinese people and Party to implement the Party's basic principle as relating to religious affairs, especially in connection with the fourth objective. As part of this, the Party was instructed to bring into play the positive role of religious personages and believers in promoting economic and social development.<sup>237</sup>

Hu Jintao stressed that the Party "will accelerate the separation of the functions of the government from those enterprises, state assets management authorities, public institutions and market-based intermediaries, standardize administrative practices, strengthen administrative law-enforcement agencies . . . and reduce government intervention in microeconomic operations."<sup>238</sup> Lastly, Hu Jintao called for implementing the intra-Party oversight regulations, strengthening democratic oversight and giving scope to the oversight role of public opinion. To maximize efficiency, the oversight forces were instructed to pool together.<sup>239</sup>

These ideological developments have gone a long way to differentiating State-Party notions in post-Mao Zedong China from its Soviet antecedents. Indeed, that development, now institutionalized within the scientific development party line, has made it possible to criticize the Soviet variant as incompatible with basic principles of Marxist-Leninist state organization, something that might have been impossible as little as a generation ago. Chinese theorists suggest, for example, that the Soviet

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

experience failed to adhere to Marxist principles because it “departed increasingly from being the ‘plenipotentiary.’ The state power was actually centralized in the party and the executive departments, even to a few people or a single man.”<sup>240</sup> Because Marxists adhere to two major attributes of socialist democracy: (1) full realization of the people’s power and rights and (2) the Communist Party’s leadership over the state, they insist upon Communist leadership over that state as the precondition and guarantee of the people’s ability to exercise and enjoy their power and rights.<sup>241</sup> In Stalin’s case, these values were sacrificed and his rule was instead legitimized in the name of Communist leadership over the state.<sup>242</sup> That approach has been criticized sharply: “It is impossible to reach socialism by starting from Stalinism, for one will never reach anything except something whose instrument has been Stalinism.”<sup>243</sup>

China’s significant theoretical advances are by no means evidence of a deep transformation of the State or the Party. The issue of implementation is relatively untouched in the construction of a theoretical framework. However, implementation issues are becoming more important within Chinese constitutional discourse.<sup>244</sup> In the West, these issues have sometimes served as a substitute, or the prism through which, constitutionalism is understood in China. The suggestion here is that while issues of implementation are critical to deep rule of law naturalization, they are no substitute for theory.

It is implementation — that large space between theory and practice — that rightly continues to generate much internal and external criticism.<sup>245</sup> Implementation carries its own constitutional issue, that of rights vindication. It is in this context that Chinese constitutionalist theory supplies a ready theoretical answer, but that theory remains aspirational. A single method of rights vindication is not required. While the West has focused on judicial vindication,<sup>246</sup> it is not the only path. However, to the extent

<sup>240</sup> JIANG, *supra* note 189, at 37.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> IAN F. BIRCHALL, SARTRE AGAINST STALINISM 213 (2004) (citing JEAN-PAUL SARTRE, SITUATIONS, VIII 354 (1972)).

<sup>244</sup> Responding to criticisms that “party organizations and individuals persist in influencing and interfering with the judiciary,” Zhu Soli noted: “although these interferers are sometimes leading party cadres who wave the flag of the local Party organization, it does not mean that this individual’s interference represents the Party’s or that particular party organization’s interference. To the contrary some of them are violating CCP principles, policies, and disciplinary rules.” Soli, *supra* note 2, at 540.

<sup>245</sup> See, e.g., Lubman, *Bird in a Cage*, *supra* note 14; Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case Of China*, 35 N.Y.U. J. INT’L L. & POL. 1 (2002); Hu, *supra* note 230.

<sup>246</sup> See, e.g., RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

that the Chinese seek to invoke that model in their construction of a state apparatus, they remain vulnerable to criticism for failure to properly implement. It is especially in this respect that constitutionalism with Chinese characteristics has room to develop. This development requires at both the State and Party levels. China's recent emphasis on corruption campaigns is an indicator of both.<sup>247</sup>

For all that, though, law continues to be “conceived and operates as an instrument with which to uphold the Socialist political order and perpetuate party domination.”<sup>248</sup> What to the West looks like the organization of the Chinese government into something that satisfies Western tastes for such organs is in reality the organization of a more complicated set of institutions. In the process, China has chosen to avoid building a political and governmental organization that embraces Western ideals of the conflation of political and governmental power. The reverse is also true. Though the form of governmental organization is similar, the values foundation are different, and implementation — that is, the way in which the state and political structure is implemented — are substantially different from governmental systems in the West. The Party is accountable to itself (as the microcosm of the people) and ultimately to the people. Its internal organization (process values) reflects values and rule of law concerns that underlie the Constitution and the organization of the State.

The Chinese governance/political framework of 2012 is very different both from the classical Soviet state party structure and from its own level of development in the third quarter of the twentieth century. Three major elements mark this transformation. The first is a move from a reliance on undifferentiated politics as the engine of governance, a governance that reached its zenith during the Cultural Revolution, to an embrace of a formal rule of law culture. The pinnacle product of this move is a constitution that is beginning to serve as more than the symbolic tokenism of Russia's Soviet era. The second is the use of this rules framework to effect a separation of political power, and with it a more formal power hierarchy. At the lower level sits the State apparatus, charged with governance of the people. Above it is the CCP, which is the supreme political authority. Its guiding role is effected indirectly through oversight. This is a powerful function, made more so by the third element, the institutionalization and bureaucratization of such power in the institutions of the State and Party. The bureaucratization, separation and oversight characteristics of the emerging organization are roughly expressed in recent changes to the CCP constitution.

As a consequence of these trends, Politburo membership is increasingly allotted on the basis of policy expertise and institutional representation.

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<sup>247</sup> See, e.g., Gunter Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative*, 4 INT'L J. CONST. L. 439 (2006).

<sup>248</sup> Edward J. Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19 (Pitman B. Potter ed., 1994).

This does not mean that conflict among leadership factions has withered away; it simply means that competition has instead been channeled into a structure of leadership work that suits the tasks of managing an increasingly complex economy and society and maintaining political stability.<sup>249</sup> Thus, Deng's revolutionary outsider movement is taking a turn toward formalist constitutionalism and institutionalization. As Alice Miller put it: "The pattern of balancing institutional constituencies emerged in that context as a means of facilitating collective decision-making under the general secretary as first among equals rather than as paramount leader."<sup>250</sup>

V. SKETCHING THE CONTOURS OF A CONSTITUTIONALIST STATE-PARTY: THE PARTY AS POLITY, GOVERNMENT AND THE STATE, FROM IDEOLOGY TO APPARATUS

For nearly a century the idea of constitutionalism in the context of a Marxist-Leninist state, or better put, State-Party constructions, was impossible. Indeed, from the time of Stalin, Western notions of constitutionalism were considered incompatible with Marxist-Leninist governance principles.<sup>251</sup> Theorists in each camp viewed the other as the most subtle and nefarious form of subordination.<sup>252</sup> Yet, as the previous section suggests, Chinese intellectuals, and indeed, to some extent, the CCP apparatus itself, has seemingly moved aggressively and deliberately to bridge that conceptual gap. The foundation of that bridging was made possible by Deng Xiaoping, and the possibilities actualized under the principles at the heart of Sange Daibiao, whose transformative potential is legitimated under the dynamic principles inherent in the recently adopted party line of scientific development. These theoretical movements present a normative framework that is grounded substantively in the rule of law. Those rule of law values in turn are derived from the

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<sup>249</sup> Alice Miller, *The Work System of the New Hu Leadership*, CHINA LEADERSHIP MONITOR, Spring 2008, available at <http://media.hoover.org/sites/default/files/documents/CLM24AM.pdf>.

<sup>250</sup> *Id.*

<sup>251</sup> This became an item of common political knowledge in the 1980s. "In 1982, President Ronald Reagan acknowledged the importance of political institutions and democracy as a weapon against communist totalitarianism. Reagan conceived of democracy and political development as an ideology against the Soviet 'evil empire.' Abdo I. Baaklini, *Viable Constitutionalism and Democratic Political Stability*, in *DESIGNS FOR DEMOCRATIC STABILITY: STUDIES IN VIABLE CONSTITUTIONALISM* 3, 6 (Abdo I. Baaklini & Helen Desfosses eds., 1997). The 1950s academic courses emphasized "the contest in Western thought and history between totalitarianism and constitutionalism." THOMAS H. REED & DORIS D. REED, *EVALUATION OF CITIZENSHIP TRAINING AND INCENTIVE IN AMERICAN COLLEGES AND UNIVERSITIES* 26 (1950).

<sup>252</sup> See, e.g., Richard A. Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106(2) *YALE L. J.* 423-67 (1996).



universalist rationalism of Marxist-Leninist theory itself, which is now developed in a contextualized and dynamic way by the Party apparatus, while remaining loyal to core principles.

Is it possible to extract from this great movement in Chinese State-Party understanding a universal notion of the constitutionalism inherent in a particular adaptation of the State-Party governance model? This section suggests the possible fruits of such efforts, as well as the critical limits of constitutionalist State-Party systems. Those possibilities can be extracted both by theoretical advances in Chinese Marxist Leninist theory and their application to the construction of a state and political apparatus in China. Critical to an understanding of that framework are the development of not only the Chinese Constitution of 1982<sup>253</sup> but also the Constitution of the CCP.<sup>254</sup>

The Chinese constitutional system resembles modern constitutions elsewhere, and adheres to the current structure of modern constitutionalism in its form and objectives — to formulate a system of governance based on legitimating principles and authoritative values. It adheres to thick “rule of law” constitutionalism.<sup>255</sup> The power of the state and its governance organs are strictly limited and may be asserted only through law.<sup>256</sup> Those limitations are set forth in the instrument itself, but more importantly, the constitution is itself a flow through document — shifting political authority for substantive values to the CCP. Article 1 of the Constitution declares that the nation is a “socialist state under the people’s democratic dictatorship.”<sup>257</sup> Adherence to the people’s democratic dictatorship is to be effected “under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of ‘Three Represents.’”<sup>258</sup> Article 2 then declares that all power “belongs to the peo-

<sup>253</sup> XIANFA, *supra* note 37.

<sup>254</sup> Constitution of The Communist Party of China, *supra* note 172.

<sup>255</sup> As Randall Peerenboom explains:

Theories of rule of law can be divided into two general types: thin and thick. A thin theory stresses the formal or instrumental aspects of rule of law – those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or nondemocratic society, capitalist or socialist, liberal or theocratic. . . . In contrast to thin versions, thick or substantive conceptions begin with the basic elements of a thin concept of rule of law but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single party socialism, etc.), or conceptions of human rights (liberal, communitarian, ‘Asian values,’ etc.).

PEERENBOOM, *supra* note 36, at 3.

<sup>256</sup> “The People’s Republic of China governs the country according to law and makes it a socialist country under rule of law.” XIANFA, *supra* note 37, art. 5 (amended in 1999).

<sup>257</sup> *Id.* at art. 1.

<sup>258</sup> *Id.* at pmb1.

ple”<sup>259</sup> yet vests the “exercise of state power” only in the National People’s Congress and local congresses.<sup>260</sup> The organization of the State and its apparatus is elaborated in the Constitution, and all persons and parties, including the Communist Party, are subject to its provisions.<sup>261</sup> The Constitution acknowledges the special leadership role of the CCP within this Constitutional framework — not beyond the Constitution so much as above all State actors. “Leadership by the Party means mainly political, ideological and organizational leadership.”<sup>262</sup> It is in this sense that Deng Xiaoping’s principle of a rule of law organizational framework, coupled with a separation of the State apparatus from the Party apparatus, where the Party retains a paramount political position in the State, is memorialized as foundational constitutional rule of law.

The power of the CCP, in turn, is substantially constrained by its ideological foundation, the preservation and implementation of which is a basic legitimating source of its power. “The Four Cardinal Principles — to keep to the socialist road and to uphold the people’s democratic dictatorship, leadership by the Communist Party of China, and Marxism-Leninism and Mao Zedong Thought — are the foundation on which to build our country.”<sup>263</sup> Like state organs, the CCP is understood as an institutionalized collective whose authority is based on doctrines beyond the power of any individual to trample. “The Party is an integral body organized under its program and Constitution on the principle of democratic centralism.”<sup>264</sup> In this sense, the Chinese constitutional pattern follows emerging models of transnational constitutionalism.<sup>265</sup>

The difference — and a critical one to be sure — is the source of the norms constituting those boundaries of governance and the mechanisms for engaging those norms. Unlike secular transnational constitutions that look to consensus among the community of nations for a binding set of universal governance norms, or theocratic constitutions that look to the commands and rules of a particular universalizing religion, the Chinese

<sup>259</sup> *Id.* at art. 2.

<sup>260</sup> *Id.*

<sup>261</sup> “All State organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and other laws. All acts in violation of the Constitution or other laws must be investigated.” *Id.* at art. 5.

<sup>262</sup> Constitution of the Communist Party of China, *supra* note 172, at General Program (“Acting on the principle that the Party commands the overall situation and coordinates the efforts of all quarters, the Party must play the role as the core of leadership among all other organizations at the corresponding levels.”).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at art. 10.

<sup>265</sup> See Backer, *From Constitution to Constitutionalism*, *supra* note 9, at 675 (“Emerging . . . were the beginnings of a consensus that values matter in the establishment of constitutions . . . superior in authority to any peculiarities of national sentiment.”).

constitutionalist state looks to a contextually relevant application of the universalizing norms of Marxist Leninist theory that focuses on the construction of a political citizenship vested in the Communist Party and the filter through which the common good is understood and applied. That produces a normative framework for understanding the common good that is considered distinct from that of Western liberal democracies.<sup>266</sup> The framework acquires a constitutionalist cast as it has become institutionalized and bureaucratized.<sup>267</sup>

China's government is not merely a collection of bureaucracies that reflect the imposition of a Marxist State apparatus without limits — governed in accordance with the individualized discretion of powerful Party cadres. Instead, it suggests a principled basis of state organization through law, the object of which is to secure the benefits of a specific (though perhaps odious to non-believers) set of legitimate (to believers) normative values.<sup>268</sup> Those values themselves are constructed as extra governmental — that is, beyond the power of the State apparatus to alter, and themselves subject to interpretation through an institutional system that increasingly views itself as also bound by law — both the internal rules of process for the elaboration of Party governance and the substantive values which that process is meant to implement. The evolution of constitutional values in China has been an important element of constitutional development in that country since 1979.<sup>269</sup>

To see the constitutionalist framework of the Chinese system, it is perhaps useful to contrast it to the emerging theocratic constitution of Iran.<sup>270</sup> The government constituted pursuant to the Chinese Constitution is in some great sense democratic, though subject to the mandatory direction of the CCP and the principles of democratic centralism.<sup>271</sup> People are given a limited role in the selection of individuals who represent

<sup>266</sup> As Deng Xiaoping argued:

Since the downfall of the Gang of Four an ideological trend has appeared that we call bourgeois liberalization. Its exponents worship the 'democracy' and 'freedom' of the Western capitalist countries and reject socialism. This cannot be allowed. China must modernize; it must absolutely not liberalize or take the capitalist road, as countries of the West have done.

Deng Xiaoping, *Bourgeois Liberalization Means Taking the Capitalist Road, May and June 1985*, in 3 *SELECTED WORKS OF DENG XIAOPING*, available at <http://english.people.com.cn/dengxp/vol3/text/c1400.html>.

<sup>267</sup> See Backer, *A Constitutional Court*, *supra* note 8, at 614 (discussing institutionalization of the CCP's values-interpretation function through a constitutional court within the CCP).

<sup>268</sup> PEERENBOOM, *supra* note 36.

<sup>269</sup> See Backer, *The Rule of Law*, *supra* note 26.

<sup>270</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980].

<sup>271</sup> XIANFA, *supra* note 37, at pmbl, arts. 2-3.

their interests within the apparatus of government.<sup>272</sup> The Iranian Constitution of 1979 is also democratic in this sense,<sup>273</sup> the people may have a role in electing their representatives in the State apparatus, but that apparatus itself is subject to ultimate limitations imposed by a supreme religious leader.<sup>274</sup>

Both the governing religious super structure of Iran and the CCP structure of China are themselves in turn subject to theoretically strict limits — both as to ideological range of value choices for the nation (Shia Islam in Iran and Marxist-Leninist Mao Thought, Deng Xiaoping theory, the important thought of Sange Diabiao and scientific development in China) and as to organization. In the case of China, the CCP itself is subject to a rule of law institutionalization of intra-Party organization. “The Communist Party of China leads the people in promoting socialist democracy and building socialist political civilization. It keeps expanding socialist democracy, strengthens the socialist legal system, rules the country by law, builds a socialist country under the rule of law and consolidates the people’s democratic dictatorship.”<sup>275</sup> In both cases, this superstructure sits atop a state apparatus. That apparatus is charged with the direct governance of the people. Its power is subject to the guidance of the superior political authority of the Guardian Counsel (a politically constituted religious body) in Iran<sup>276</sup> and the CCP in general and the politburo in particular in China.<sup>277</sup> This separation of powers is embodied in the organic law of each nation — their respective constitutions.<sup>278</sup>

Consider how the process elements of rule of law constitutionalism are observed in both systems. The Chinese Constitution provides for a government through law, and a system for its legislation that, at least in theory, is transparent (in the sense that one understands the process of legislation) and certain.<sup>279</sup> Specifically:

<sup>272</sup> *Id.* at art. 3.

<sup>273</sup> *Id.* at arts. 6-8.

<sup>274</sup> *Id.* at art. 5.

<sup>275</sup> Constitution of The Communist Party of China, *supra* note 172, at General Program.

<sup>276</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN, *supra* note 273, art. 56 (“Absolute sovereignty over the world and man belongs to God, and it is He Who has made man master of his own social destiny. No one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual or group. The people are to exercise this divine right in the manner specified in the following articles.”).

<sup>277</sup> XIANFA, *supra* note 37, at pmb.

<sup>278</sup> *Id.* at arts. 57-94, 123-35. QANUNI ASSASSI JUMHURII ISLAMAI IRAN, *supra* note 271, art. 57 (“The powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers, functioning under the supervision of the absolute wilayat al-’amr [religious leader] and the leadership of the Ummah, in accordance with the forthcoming articles of this Constitution. These powers are independent of each other.”).

<sup>279</sup> XIANFA, *supra* note 37, at arts. 57-67.

No law or administrative or local rules and regulations shall contravene the constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the Constitution and the law.<sup>280</sup> The Iranian Constitution also provides for rule through law, and specifies the system of law making.<sup>281</sup>

Both constitutions also specify the powers and functions of executive and judicial officials. Judicial officials are constituted independent in form.<sup>282</sup> However, they also owe a duty of fidelity to the principles of state values organization. In China, constitutional interpretation is vested in the legislative branch,<sup>283</sup> subject to the guidance of the CCP.<sup>284</sup> In addition to the separation of powers between the government and the CCP, there is also a significant element of separation of powers in the construction of the state apparatus in both state constitutional systems. The Chinese constitution constructs an elaborate system of governance grounded in the National People's Congress and the State Council.<sup>285</sup> Though in the Chinese case, these organs are subject to the overriding direction of the CCP.<sup>286</sup> The Iranian Constitution also constructs a system of interlocking government organs with distinct functions.<sup>287</sup> However, again, in the Iranian case, this is carried out only accordance with the limitations of Islam, as exercised through a religious leader.<sup>288</sup>

The substantive elements of contemporary constitutionalism described above are also observed. The positive and passive obligations of the State are described.<sup>289</sup> Human rights are enshrined in both constitutions and protected. Specifically, they are described in articles 33-56 of the Chinese Constitution and articles 19-42 of the Iranian Constitution. Indeed, those within the Chinese academic establishment hailed the 2004 amendments to the Chinese Constitution for that very reason. "The draft amendment to the Constitution is expected to inject stronger protection of private property rights, clarify that the country respects and safeguards human rights, and strengthen social security among other things."<sup>290</sup>

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<sup>280</sup> *Id.* at art. 5.

<sup>281</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN, *supra* note 270, at arts. 71-99.

<sup>282</sup> XIANFA, *supra* note 37, at arts. 123-35.

<sup>283</sup> *Id.* at art. 67(1).

<sup>284</sup> *Id.* at pmb.

<sup>285</sup> *Id.* at arts. 57-92.

<sup>286</sup> See JINSONG, *supra* note 189.

<sup>287</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN, *supra* note 270, at arts. 56-63.

<sup>288</sup> For limiting parameters, see *id.* at arts. 5, 90-99.

<sup>289</sup> XIANFA, *supra* note 37, at arts. 3-32.

<sup>290</sup> *Constitution to Be Amended a Fourth Time*, CHINA DAILY, Mar. 3, 2004, <http://china.org.cn/english/10th/89070.htm>. ("More important, Professor Hu Jinguang of

In both systems the power to petition the government is preserved, though in both constitutions these petition rights are ambiguous as to both their extent and the protections for assertion of those right. In the Chinese Constitution,<sup>291</sup> there are strong penalties for those who appear to abuse the power in certain ways. The Iranian Constitution<sup>292</sup> is ambiguous with respect to the protections offered. The Iranian Constitution creates a system of government grounded in rules and separation of powers. Like the Chinese Constitution, the Iranian Constitution vests the legislative power in the people's representatives.<sup>293</sup> Like modern constitutions it also imposes limits on power that can be exercised by the State, though some of these are explicitly grounded "in conformity with Islamic criteria."<sup>294</sup> The Chinese Constitution also limits state power with respect to a number of rights,<sup>295</sup> though many of these restrictions are subject to exception and to the overriding obligation to protect the objectives of the Revolution.<sup>296</sup>

Constitutionally granted authority may only be exercised within the limits of the legal framework of the values systems incorporated into the document. In China that values system is constrained within the parameters and possibilities inherent in Marxist-Leninist Mao Thought, Deng Xiaoping Theory and the important theory of Three Represents.<sup>297</sup> The institution charged with the system's elaboration assumes a leadership role in the direction of the State government oversight.<sup>298</sup> That institution, in turn, is charged with maintaining cadres that represent and ensure State compliance with the values system on which both State and Party are built. In Iran that values system and the institution authoritatively charged with its elaboration assume a leadership role in the direction of

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Renmin University of China, said this amendment is being conducted amid increased constitutionalism awareness among the public.”).

<sup>291</sup> XIANFA, *supra* note 37, art. 41.

<sup>292</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN, *supra* note 270, at arts. 26-27.

<sup>293</sup> *Id.* at art. 57 (powers of government are vested in the legislature, judiciary and executive), art. 58 (legislative functions to be exercised through the Islamic Consultative Assembly).

<sup>294</sup> *Id.* at art. 20 (equal protection of the laws), art. 21 (rights of women), art. 24 (press freedom except when “detrimental to the fundamental principles of Islam”), art. 27 (public gatherings, same as art. 24), art. 28 (right to choose occupation, “if not contrary to Islam and the public interest”).

<sup>295</sup> XIANFA, *supra* note 37, art. 36 (with respect to religion), art. 37 (detention), art. 45 (right and duty to work), art. 46 (right to material assistance and the right to education).

<sup>296</sup> *Id.* at art. 28 (“The State maintains public order and suppresses treasonable and other criminal activities that endanger State security; it penalizes criminal activities that endanger public security and disrupt the socialist economy as well as other criminal activities; and it punishes and reforms criminals.”).

<sup>297</sup> XIANFA, *supra* note 37, at pmbl.

<sup>298</sup> *Id.*

the State and government oversight. Islam is constituted as not only the normative foundation of the state but also as a foundational system of legal organization.<sup>299</sup> The legalist nature of Islam within Iranian constitutionalism is further refined in art. 12 of the Iranian Constitution.<sup>300</sup> The authority of these legal schools is also legitimized through the Iranian Constitution. Specifically:

These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools of fiqh constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school of fiqh, without infringing upon the rights of the followers of other schools.<sup>301</sup>

This is not a supplement, but it is a substitute for the constitutionalist values represented by the international system and the values generated by the community of states.

A key concept embraced in the both constitutions is that neither is imposed from above but rather represents an act of will of the people as the appropriate form of political organization on which the government (ie: the apparatus of that State) is to be based. This is the framework of both the Chinese and Iranian Constitutions. It is well in line with the core tenets of constitutionalism as theory.<sup>302</sup> The Preamble of the Chinese Constitution speaks of a broad values based front:

In the long years of revolution and construction, there has been formed under the leadership of the Communist Party of China a broad patriotic united front that is composed of the democratic parties and people's organizations and embraces all socialist working people, all patriots who support socialism, and all patriots who stand for the reunification of the motherland. This united front will continue to be consolidated and developed.<sup>303</sup>

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<sup>299</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN, *supra* note 270, art. 12 (“The official religion of Iran is Islam and the Twelver Ja’fari school [in usual al-Din and fiqh], and this principle will remain eternally immutable.”).

<sup>300</sup> *Id.* at art. 12 (“Other Islamic schools, including the Hanafi, Shafi’i, Maliki, Hanbali, and Zaydi, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites.”).

<sup>301</sup> *Id.*

<sup>302</sup> This article speaks only to theory, the object of which is to consider the threshold question of legitimacy. It is a wholly different, and more difficult question in both China and Iran, to test the theoretical provisions of their respective constitutions against the realities of their application. But issues of appropriate implementation become more difficult in the face of what may be distracting questions of legitimacy.

<sup>303</sup> XIANFA, *supra* note 37, at pmb1.

Article 1 of the Iranian Constitution, provides that:

The form of government of Iran is that of an Islamic Republic, endorsed by the people of Iran on the basis of their longstanding belief in the sovereignty of truth and Koranic justice, in the referendum of 29 and 30 March 1979, through the affirmative vote of a majority of 98.2% of eligible voters, held after the victorious Islamic Revolution led by Imam Khomeini.<sup>304</sup>

The privileging of Islam in the political context is absolute, as is the privileging of the religious establishment — a party in power in every sense of the word as Chinese Marxists might understand it.<sup>305</sup> It parallels an understanding of the notion of values aspects of the party in power concepts in Chinese constitutionalism. Islam “applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the *fuqaha*’ of the Guardian Council are judges in this matter.”<sup>306</sup> For that purpose, the constitutional system creates an institutional framework for religious oversight of political activity,<sup>307</sup> at the apex of which stands the Guardian Council,<sup>308</sup> “with a view to safeguard the Islamic ordinances and the Constitution, [and] in order to examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam.”<sup>309</sup> There is a party in power, though separated from the operation of the State, yet fundamental to it. Indeed, the representative legislature<sup>310</sup> “does not hold any legal status if there is no Guardian Council in existence” in the way that the organs of the Chinese State could not assert legal rights without the Party in power. There is no popular right to interrogate and alter the formulation of the basic substantive norms on which political governance is founded in Iran unless one is part of the instructional structure of the religion.

It is possible, at least on a superficial level, to see similarity in the role of the clergy in Iran to the role of the CCP in China – though in a contextually specific way that is grounded in a religious rather than “scientific” nature of its value systems and institution building project in the clergy on the one hand and Party on the other. “This Constitution affirms the achievements of the struggles of the Chinese people of all ethnicities and defines the basic system and basic tasks of the state in legal form; it is the

<sup>304</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN, *supra* note 270, at art 1.

<sup>305</sup> Here again is an example of the way in which the notion of political party cannot be understood in the Western sense of faction within a community. Rather, the model reifies a more basic division between different forms of citizenship. For the classic discussion, see THE FEDERALIST NO. 10 (James Madison).

<sup>306</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN, *supra* note 270, art. 4.

<sup>307</sup> Said Saffari, *The Legitimation of the Clergy’s Right to Rule in the Iranian Constitution of 1979*, 20 BRIT. J. MIDDLE E. STUDIES 64 (1993).

<sup>308</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN, *supra* note 270, art. 91.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at art 93.



fundamental law of the state and has supreme legal authority.”<sup>311</sup> The intertwining of state and political apparatus is both constitutionally mandated and follows the process and values framework of the rule of law system instituted. “The party leaders simultaneously hold positions in the governmental institutions. One leader could hold several positions. All powers are in the hands of Party leaders. The Party exercises “democratic centralism” by which every Party member has to abide. As a result, the Party totally dominates the policy-making process within these governmental institutions.”<sup>312</sup> While written as a criticism, it actually reflects a values choice that is institutionally embedded in the constitutional system — assuming it works right.

It might follow that within the constructed apparatus of state institutions, the framework for constitutionalist state organization could be recognized as legitimate constitutionalism, though in application its values are inimical with those embraced by Western constitutions. With theocratic constitutionalism, the fundamental difference is found in the source of values and legitimacy — religion. In rationalist constitutionalist systems like China, the fundamental difference is found in the source of political legitimacy and normative political values — the Communist Party as the embodiment of the nation’s political values and legitimacy. This fundamental insight, one more readily recognized within China than outside of it, is the nature and structural effect of the “party in power” concept. Taking Chinese theory at face value<sup>313</sup> it becomes clear that at least since the time of Deng Xiaoping, the CCP has sought to attain a more refined institutionalization within the political order. This is brought out in the CCP’s Constitution.<sup>314</sup>

“The Communist Party of China leads the people in promoting socialist democracy and building socialist political civilization. It keeps expanding socialist democracy, strengthens the socialist legal system, rules the country by law, builds a socialist country under rule of law and consolidates the people’s democratic dictatorship.”<sup>315</sup> That effort is bounded by the values system it is charged with advancing.<sup>316</sup> The institutional context in which the CCP operates is bounded by democratic values applied

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<sup>311</sup> XIANFA, *supra* note 37, at pmb. (The goal is to achieve “socialist modernization” by building socialism with Chinese characteristics, “[u]nder the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, [and] Deng Xiaoping Theory . . .”).

<sup>312</sup> SUJIAN GUO, *POST-MAO CHINA: FROM TOTALITARIANISM TO AUTHORITARIANISM?* 87 (2000).

<sup>313</sup> See Backer, *The Rule of Law*, *supra* note 26.

<sup>314</sup> XIANFA, *supra* note 37, art. 10.

<sup>315</sup> Constitution of The Communist Party of China, *supra* note 172, General Program.

<sup>316</sup> “The Communist Party of China takes Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents as its guide to action.” *Id.*

inward.<sup>317</sup> The constitutional rule of law ideals are applied within the CCP architecture.<sup>318</sup> The CCP acts institutionally under its rules and subject to its ideological principles.<sup>319</sup> Party action is meant to be collective.<sup>320</sup>

Here there is a conception of the party fundamentally different from that in which the concept originated over a century ago.<sup>321</sup> As an institutionalized collective it has principal responsibility for constitutional values — for shaping the form and values substance of the rule of law. The source of thick rule of law in China is the CCP — and that function is vested in the CCP through the Constitution that also organizes the State governmental apparatus beneath it. In this sense the CCP is a state institution with its own functional role constrained by the rule of law notions described in the Constitution.

At the same time, the CCP is more than just a state institution because it is not just an instrument among others within the State apparatus. Its role is also extra constitutional in the sense that it represents the political power of the people of the State. Democratic governance is funneled through the CCP in a manner that mimics loosely the way in which political power of the state was vested in the enrolled electorate in eighteenth century America.<sup>322</sup> With that institutionalization has come a reliance on those mechanisms that constrain assertions of individual power through rule of law concepts. Indeed, “[T]he effort to strengthen ‘democratic centralism’ has been accompanied by a campaign to diminish personalism within the party. Similar is the move to strengthen the role of NPC not only to pass legislation but also to supervise implementation of law. These trends are healthy as they might lay the foundation for a more institutionalized era.”<sup>323</sup>

<sup>317</sup> “The Party must . . . give play to the initiative and creativity of Party organizations at all levels as well as its members.” *Id.*

<sup>318</sup> “It is strictly forbidden in the Party to take any measures against a member that contravene the Party Constitution or the laws of the state, or to retaliate against or frame a member. Any offending organization or individual must be dealt with according to Party discipline and the laws of the state.” *Id.* at art. 38.

<sup>319</sup> *Id.* at art. 10 (“The Party is an integral body organized under its program and Constitution and on the basis of democratic centralism.”).

<sup>320</sup> *Id.* at art. 16 (“Party organizations must keep to the principle of subordination of the minority to the majority.” But consensus is preferred. “In case of controversy over major issues in which supporters of the two opposing views are nearly equal in number, . . . , the decision should be put off to allow for further investigation, study and exchange of opinions followed by another vote.” Where consensus is impossible, “[u]nder special circumstances, the controversy may be reported to the next higher Party organisation for a ruling.”).

<sup>321</sup> See Backer, *The Rule of Law*, *supra* note 26, at 76-80.

<sup>322</sup> Discussed *infra* at text notes 337-40.

<sup>323</sup> Burra Srinivas, *Liberalisation, Power and Politics in China and India*, 27 J. CONTEM. ASIA 460 (1997).

Rule of law provides an expression of collective governance both within and outside government. The CCP serves as a bridge. On the one hand it is bound by the Constitution as the guardian of national political framework values. On the other, the CCP serves as the representative (Sange Daibiao) of the people in their capacity as sovereigns with rights to political citizenship. Thus, that collective space serves as the arena for democratic citizenship. That site is the Party itself, as an autonomous community. The Party becomes the polity.<sup>324</sup> This notion is consonant with the long held notion of the difference between political power and the power of rule that has long been held by virtually all strata of CCP leadership. Thus, for example, from the earliest period of CCP rule in China, “[d]istinguishing between the concepts of political power (zheng quan) and the power of rule (zhi quan), Peng argued that the political power of the people did not include the powers of direct election and recall of officials.”<sup>325</sup>

That community itself serves as a representative and proxy for the nation in two respects — it is the site where political values are elaborated and protected and it serves as the body of individuals charged with the task of such elaboration and protection within both the political order and in its state institutions. It is in this sense that one can better understand the modern meaning of that old Marxist notion of Party as vanguard — the Party itself is vanguard/guardian of fundamental substantive values of the political state. The CCP, then, cannot be understood as an orthodox party natural to liberal democratic states; “they represented movements of solidarity, movements charged with infusing the masses with a belief system.”<sup>326</sup> The CCP, in this sense, embodies the consequences of its principal mission, the assumption of “pedagogical and tutelary responsibilities never before exercised by men outside of religious orders.”<sup>327</sup>

It is in this sense as well that one can understand Party membership as the functional equivalent in the West of political citizenship.<sup>328</sup> The hold-

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<sup>324</sup> In this respect, Chinese State-Party and theocratic constitutionalism have more in common with respect to the values basis of political organization than either might have with Western or transnational constitutionalism. See Backer, *Theocratic Constitutionalism*, *supra* note 35.

<sup>325</sup> Potter, *supra* note 169.

<sup>326</sup> GREGOR, *supra* note 86, at 353.

<sup>327</sup> *Id.*

<sup>328</sup> The contemporary notion of the components of citizenship — social, political and civil — owe much to the work of Thomas Marshall. See THOMAS H. MARSHALL, *CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT* (1963); THOMAS H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1987). While the understanding of the acceptability of disaggregating citizenship remains controversial, the division is useful for understanding the possibility of creating multiple iterations of citizenship within a polity. Will Kymlicka & Wayne Norman, *Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts*, in *CITIZENSHIP IN DIVERSE SOCIETIES* (Will Kymlicka &

ers of political citizenship — Party members — then serve within the Party as the forces for social cohesion and the deployment of values based rule of law substantive values, and outside the Party in a fiduciary capacity to all people in the political community who are holders of social and economic rights, but who lack political rights. This both nods to the traditional origins of communist parties as vanguard parties and the evolution of that traditional role into something more institutionalized and evolutionary once the vanguard revolutionary party became the holder of the highest national power within the political community it leads.

Political citizenship, then, though limited, is open to those who would adhere to and further the political and rule of law values of the Party (which are themselves built into the Constitution of 1982) within the governance structures of the State set up for that purpose. But rule of law notions within the Party must then be applied to make such political citizenship available to all in exchange for adherence to the Party “line” (the substantive political values on which the State was founded). This is in line with the ethos surrounding the Sange Daibiao campaign,<sup>329</sup> but political citizenship is no longer direct governance. The Constitution has set that separation of powers framework quite distinctly.

Rule of law resides within the Party architecture, and between that Party architecture and the elaboration of the State apparatus. It is from that Party architecture that rule of law concepts move out to the governmental, social and economic spheres. State organization devolves from, and reflects, Party organization and the values the Party represents as an institutionalized, rules governed collective of the State’s political citizens. Chinese constitutionalism, then, can be understood as a combination of the constitutional order within the CCP recognized in the Constitution combined with the constitutional order as elaborated in the government constituted through the Constitution. Constitutional analysis ought to focus on the CCP Constitution, and its elaboration/application of rule of law ideals within its value order to understand its elaboration as national political power under the National Constitution.

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Wayne Norman eds., 2000). “More to the point, talk about disintegration, fragmentation, or weakening of citizenship can be expressing any number of quite distinct political worries.” *Id.* at 30. While democratic citizenship now generally views citizenship as a bundle of social, civil and political rights universally available to all citizens, the equal distribution of political rights has not always been a core value of democratic societies. *See text, infra*, at notes 337-40.

<sup>329</sup> The focus underlying Sange Daibiao is the centrality of the Party to progress and governance. The underlying principle suggests that between the people and the community, organized as such, must stand the Party as the representative of the people, to whose welfare they are committed but strictly bounded by the values systems on which the State is organized. *See Backer, The Rule of Law, supra* note 26.

This structuring of power relationships between political collective and the governmental organizations meant to institutionalize State power (within that collective) have significant values effects on the way in which Party, State and individuals relate. First, it implies a distinct view of citizenship, disaggregating the political rights of citizens from their economic and social rights.<sup>330</sup> The former can be exercised fully and directly only through CCP membership, and may be exercised to a more limited and indirect extent by non-CCP members. The latter comprise citizenship rights preserved for all people. Second, it rests on an acceptance of the view that government is not the ultimate repository of political power. The ultimate repository of political power is the vanguard Party. It accepts the idea that government, like non-state actors and individuals, has been charged with specific social, political economic and other tasks, but that the determination of those objectives — the politics of governance — rests with those whose role it is to safeguard and advance the political objectives of the state. This represents a distinct approach from other states, where the grounding postulate is an identity between political and administrative authority in government. Third, it is implemented through an institutionalization of political authority outside the structures of government. It effectively delegates to this institutionalization of political power the obligation to safeguard substantive constitutional values. Fourth, it operates successfully only on the assumption that these institutionalized holders of state and political authority will police themselves effectively. As a consequence, corruption has a constitutional and system legitimating aspect.<sup>331</sup>

The most important consequence, however, flows from the identification of the Party with the people, in effect the Party as both organization and representative of the political will of the people. The Party, and so the people, assumes a privileged position with respect to the State, and to the apparatus of government through which the State is administered. The site of democratic development, and the deepening of the practice

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<sup>330</sup> Globalization has broadened the scope and importance of this division of citizenship along functional lines. See, e.g., Ronnie D. Lipschutz, *Constituting Political Community: Globalization, Citizenship, and Human Rights*, in *PEOPLE OUT OF PLACE: GLOBALIZATION, HUMAN RIGHTS, AND THE CITIZENSHIP GAP* 29-51 (Alison Brysk & Gershon Shafir eds., 2004) (noting the contradiction “between spaces of political membership (national citizenship) and spaces of market participation (economic citizenship)”). See generally Johanna Waters, *Flexible Citizens? Transnationalism and Citizenship Amongst Economic Immigrants in Vancouver*, 47(3) *THE CANADIAN GEOGRAPHER* 219 (2003). In a sense, this notion represents an inversion of the argument advanced by influential members of the global community of the rights of minority groups to keep their distinctive cultures. See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

<sup>331</sup> For context, see, e.g., TING GONG, *THE POLITICS OF CORRUPTION IN CONTEMPORARY CHINA: AN ANALYSIS OF POLICY OUTCOMES* (1994).

and culture of the rule of law, must be focused on the Party, its internal structure, its mechanics for accepting and nurturing members and its relation to the State apparatus. The great exponent of a law based political structure, Peng Zhen

[S]tressed the realistic formulation of policy; the strengthening of leadership and supervision over cadres; and the practical reeducation of Party members. Peng emphasized the need for discipline in the formulation and fulfillment of Party policies. Noting that the Party often was accused of ‘being able to talk but unable to act,’ Peng advocated realism in the formulation of policy and rigor in the fulfillment of policy.<sup>332</sup>

The objective has been to subject mass movements to organizational control.<sup>333</sup> This is a theme very much on the mind of Chinese theorists — bureaucratization and institutionalization of political power, but centered on the CCP.<sup>334</sup>

At the same time the separation of powers aspects of that structure must also be recognized. The heaviest burden falls on the Party to ensure fidelity to the values system that is inherent in the Constitution, binding on it and binding on the State organs. It is within the sphere of the CCP’s internal engagement with deep rule of law in theory and practice that constitutionalism can be understood in China. That engagement is crucial, along with the elaboration of its practices within State organs and among the polity, for the movement from theory to practice with direct effect on the people. The bifurcation of government and political power is thus central to the ideal of constitutionalism in China. That requires recognition of the political authority of the Party and the structural obligations of the State to effect policy in accordance with constitutional norms. It is with the government that the administration of the State must be effected, but the substantive values and direction of that administration is at the core of the political duties of the government of the CCP. While the theoretical framework has been elaborated with greater clarity over the last decade, the actual implementation — and the training of party cadres in this normative framework, especially at the local level — has a long way to go.<sup>335</sup>

One might have said something similar looking back at the cadres making up the American political class formulating their conceptions of con-

<sup>332</sup> Potter, *supra* note 169, at 28-29.

<sup>333</sup> *Id.*

<sup>334</sup> See Backer, *From Constitution to Constitutionalism*, *supra* note 9.

<sup>335</sup> See Joseph Fewsmith, *An “Anger-Venting” Mass Incident Catches the Attention of China’s Leadership*, 26 CHINA LEADERSHIP MONITOR, 9 (Sept. 02, 2008), available at <http://media.hoover.org/sites/default/files/documents/CLM26JF.pdf>. (“China’s leaders would like to use this event to promote greater professionalism and accountability by China’s local leaders . . .”).

stitutionalism in the 1820s.<sup>336</sup> The separation of political from social power in the United States was more subtly effected — through the Electoral College system,<sup>337</sup> the indirect election of senators<sup>338</sup> and through the rules limiting the right to vote in elections,<sup>339</sup> but it was no less effective because of its subtlety. The Habermasian public sphere,<sup>340</sup> in effect, is now centered in the CCP for political matters and in the State for administrative matters.

As such, the CCP remains deeply embedded within the constitutional system of China. The Party is not embedded within the organization of the State. The government of the State is organized under the Constitution, and may be held accountable to the people through elections and the right to petition, but the government is the administrative organ of

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<sup>336</sup> Among the objectives of the constitutional framers, the limitation of political participation by the masses loomed large and was thought necessary to construct a system that would “guard against what were thought to be the weaknesses of popular democracy.” DAVID MATHEWS, *POLITICS FOR PEOPLE. FINDING A RESPONSIBLE PUBLIC VOICE* 51 (1994). The framers sought to “*permit political participation but prevent democracy* in the United States.” John F. Manley & Kenneth M. Dolbeare, *Introduction, in THE CASE AGAINST THE CONSTITUTION: FROM THE ANTIFEDERALISTS TO THE PRESENT* x (John F. Manley & Kenneth M. Dolbeare eds., 1987) (*emphasis added*). These notions contribute both to a certain aspirational nature of the American Constitution and a certain frustration with the slow pace of attainment of its goals. See, e.g., Frank I. Michelman, *Socioeconomic Rights In Constitutional Law: Explaining America Away*, 6 INT’L J. CONST. L. 663 (2008); Arthur S. Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375 (1986).

<sup>337</sup> “Only a few delegates to the Constitutional Convention felt that American democracy had matured sufficiently for the choice of the President to be entrusted directly to the people. . . . In retrospect, the arguments they offered seemed better suited to future generations than their own.” NEAL R. PEIRCE, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE*. 41 (1968). Also see discussion in *id.* at 28-57). See also JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* (1975).

<sup>338</sup> See, e.g., Scott R. Meinke, *Institutional Change and the Electoral Connection in the Senate: Revisiting the Effects of Direct Election*, 61(3) POLITICAL RESEARCH QUARTERLY 445 (2008).

<sup>339</sup> The American constitutional system created by the Framers “allowed for only limited participation by the citizenry in periodic elections. Women and slaves were excluded from the franchise; only property holders could vote for members of the House of Representatives.” CRAIG A. RIMMERMAN, *THE NEW CITIZENSHIP: UNCONVENTIONAL POLITICS, ACTIVISM, AND SERVICE* 15 (1997).

<sup>340</sup> JURGEN HABERMAS, *STRUCTURAL TRANSFORMATIONS OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., 1991) (following the rise of a public sphere in Europe, its functioning and transformation from direct participation by individuals to the abstraction of the individual in the form of party politics).

the Chinese political system, not its source. Administratively, the people act through the National People's Congress system and other organs of government. Politically, the people act through the CCP in its leadership role. The administrative role of the State is inferior in power to, and a subset of, the political power of the people. The people speak through the Party but act through the State. Party, people and government are constrained by the substantive and procedural norms of the Constitution. The Party is further constrained by the institutionalized structures of the organization of the Party itself. The scope of political action by the party and administrative action by the government are constrained by law and the normative values specified in the Constitution itself. These are the fundamental ordering principles of Chinese constitutionalism.

## VI. IMPLICATIONS AND CONSEQUENCES FOR CONSTITUTIONALISM

Michel Foucault once noted that the late eighteenth and early nineteenth century in Europe saw the emergence of two distinct aspects of political monstrosity, and thus of the illegitimate use of power. The first was the despot or tyrant.<sup>341</sup> The second was disordered mass democracy.<sup>342</sup> Both are beyond law and legitimacy because by their nature they neither acknowledge nor respect the fundamental rules by which society is ordered.

This article has argued that the traditional Western reflex to dismiss State-Party political organization as always and inherently despotic and as inconsistent with constitutionalism, is both anachronistic and too simple minded for the emerging possibilities in states like China. While many State-Party systems can justifiably be dismissed as despotic —the use of a party organization as a cover for centralized power (ie: individual power) — this paper sketches a basis, in theory, for conceptualizing a State-Party governance model as a constitutionalist one.

The article has not suggested that such constitutionalism is as yet deeply embedded or adequately practiced throughout the Chinese governance system. Still, theory is important — certainly as important in China as it was in the young United States working through basic governance issues such as federalism,<sup>343</sup> the form of constitutional review<sup>344</sup> and values constitutionalism in the context of a constitutional permission to

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<sup>341</sup> “The despot is the permanent outlaw, the individual without social ties . . . . The despot is someone who . . . merely by his existence, performs the greatest crime . . . of a total breach of the social pact by which the very body of society can exist and maintain itself.” MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE 1974-1975* 94 (Graham Burchell trans., 2003).

<sup>342</sup> *Id.* at 98 (“Here is not the monster of abuse of power, but the monster that breaks the social pact by revolt. The monster is no longer the king but the revolutionary people who are the mirror image of the bloodthirsty monarch. The people in revolt are the hyena that attacks the social body.”).

<sup>343</sup> See *McCulloch v. Maryland*, 17 U.S. 316 (1819).



enslave a large portion of the American population.<sup>345</sup> In each case, theory provided a substantive-values base upon which political action could be mobilized and the operations of political actors measured.

Nor is the purpose of the article to advocate State-Party political organization as a viable alternative everywhere, or that it ought to be considered in places like the United States and other political communities that draw on their own rich cultural-political heritage for governance frameworks. Nor do I suggest that any state has actually attained in practice the full measure of the objects of nationalist, transnationalist or any other variant of the constitutionalist ideal.<sup>346</sup> Like their American counterparts, the Chinese are astute observers of the space that separates goals from reality. They have been willing to define that space and to point to the direction in which they mean to travel. Issues of implementation, crucial to the maturing of the Chinese political system, do not serve as a substitute for a theory of Chinese constitutionalism. Nor should it necessarily serve as an indictment of its failures as a rule of law system. The American experience suggests the difficulties of transposing constitutional ideals into applied governance. The two aspects of constitutionalism are important, but not the same thing.

That is the point here — it is possible to describe goals within a State-Party governance architecture that parallels those of transnational or Western nationalist constitutionalism; these represent an evolution of traditional ways of conceiving the State-Party relationship. These are grounded in the basic assumptions of constitutionalist state — rule of law, institutionalized governance, accountability, and limitations on the power of governing organs based on both process and substantive values that are grounded in sources beyond the power of individuals to change or manipulate. Just as the United States has been able to construct a constitutionalist State by contextualizing universal value sets touching on the boundaries of legitimate state and social organization in the political sphere, so the Chinese are seeking to do the same, contextualizing the

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<sup>344</sup> *Marbury v. Madison*, 5 U.S. 137 (1803). For discussion of a different vision and its development within the context of the European Union, see Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001).

<sup>345</sup> See, e.g., *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

<sup>346</sup> In a sense, all constitutionalism is aspirational or contains aspirational elements. See, e.g., PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 135-36 (2001) (1990). Conventional American analysis would have it understood that Americans tend to be pragmatic about their Constitution while Europeans tend to be more aspirational in the organization and elaboration of their constitutions. The former approach is thought to focus on implementation and workability, the latter on principles. See, e.g., Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 14-15 (2005). I suspect Cass Sunstein, like Queen Gertrude in *Hamlet*, “doth protest too much, methinks.” WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 2.

universal in a different political setting. Their road will be quite different from that taken in the West.<sup>347</sup>

Constitutionalist theory provides us with the tools necessary to better analyze political systems.<sup>348</sup> It helps us judge them against an unmoving set of assumptions and criteria. It helps us distinguish between differences based on value choices grounded in political, religious, economic and social frameworks from those based on organizational frameworks. All despotism tends to share certain characteristics, but also evidences a great variation in its actual implementation — adjusting to local conditions. So, too, constitutionalist states share a certain set of core characteristics — characteristics that distinguish constitutionalist states from despotism. That the American and Chinese value systems are incompatible does not affect the conclusion that both presents legitimating variations on constitutionalist political organization.

China presents an interesting variant on constitutionalism — at least at the theoretical level. It suggests the possibility of authoritarian constitutionalism, that is, of constitutionalism with an extreme variant of Western-style democratic values.<sup>349</sup> For that purpose, the CCP plays a critical role. It is no longer the institutionalized cover for personal dictatorship, kleptocracy or tyranny (whether or not organized as old fashioned totalitarianism). Instead it plays a dual role in the political order — both bound tightly (again in theory) by rule of law presumptions. On the one hand, the CCP serves as the political collective from which constitutional norms are formulated, developed, defended and reviewed. The CCP plays a role as the constitutional source of values for the application of rule of law (ie: the Constitution as applied). That constitutes it as a critical component of rule of law constitutionalism as developed under the Constitution of 1982. The CCP both adheres to rule of law governance and serves as the source of the values framework within which rule of law is understood and applied by the government. The CCP thus sits atop the State apparatus. But the CCP serves as more than the supreme institutional collective of political power — it also serves as the representative of the people. It is the sovereign collective. Those who, because of their fidelity to the core notions of national organization, have been afforded political citizenship.

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<sup>347</sup> Cf. essays in *POWER AND IDENTITY IN THE CHINESE WORLD ORDER: FESTSCHRIFT IN HONOUR OF PROFESSOR WANG GUNGWU* (Billy K. L. So, John Fitzgerald, Huang Jianli & James K. Chin eds., 2003).

<sup>348</sup> See Backer, *From Constitution to Constitutionalism*, *supra* note 9.

<sup>349</sup> On authoritarian constitutionalism as a type, see the discussion of constitutional classification in Karl Loewenstein, *Reflections on the Value of Constitutions in Our Revolutionary Age*, in *CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II* (Arnold J. Zurcher, ed., 1951) and Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*. 56 *AMERICAN POL. SCI. REV.* 853-64 (December 1962).

This role of the CCP has emerged more clearly with the rise of Sange Daibiao, the substantive objectives of harmonious society and the methodologies of scientific development. It is also consistent with the long-term goal of creating a Marxist democratic society. That goal is impossible without a mechanism for including all people within its framework. The opening of the CCP to all class elements, that is all class elements who demonstrate a fidelity to the framework within which rule of law governance operates in China, appears to be the governing mechanism for that objective. The Constitution of 1982 thus begins to draw a picture of a different sort of constitutionalism — one heavily invested in rule of law notions, but rule of law notions where actors play substantially different political and governance roles than would be tolerable within Western constitutional traditions. The difference is values, and not necessarily legitimacy. The difficulty will be implementation — something the Chinese are well aware.

The CCP today<sup>350</sup> is not organized like the Stalinist dictatorships of the last century.<sup>351</sup> China's constitutional project is as different from that of the old Soviet Union as it is from that of 1980s Castroism.<sup>352</sup> Nor does it suffer from the individualist expressions of the Cultural Revolution period of a generation ago.<sup>353</sup> I have suggested that the real constitutionalist revolution began in the 1980s with the theoretical refinements of Deng Xiaoping, as elaborated during the leadership of Jiang Zemin and Hu Jintao, marked a reemergence of constitutionalism. The core of that refinement focused on the relationship between party and people — but also between party, people and government. The nexus between party, people and government, institutionalized and bureaucratized through conventionally understood rule of law principles, provides a basis, in theory, for understanding the constitutionalist dimensions of the organization of the Chinese State, with unique Chinese characteristics. While its normative and political values may, to some extent, be either incompre-

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<sup>350</sup> As this article has suggested, contemporary China marks a substantial advancement from out of the pre-1980s organization of the State. *See, e.g.*, JAMES CHIEH HSIUNG, *IDEOLOGY AND PRACTICE: THE EVOLUTION OF CHINESE COMMUNISM* (1970). However, consider the lingering effects of practices discussed in *THE CHINESE COMMUNIST PARTY'S NOMENKLATURA SYSTEM: A DOCUMENTARY STUDY OF PARTY CONTROL OF LEADERSHIP SELECTION, 1979-1984* (John P. Burns ed., 1989).

<sup>351</sup> *See, e.g.*, PAVEL CAMPEANU, *THE GENESIS OF THE STALINIST SOCIAL ORDER* (Michel Vale trans., 1988). For a discussion of the connections between pre-Deng Chinese Communism and its Soviet allies, *see* CHARLES B. McLANE, *SOVIET POLICY AND THE CHINESE COMMUNISTS, 1931-1946* (1958).

<sup>352</sup> *See* SUSAN EVA ECKSTEIN, *BACK FROM THE FUTURE: CUBA UNDER CASTRO* (Routledge 2d ed. 2003) (1994).

<sup>353</sup> *See* CONSTITUTIONS OF THE COMMUNIST STATE PARTYS (Jan F. Triska ed., 1968); FU-SHENG MU, *THE WILTING OF THE HUNDRED FLOWERS: THE CHINESE INTELLIGENTSIA UNDER MAO* (1974).

hensible or anathema to the constitutional value traditions of the West, it demonstrates the sort of framework that might fairly be considered constitutionalist. Thus understood as legitimate within its own context, the issue of implementation, and of the fidelity of individuals and organizations to the core values of Chinese constitutionalism, can be extracted and considered in its own right without the distraction of the legitimacy argument. Implementation rather than legitimacy then moves to center stage.

The form of rule of law constitutionalism in China emerges as something quite distinct from that of Western constitutionalism. The West prefers the vesting of the whole of the popular power in a government constituted by a constitution, representing the organization of political reason consonant with local culture.<sup>354</sup> China prefers to divide the whole of the popular power into two parts. Political power is vested in the CCP and asserted legitimately only when it conforms to the fundamental substantive frameworks on which the State is organized and only when properly adopted in accordance with its institutional rules — effectively recognizing a political government. Administrative power is vested in institutional structures that appear to operate like Western governments, but appearances are deceiving. This administrative state structure is itself subject to the leadership of the political government of the Party. Western states then prefer to divide the whole of popular power vested in a single government structure along legislative, executive and judicial functions. The Chinese system, having divided administrative from political functions, tends to find such strict divisions less helpful in organizing a rule of law State.<sup>355</sup>

Western scholars who may only see in others what they understand about themselves will be unable to appreciate the structures and functioning of the system, and will fall prey to the tendency to criticize the system for theoretical deficiencies that reflect more on the values of the scholar than on the object of study,<sup>356</sup> though the relationship is complex.<sup>357</sup> Ultimately, such criticism, focused solely on issues of structural and theoretical legitimacy, suggests directly what most tends to be underplayed — an idea that the only form of a constitutional state that can be

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<sup>354</sup> See, e.g., STEVEN D. SMITH, *THE CONSTITUTION & THE PRIDE OF REASON* (1998).

<sup>355</sup> *But cf.* SHAOHUA HU, *EXPLAINING CHINESE DEMOCRATIZATION* (2000).

<sup>356</sup> This can be the case even in sympathetic studies. For a traditional form, see, e.g., EDWARD ALSWORTH ROSS, *THE CHANGING CHINESE: THE CONFLICT OF ORIENTAL AND WESTERN CULTURES IN CHINA* (1911); ELBERT DUNCAN THOMAS, *CHINESE POLITICAL THOUGHT: A STUDY BASED UPON THE THEORIES OF THE PRINCIPAL THINKERS OF THE CHOU PERIOD* (1927). *But see* CHINESE DEMOCRACY AND THE CRISIS OF 1989: CHINESE AND AMERICAN REFLECTIONS (Roger V. Des Forges, Lou Ning, & Wu Yen-Bo eds., 1993).

<sup>357</sup> See, e.g., Y. C. WANG, *CHINESE INTELLECTUALS AND THE WEST, 1872-1949* (1966).

legitimate is that conforming in form and effect to those based on the forms of government developed in the aftermath of the American and French Revolutions.

Such reasoning is distracting from an important area of Chinese constitutional work — the great project of fully implementing the constitutional model in fact.<sup>358</sup> China's Constitution, like that of other modern states, is subject to a constant process of implementation and interpretation. Failure to follow constitutional norms in China, as in other states, is an important subject of scholarship.<sup>359</sup> Equally important for political theory, and also substantially under-studied, are issues of social and informal control,<sup>360</sup> issues that have received substantially more attention in the West. Those issues should not be confused with the question of the constitutional legitimacy of the organization of the state itself. This is constitutionalism with Chinese characteristics.

## VII. CONCLUSION

This article has argued that, in order to understand Chinese constitutionalism, it is not sufficient to equate the constitutional system with the written Constitution alone. It is necessary to recognize the more complex nature of Chinese constitutionalism, grounded in a division between political and administrative authority separated between a vanguard Party and an administrative apparatus. After an introduction, Part II reviewed the basic principles of current constitutionalism theory and its role as a legitimating global ideology against which state organization, and the actions of state officials, are judged. Part III applied that constitutionalist framework for analysis on the conventional discourse of State-Party models of political organization. Part IV then brought this analysis into the Chinese context, exploring the evolution of the Party and State model from its Maoist origins to its present structure. Part V analyzed the current system, as formally constructed, one that appears to move toward a new model of the constitutional State-Party, embracing process and substantive rule of law norms while attempting to remain true to the ideals of constitutionalism and to the core values of the Chinese political system. Lastly, Part VI considered the ramifications, limits and direction for constitutionalism of a constitutionalist analysis of the Chinese system.

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<sup>358</sup> See, e.g., Joan E. Hemphill, *China's Practice of Procuring Organs from Executed Prisoners: Human Rights Groups Must Narrowly Tailor Their Criticism and Endorse the Chinese Constitution to End Abuses*, 16 PAC. RIM L. & POL'Y J. 431 (2007).

<sup>359</sup> See, e.g., PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* (2001); STEPHEN C. ANGLE, *HUMAN RIGHTS AND CHINESE THOUGHT: A CROSS-CULTURAL INQUIRY* (2002).

<sup>360</sup> See, e.g., VICTOR N. SHAW, *SOCIAL CONTROL IN CHINA: A STUDY OF CHINESE WORK UNITS* (1996).

What emerged from this analysis was a Chinese constitutional that exists as a combination of polity and governing ideology on the one hand, and State apparatus on the other. The CCP serves as the institutionalization of the polity and the source of its substantive values. The government established under the Constitution serves as the institutionalization of State power, within which the people may more directly participate under the guidance of the Party. The Party is the repository of political power and the government the repository of administrative power. Together they represent the whole of China's constitutional order. When one looks to the Chinese Constitution, then, one is not presented with a document that contains within it the whole of the organization of the political collective. The Constitution itself organizes the administrative power in a government. It also recognizes, as a constitutional matter, the position of the CCP both within and without the Constitution. To approach the Chinese constitution the way one would a conventional European or Western constitution is both to distort and misunderstand the organization of the Chinese constitutional system.

Thus understood, the CCP does not play an extra-constitutional role in Chinese constitutionalism. Nor is it meant to function like a Western style political party, whose members advance a political line to induce voters to elect them to office from which political authority may be exercised in government. The Chinese Constitution identifies the political authority of the CCP, but does not define the extent of that authority. It constitutes a government, but that Constitution is itself a product of the vanguard role of the Party. The people can exercise political authority through the CCP. They may also elect and hold accountable members of the government, under the leadership of the CCP. Popular participation is thus both direct and indirect. Accountability of government officials is undertaken through elections and the CCP leadership; accountability of CCP officials is supposed to be undertaken through CCP discipline, the constitutionality of which remains a lively subject of debate in China. The CCP represents the people directly but may act only to further the fundamental substantive principles on which the State is founded. The people speak through the Party but act through the State.

These are the fundamental ordering principle of Chinese constitutionalism. Understood as legitimate within these organizational parameters, it is then possible to turn attention where it is sorely needed: to the question of appropriate implementation of Chinese constitutional principles in fact. Accountability and reform is possible only after the threshold question of constitutional legitimacy is settled. There is no doubt that the Chinese constitutional system can be better implemented to more completely realize its potential. The ability of Chinese constitutionalism to be true to itself, and to move reality closer to ideal, will determine its future success.