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CHINESE CONSTITUTIONALISM IN THE “NEW ERA”: THE CONSTITUTION IN EMERGING IDEA AND PRACTICE

Larry Catá Backer**

Abstract

The 19th Congress of the Chinese Communist Party concluded at the end of October 2017. It set the fundamental policy positions of China’s leadership for the next five years with particular emphasis on its approaches to constitutionalism, law, and the political theory of the state. These internal political changes will have substantial effects on China’s external relations and on the ways in which Western liberal democracies engage with China. In that context among the most important questions for law revolve around the extent and character of the evolution of CPC thinking, and the CPC Basic Line, with respect to Socialist Rule of Law and Socialist Constitutionalism now bound up in the adoption of “Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era.” The question is central to a consideration of the Work Report delivered by Xi Jinping reflected in the resulting final Resolution of the 19th Congress to amend the Constitution of the Chinese Communist Party and thereafter in 2018 to amend the State Constitution to reflect the advances in political principle and the CPC political framework embedded in the CPC Constitution. A key element of that question involves constitutional trajectory: to what extent did this report reflect an official downshifting of the importance of the state constitution and constitutionalism within the construction of Chinese notions of Constitutionalism, and if so, what variation on constitutionalism is likely to emerge? If so, what are the effects of any such downshift on the relation between the state and the political constitutions of China. To that end, it is worth considering whether principles of constitutionalism for the “New Era” may be extracted from Xi Jinping’s Report to the 19th Congress.

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And if they can, to try to extract a sense of the likely characteristics of emerging structures of Chinese constitutionalism. What follows, then is a preliminary report and assessment of Constitutionalism with Chinese Characteristics in the New Era from Out of the 19th CPC Report. After this short introduction to the issues and context of Chinese constitutionalism before the 19th Congress, Section II provides a contextual framework for situating the constitutional work of the 19th CPC Congress within contemporary Chinese currents of constitutional theory. Section III then explores the references to notions of constitution in earlier CPC Congress Reports. Section IV then turns to the consideration of the constitution project for China in the "New Era." It first considers in more detail the understanding of constitution and its role in politics and governance within the 19th CPC Congress Report itself. It then explores the role of constitutionalism within the structures of the 19th CPC Congress Report through a close reading of the specific references to constitutions in the Report (state, political and mixed). Lastly, it provides a concise consideration of the connection between constitutionalism and the emerging characteristics of Chinese consultative democracy.

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INTRODUCTION

The Communist Party of China (CPC)¹ Congress is “a twice-per-decade event to set the party’s national policy goals and elect its top leadership.”² The first Congress was held in 1921, on the suggestion of European members of the Comintern,³ who had urged that the various communist organizations then recently established in China should send representatives to a general Congress.⁴ Since then, periodic CPC Congresses have provided a critical space through which the CPC can articulate, develop, and operationalize its objectives as a vanguard party. It provides a formal arena where the vanguard can come together to express the results of a

¹ The Communist Party of China (CPC) is a Marxist-Leninist vanguard party whose leadership role in the operation of state, society, politics, economics and culture forms the essential and central element of the political and constitutional system of the Chinese state. It has a long and complex history, with origins in the transposition of Russo-European notions of Marxism and Leninism into China, which was then naturalized within a rich political culture of post-Imperial anti-colonialist nationalism, contentious relations with the counterpart Chinese Nationalist Party (Zhongguo Guomindang (GMD)), Soviet and European state Marxist Leninism, and ultimately developed with Chinese characteristics increasingly after 1949. See *Brief History of the Communist Party of China*, CHINA DAILY, http://cpcchina.chinadaily.com.cn/2010-09/07/content_13901594_2.htm.

² *China’s 19th Party Congress*, BROOKINGS INST. (2017), <https://www.brookings.edu/product/chinas-19th-party-congress/>.

³ “In March 1919 leading members of the Communist Party in Russia founded the Communist International (later known as Comintern). The aim of the organization was to fight “by all available means, including armed force, for the overthrow of the international bourgeoisie and for the creation of an international Soviet republic as a transition stage to the complete abolition of the State.” John Simkin, *Comintern*, SPARTACUS EDUC. (Aug., 2014), <http://spartacus-educational.com/RUScomintern.htm>; see VLADIMIR I. LENIN, *The Third Communist International* (1919), reprinted in LENIN’S COLLECTED WORKS, 29, 240-241 (George Hanna trans., Progress Publishers 4th ed. 1972) (“In March of this year of 1919, an international congress of Communists was held in Moscow. This congress founded the Third Communist International, an association of the workers of the whole world who are striving to establish Soviet power in all countries. The First International, founded by Marx, existed from 1864 to 1872...[t]he Second International existed from 1889 to 1914, up to the war.”). <http://spartacus-educational.com/RUScomintern.htm>.

⁴ The First National Congress of the CPC (中国共产党第一次全国代表大会) was held in Shanghai from 23 July to 2 August 1921 in the course of which the CPC itself was established. See *Brief Introduction to the First National Congress of the Communist Party of China* 中国共产党第一次全国代表大会简介, CHINESE COMMUNIST PARTY NEWS, <http://cpc.people.com.cn/GB/64162/64168/64553/4427940.html> (“共产国际代表建议及早召开党的代表大会, 宣告中国共产党的正式成立。” [“The Comintern’s representative suggested convening the congress of the party as soon as possible and declaring the formal establishment of the Chinese Communist Party.”]; see also HANS J. VAN DE VEN, *FROM FRIEND TO COMRADE: THE FOUNDING OF THE CHINESE COMMUNIST PARTY, 1920-1927* (Univ. of Cal. Press, 1991) (arguing that the CPC emerged from the consolidation and transformation of a group of study societies, that acquired definitive contemporary form only after 1927 as a mass Marxist-Leninist party); see also TONY SAICH, *THE CHINESE COMMUNIST PARTY DURING THE ERA OF THE COMINTERN (1919-1943)*, (Int’l Inst. of Soc. History, Amsterdam), <https://sites.hks.harvard.edu/fs/asaich/chinese-communist-party-during-comintern.pdf>.

reflexive period of internal dialogue ideally founded on its own process principles.⁵ The Congress serves as the meeting at which the leadership is elected and confirmed. It is also the key formal event in which such work can be elaborated and disseminated to the nation at large. "But the practice of quinquennial gatherings dates to Deng Xiaoping's attempts in the 1980s to introduce a sense of order and predictability after the chaos of the Cultural Revolution."⁶

With the 19th CPC Congress, held during the last week of October 2017, the CPC has announced that state, party and people have entered into a new historical stage, a "New Era."⁷ "With decades of hard work, socialism with Chinese characteristics has crossed the threshold into a new era. This is a new historic juncture in China's development."⁸ That New Era itself pointed to a further development of Marxism Leninism in the Chinese context, the "Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era" which was itself at the center of the 19th CPC Report.⁹ "That New Era has a number of important consequences for politics, for law and for the construction of a responsive constitutional state. The first is that the New Era again shifts the fundamental contradiction of society. "As socialism with Chinese characteristics has entered a new era, the principal contradiction facing Chinese society has evolved. What we now face is the contradiction between unbalanced and inadequate development and the people's ever-growing needs for a better life."¹⁰ The second is that, like the American approach to politics and law that came before it, "New Era" offers an important alternative to legitimate construction of states and their politics: "It means that the path, the theory, the system, and the culture of socialism with Chinese characteristics have kept developing, blazing a new trail for other developing

⁵ See, e.g., Cheng Li, *Preparing For the 18th Party Congress: Procedures and Mechanisms*, 36 CHINA LEADERSHIP MONITOR (2012), <http://media.hoover.org/sites/default/files/documents/CLM36CL.pdf>.

⁶ J.P., *What is China's 19th Communist Party congress and why does it matter?*, THE ECONOMIST (Oct. 17, 2017), <https://www.economist.com/blogs/economist-explains/2017/10/economist-explains-11>. For English language CPC sources on the 19th CPC Congress, see 19TH CPCP NATIONAL CONGRESS, <http://www.xinhuanet.com/english/special/19cpcnc/index.htm>.

⁷ Xi Jinping, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era: Delivered at the 19th National Congress of the Communist Party of China* (Oct. 18, 2017), http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

⁸ *Id.* at 10.

⁹ *Id.* at 15-23; see Michael A. Peters, *The Chinese Dream: Xi Jinping thought on Socialism with Chinese characteristics for a new era*, 49(14) EDUC. PHIL. & THEORY, 1299-1304 (2017). "The Thought is the biggest highlight of the 19th National Congress of the Communist Party of China (CPC) and a historic contribution to the Party's development," said Zhang Dejiang when joining a panel discussion at the congress opened Wednesday. "This important thought represents the latest achievement in adapting Marxism to the Chinese context, and is an important component of the system of theories of socialism with Chinese characteristics," Yu Zhengsheng said while joining another panel discussion." Hou Qiang ed., *CPC creates Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era*, XINHUA (Oct. 19, 2017), http://news.xinhuanet.com/english/2017-10/19/c_136689808.htm.

¹⁰ Xi Jinping, *supra* note 7, at 9-10. ("We must recognize that the evolution of the principal contradiction facing Chinese society represents a historic shift that affects the whole landscape and that creates many new demands for the work of the Party and the country.")

countries to achieve modernization.”¹¹ But it also conflates national and international structural and normative development. On the one hand, it conflates the “China Dream of national rejuvenation”¹² with its transnational implications that it explained will see “China moving closer to center stage and making greater contributions to mankind.”¹³ Thus, the thrust of the changes announced in the 19th CPC Congress through the articulation of the “New Era” principles “are not merely political, but enhance the “all-around” (comprehensive) approach to Chinese development which sees an intimate connection between law, politics, culture, internal and external relations.”¹⁴

The emerging principal contradiction of the “New Era,” however, does not diminish the role of the vanguard party is its leadership obligations or in its role as the center of political authority in China. “The basic dimension of the Chinese context—that our country is still and will long remain in the primary stage of socialism—has not changed. . . . We must remain fully committed to the Party’s basic line as the source that keeps the Party and the country going and that brings happiness to the people.”¹⁵ To that end the leadership of the CPC—expressed through its Party and state constitutions—is essential.¹⁶ “We must keep on strengthening the Party’s ability to lead politically, to guide through theory, to organize the people, and to inspire society, thus ensuring that the Party’s great vitality and strong ability are forever maintained.”¹⁷ It is to that end that the governance reforms implicit in the “New Era” thinking, “The Thought on Socialism with Chinese Characteristics for a New Era and the Basic Policy”, are elaborated.¹⁸

The 19th Congress of the Chinese Communist Party announced a program of potentially significant development of its constitutional model. The changes required adjustment of the two

¹¹ *Id.* at 9.

¹² *Id.* National Rejuvenation was elaborated. *Id.* at 11-14. Rejuvenation “is designed to hark back to and move on a century of hardship and humiliation, utilising the master narrative of Chinese nationalism to harness Chinese identity and nation-building.” Peters, *supra* note 9, at 1302, 1303.

¹³ Jinping, *supra* note 7, at 10.

¹⁴ Larry Catá Backer, *Constitutional Reform Comes to the Chinese State Constitution and Changes to China’s Global Trade Relationships*, L. AT THE END OF THE DAY (Jan. 15, 2018), <http://lcbackerblog.blogspot.com/2018/01/constitutional-reform-comes-to-chinese.html>.

¹⁵ *Id.* at 10-11.

¹⁶ This idea found expression in the RESOLUTION OF THE 19TH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA ON THE REVISED CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Oct. 24, 2017) (hereinafter “Resolution”), http://news.xinhuanet.com/english/2017-10/24/c_136702726.htm. The Resolution provided, in part that “The Congress holds that the leadership of the Communist Party of China is the most essential attribute of socialism with Chinese characteristics, and the greatest strength of this system; the Party exercises overall leadership over all areas of endeavor in every part of the country.” *Id.* The Resolution provided, in part that “The Congress holds that the leadership of the Communist Party of China is the most essential attribute of socialism with Chinese characteristics, and the greatest strength of this system; the Party exercises overall leadership over all areas of endeavor in every part of the country.” *Id.*

¹⁷ Jinping, *supra* note 7, at 14.

¹⁸ *Id.* at 15-23. For an interesting analysis, see Son Daekwon, *Xi Jinping Thought Vs. Deng Xiaoping Theory: Xi’s “new era” will see some of Deng’s famous maxims altered, if not discarded altogether*, THE DIPLOMAT (Oct. 25, 2017), <https://thediplomat.com/2017/10/xi-jinping-thought-vs-deng-xiaoping-theory/>.

great instruments of Chinese political legitimacy--first, the constitution of the vanguard Party, the holder of political leadership, and second, from that the modification of the constitution of the administrative state to conform its organization and operation, to ensure that the principles through which it is operated, conforms to that of the political constitution of the vanguard party.¹⁹

The CPC moved quickly to implement the recommendations of the 19th CPC Congress Report. At the close of the 19th CPC Congress it adopted a Resolution,²⁰ to amend the Constitution of the CPC²¹ to incorporate the thrust of the ideological changes and principles elaborated in the 19th CPC Congress Report. In January 2018, the CPC also announced that the central element of its 2nd Plenum²² was to consider and adopt corresponding amendments to the 1982 State Constitution.²³ That transposition of the work of the CPC into the CPC and State Constitutions evidence the thrust of the Chinese legal-political system, one grounded on the CPC as polity, the CPC Constitution as the expression of binding ideology of that polity, and the state constitution as its expression.²⁴ The CPC Constitution organizes the government of politics; the State Constitution organizes the government of state, and both under the leadership of the CPC in its vanguard role.

The relationships among these actors and what they might suggest about the evolving theories of Chinese constitutionalism were an object of consideration during the course of a Round Table²⁵ held shortly after the conclusion of the 19th

¹⁹ Backer, *supra* note 14.

²⁰ RESOLUTION, *supra* note 16.

²¹ CONSTITUTION OF THE COMMUNIST PARTY OF CHINA REVISED AND ADOPTED AT THE 18TH CPC NATIONAL CONGRESS REVISED AND ADOPTED AT THE 19TH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA (Oct. 24, 2017) ("CPC Constitution"), available at <http://www.china.org.cn/20171105-001.pdf>.

²² 中共中央政治局召开会议 讨论拟提请十九届二中全会审议的文件 中共中央总书记习近平主持会议, http://www.xinhuanet.com/politics/leaders/2018-01/12/c_1122250299.htm; see also *Explainer: China to Amend the Constitution for the Fifth Time*, NCP OBSERVER (Jan. 25, 2017), <https://npcobserver.com/2017/12/27/explainer-china-to-amend-the-constitution-for-the-fifth-time/>.

²³ XIANFA (1982) (revised through Mar. 14, 2004), available at http://english.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987458.htm.

²⁴ Discussed in Larry Catá Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 B.U. INT'L L.J. 331 (2012). This builds and elaborates the classical Leninist notion of the relationship between state, Party and constitution: "the state constitution is by and large a codification of the crucial elements of the communist party program." Chris Osakwe, *The Common Law of Constitutions of the Communist-Party States*, 3 REV. SOCIALIST L. 155, 161 (1977).

²⁵ *Roundtable on the Implications of the 19th Congress of the Chinese Communist Party*, PA. STATE UNIV. SCH. OF INT'L AFFAIRS, (Nov. 3, 2017), http://www.thecpc.org/?page_id=575.

Congress.²⁶ In the course of the proceedings, the speakers collectively wondered²⁷ about the extent and character of the evolution of CPC thinking, and the CPC Basic Line, with respect to Socialist Rule of Law and Socialist Constitutionalism. The question arose in the context of a discussion around the question of the extent to which – the 19th CPC Report delivered by Xi Jinping²⁸ and the resulting final Resolution of the 19th Congress²⁹ reflected a downshifting of the importance of the state constitution and constitutionalism in general from the Basic Line of the CPC itself. A related question arose around the effects of any such downshift on the relation between the state and the political constitutions of China. To that end, it is worth considering whether principles of constitutionalism for the “New Era” may be extracted from the sum of Xi Jinping’s Report to the 19th Congress. What follows, then is a preliminary report and assessment of Constitutionalism with Chinese Characteristics in the New Era from Out of the 19th CPC Report. What follows is a preliminary report and assessment of Constitutionalism with Chinese Characteristics in the New Era from Out of the 19th CPC Report.

After this short introduction to the issues and context of Chinese constitutionalism before the 19th Congress, Section II provides a contextual framework for situating the constitutional work of the 19th CPC Congress within contemporary Chinese currents of constitutional theory. Section III then explores the references to notions of constitution in earlier CPC Congress Reports. Section IV then turns to the consideration of the constitution project for China in the “New Era.” It first considers in more detail the understanding of constitution and its role in politics and governance within the 19th CPC Congress Report itself. It then explores the role of constitutionalism within the structures of the 19th CPC Congress Report through a close reading of the specific references to constitutions in the Report (state, political and mixed). Lastly it provides a concise consideration of the connection between constitutionalism and the emerging characteristics of Chinese consultative democracy.

That analysis is grounded in the principle that Chinese constitutionalism cannot be understood as limited to or flowing from the state constitution—an almost entirely Western misreading of the path of constitutionalism in China. Recent scholarship has increasingly suggested the centrality of the CPC to the study of constitutionalism in China, my own work included.³⁰

²⁶ The Communist Party Congress is “a twice-per-decade event to set the party’s national policy goals and elect its top leadership.” BROOKINGS INSTITUTE, *supra* note 2. “China’s Communist Party has held congresses since its foundation. The first was in 1921. But the practice of quinquennial gatherings dates to Deng Xiaoping’s attempts in the 1980s to introduce a sense of order and predictability after the chaos of the Cultural Revolution.” J.P., *supra* note 6. For English language CPC sources on the 19th CPC Congress, see 19th CPC Congress, <http://www.xinhuanet.com/english/special/19cpcnc/index.htm>.

²⁷ See *Roundtable*, *supra* note 25.

²⁸ Jinping, *supra* note 7.

²⁹ RESOLUTION, *supra* note 16.

³⁰ See, e.g., RICHARD MACGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST RULERS* (Harper Perennial 2010); ZHENG, YONGNIAN, *THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR: CULTURE, REPRODUCTION, AND TRANSFORMATION* (Routledge, 2010); DAVID L. SHAMBAUGH, *CHINA’S COMMUNIST PARTY: ATROPHY AND ADAPTATION* 103-161 (Woodrow Wilson Press 2008); KJELD ERIK BRØDSGAARD, ZHENG YONGNIAN, EDS., *THE CHINESE COMMUNIST PARTY IN REFORM* (Routledge 2006); Larry Catá Backer, *The Rule of Law, the Chinese Communist Party*,

To explain contemporary China, one cannot avoid the CCP, the most important political actor in the country ever since the People's Republic of China was established in 1949. The CCP, however, has been marginalized in our scholarly research both within and outside China in recent decades when the focus of research on China has shifted to non-party actors such as the state and society.³¹

The CPC continues to play a central role in the development of constitutional norms and their connection with constitution making with Chinese characteristics. This essay provides a small window on the dynamic evolution of Chinese constitutionalism, the central importance of Chinese (rather than Western) political normative context for that development, and the specific shape of emerging constitutional doctrine in what the CPC itself has declared to be a "New Era." What now clearly emerges is not radical change but rather an important shift in the explicit recognition of the constitutional role of the vanguard party as the center of legitimate political expression, and of the state constitution as the means through which that expression is manifested in the operation of the state. Though it has important roots in traditional socialist constitutionalism,³² the refinements and developments of Marxist and Leninist theory represents a substantial advance requiring careful study in its own right.

I. CONSTITUTIONS AND CONSTITUTIONALISM IN CHINA: A BRIEF BACKGROUND

The debates around constitution and constitutionalism in China revolve around two constitutions instruments, the State Constitution and the CPC Constitution. When the People's Republic of China was founded in October 1949, there was not a formal constitution of the state.³³ The Common Program of Chinese People's Political Consultative Conference served as the de facto constitution of the state during the early years of the new country.³⁴ Five years later, the first constitution of the People's Republic of China came into existence in the first National People's

and Ideological Campaigns: Sange Daibiao (The "Three Represents"), Socialist Rule of Law, and Modern Chinese Constitutionalism, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 29 (2006-2007).

³¹ ZHENG, YONGMIAN, *THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR: CULTURE, REPRODUCTION, AND TRANSFORMATION* xiv (Routledge, 2010).

³² See Osakwe, *supra* note 24, at 162.

³³ This is not to suggest the absence of a constitutional tradition before 1949. It was clear both that the CPC had been adept at self-organization and producing its general program, including the organization and discipline of its cadres from well before the start of the Japanese War. At the same time, as the CPC gained territory during the 1930s and early 1940s, those districts were also organized along the lines of Soviet style republics, including the development of law and judicial organs. See, e.g., Shao Chuan Leng, *Pre-1949 Development of the Communist Chinese System of Justice*, 30 *CHINA Q.* 93-114 (1967).

³⁴ Common Program of Chinese People's Political Consultative Conference. Sept. 1949. Beijing, available at <http://www.cppcc.gov.cn/2011/09/06/ART11315304517625199.shtml> (only Chinese Version Officially Posted).

Congress in September 1954. This constitution has four chapters with the first one being the general program and the other three chapters each elaborating the institution of the state, the basic rights and obligations of the citizens, and the flag, emblem and the capital of the state.³⁵ This structure was fixed till today even though the constitution of the state has already been revised and enriched. As mentioned in its prologue, the constitution of the state was based on the Common Program of Chinese People's Political Consultative Conference in 1949 with some development.³⁶

This Constitution of the State was replaced by new one in the Fourth National People's Congress in January 1975. A product of the ideologies of the Cultural Revolution, it reflected a focus on class struggles and continued revolution (继续革命).³⁷ Three years later, it was again replaced.³⁸ The constitution of the state enacted in 1978 was a transitional constitution which sought to move away from what were now viewed as the normative defects in the state constitution then in effect. It is important to remember that the 1978 Constitution might be understood as a reboot bringing the organs of State and Party back to a common constitutional default position. To that end, it reproduced significant portions (and the approaches) of the 1954 Constitution. But by 1978, conditions had changed in China and the facts of that development and the lessons learned from the period 1954-1978 suggested that China had moved substantially beyond the conditions of 1954 and it was expected that a more permanent constitution was needed to express the developments of Marxism and Leninism with Chinese characteristics in this "new era", an era that would bear the stamp of Dong Xiaoping.

The current Constitution of the People's Republic of China was enacted in the Fifth Conference of the Fifth National People's Congress 1982. It adequately elaborated the fundamental institutions of the state, affirmed the protection of the citizen's basic rights. Unlike the previous constitutions, the 1982 Constitution gave greater prominence to the chapter of the citizen's basic rights and obligations over the chapter of the institution of the state. This is the first time in the history of the constitution of the state and marked the advance of the protection of the citizen's basic rights, including rights to property. The relatively ample and precise articles in the third chapter, the chapter of the institution of the states showed a well-rounded institutional structure of the state. Moreover, the constitution of the state (1982) added the national anthem into the last chapter.³⁹ The constitution of the state in 1982

³⁵ XIANFA (1954), available at http://www.npc.gov.cn/wxzl/wxzl/2000-12/26/content_4264.htm (only Chinese Version Officially Posted).

³⁶ *Id.* ("这个宪法以 1949 年的中国人民政治协商会议共同纲领为基础, 又是共同纲领的发展。") ("zhè ge xiàn fǎ yǐ nián de zhōng guó rén mín zhèng zhì xié shāng huì yì gòng tóng gāng lǐ ng wéi jī chǔ yòu shì gòng tóng gāng lǐ ng de fā zhǎn.")

³⁷ XIANFA, PREFACE (1975), available at http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4362.htm (only Chinese Version Officially Posted).

³⁸ XIANFA (1978), available at http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4365.htm (only Chinese Version Officially Posted).

³⁹ XIANFA (1982), available at <http://www.people.com.cn/GB/shehui/1060/2391834.html> (only Chinese Version Officially Posted).

was a production of all lessons Chinese people have learned during more than three decades of exploration in making a constitution of the state. It turned out to be a good constitution of the state and served its role till today even though it experienced four amendments in 1988, 1993, 1999, and 2004 in accordance with the needs of the development of the time.

The CPC Constitution has had a longer and perhaps more complex history. When the Communist Party of China was established in 1921, it passed the Programme of the Communist Party of China (中国共产党纲领) on its first national congress.⁴⁰ The Programme included basic guiding principles of the party's goal, operation, and organization. It served as the constitution of the party for one year until the second national congress of the party passed the Constitution of the Communist Party of China in July 1922.⁴¹ The first five chapters of the party's constitution each addressed the issues of members, organization, meetings, discipline, and funding, the sixth and last chapter provided two supplementary provisions including the right to amend the party's constitution and the date it comes into effect.⁴² This structure of the party's constitution lasted for around five years even though some minor amendments were made in the third⁴³ and fourth national congresses.⁴⁴

An overhaul of the party's constitution officially referred to as the third amendment to the constitution of the party, took place during the 5th CPC Congress in June 1927⁴⁵. The contents of the party's constitution doubled by being expanded from 6 chapters to 12 chapters. Besides three chapters of members, discipline and funding which remained basically the same, the part of the organization was expanded to 7 chapters consisting of one chapter of the articles of Party building (党的建设) and others elaborating specific regulations of each level of the organization and the supervision committee. The new chapter of the supervision committee set up the supervision organs within the party for the first time. Moreover, a new chapter

⁴⁰ THE PROGRAMME OF THE COMMUNIST PARTY OF CHINA (July 23, 1921, Jiaying, Zhejiang), available at <http://cpc.people.com.cn/GB/64162/64168/64553/4427945.html> (only Chinese Version Officially Posted).

⁴¹ CONSTITUTION OF THE COMMUNIST PARTY OF CHINA, (July 16, 1922), available at <http://cpc.people.com.cn/GB/64162/64168/64554/4428163.html> (only Chinese Version Officially Posted).

⁴² CONSTITUTION OF THE COMMUNIST PARTY OF CHINA art. 28 and 29 (July 16, 1922), available at <http://cpc.people.com.cn/GB/64162/64168/64554/4428163.html> (only Chinese Version Officially Posted).

⁴³ THE FIRST AMENDMENT TO THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (July 1923, Guangzhou), available at <http://cpc.people.com.cn/GB/64162/64168/64555/4428213.html> (only Chinese Version Officially Posted).

⁴⁴ THE SECOND AMENDMENT TO THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Feb. 1925, Shanghai), available at <http://cpc.people.com.cn/GB/64162/64168/64556/4428256.html> (only Chinese Version Officially Posted).

⁴⁵ THE THIRD AMENDMENT TO THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (June 1, 1927, Wuhan), available at <http://cpc.people.com.cn/GB/64162/64168/64557/4428293.html> (only Chinese Version Officially Posted).

of Party Groups (党团, a group of party members in the organization other than the party which aims at intensifying the party's influence to non-party masses) was also created in this amendment. The last chapter of supplementary provisions was also replaced by a chapter elaborating the party's relationship with the Communist Youth League. Even though some changes were made to the party's constitution in the 6th CPC Congress,⁴⁶ the structure of the CPC Constitution remained substantially unchanged until 1945.

In June 1945, for the first time the general program was included in the constitution of the party above all the other chapters in the 7th national congress of the Communist Party of China. Since then, the general program as the statement of political ideologies and principles has been the most important part of the constitution of the party. Apart from the general program, the structure of the constitution of the party was relatively stable, consisting of four main parts: the members, organization which consists of several chapters with one describing the general organization and others elaborating specific regulations of each levels of organization and the supervision organs, the party groups (“党组”, formerly referred to as “党团”) in other organizations, discipline, and funding.⁴⁷ The 8th national congress of the Communist Party of China basically followed the structure set by the 7th national congress but omitted the chapter of funding which added the chapter of the party's relationship with the Communist Youth League.⁴⁸

During the cultural revolution period, the constitution of the party witnessed significant shrinkage in the 9th national congress in 1969⁴⁹ and the 10th national congress in 1973.⁵⁰ The shrinkage was marked by the simplification of structure or to put it in another way, the drop of a number of chapters. The 9th and 10th national congress passed the constitution of the party with only 6 chapters. The chapters of supervision organs, discipline, funding, and relationship with the Communist Youth League were omitted, leaving the general program, chapters of members and organizations. The articles of the principle of intra-party democracy and collective leadership were deleted and the articles of intra-party supervision committee were also missing. The party's constitution during in this time departed from the guidelines set by the party's constitution in the 8th national congress and mistakenly

⁴⁶ THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (June 1928, Moscow), available at <http://cpc.people.com.cn/GB/64162/64168/64558/4428362.html> (only Chinese Version Officially Posted). What's worth noticing is that the 6th national congress of Communist Party was held in Moscow in 1928 and significantly emphasized the leadership of the Communist International.

⁴⁷ THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (June 1945, Yenan), available at <http://cpc.people.com.cn/GB/64162/64168/64559/4442095.html> (only Chinese Version Officially Posted).

⁴⁸ THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Sept. 1956, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64560/65452/6412169.html> (only Chinese Version Officially Posted).

⁴⁹ THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Apr. 1969, Beijing) available at <http://cpc.people.com.cn/GB/64162/64168/64561/4429444.html> (only Chinese Version Officially Posted).

⁵⁰ THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Aug. 1973, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64562/65450/4429427.html> (Only Chinese Version Officially Posted).

focused on class struggle (阶级斗争) and demonstrated cult of personality. The 11th national congress in 1977⁵¹ made some revisions to the constitution of the party such as including democratic centralism (民主集中制) and partially recovered the intra-party supervision organs.⁵² But it continued to recognize the wrong theories of Cultural Revolution and the political lines set by the party's constitution passed in the 9th and 10th national congress. The mistakes of a cultural revolution were not thoroughly corrected until the Third Plenary Session of the 11th Central Committee of the Chinese Communist Party in 1978.

In 1982, the constitution of the party expanded back to 10 chapters in the 12th national congress of the Communist Party of China and set a stable structure of the constitution.⁵³ The general program was still the first and most important part of the constitution of the party, it elaborated the general guiding principles and political ideologies of the party and stated the general tasks and the focus of the party's work at the current stage. Some critical domestic issues such as national unification and the party's stance in international affairs were also addressed in the general program. Since the 12th CPC Congress, the basic layout of the general program of the party's constitution has been fixed and each national congress after the 12th has revised but not otherwise changed the framework. These changes are significant—incorporating the evolution of Marxist Leninist principles in the Chinese context and providing the constraining basis for political choices in the form of the Basic Line of the CPC. Other chapters each addressed different aspects of members, organizations (consists of four chapters each elaborates the party's system of organization, the party's central, local and grass-roots organizations), cadres, discipline and discipline inspection organs, party groups in other organizations, and the relationship with the Communist Youth League. Since the 16th CPC Congress,⁵⁴ the CPC Constitution added a new chapter especially for the emblem and the flag of the party. This structure of the party's constitution has been strictly followed by each national Congress since 1982 even though some revisions and enrichments may be made in every Congress.⁵⁵

⁵¹ THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Aug. 1977, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64563/4441865.html> (only Chinese Version Officially Posted).

⁵² The Constitution of the Communist Party of China art. 8 & 13 (Aug. 1977, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64563/4441865.html> (only Chinese Version Officially Posted).

⁵³ THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Sept. 1982, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64565/65448/6415129.html> (only Chinese Version Officially Posted).

⁵⁴ THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Nov. 2002, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64569/65444/4429114.html> (only Chinese Version Officially Posted).

⁵⁵ The latest Constitution of the Communist Party of China was amended on October 24, 2017 in the 19th National Congress of the Communist Party of China, full text available at http://www.xinhuanet.com/politics/19cpcnc/2017-10/28/c_1121870794.htm (Only Chinese Version Officially Posted).

There is a rich literature on Chinese constitutionalism that has grown around these instruments, but especially the State constitution.⁵⁶ There are a number of schools that have evolved around the issue of constitutionalism within Marxist Leninist states (in general) and Marxism Leninism with Chinese characteristics (in particular) especially in the period from the time of the leadership of Jiang Zemin,⁵⁷ which also sparked Western attention during the early period of Xi Jinping's leadership.⁵⁸ Dismissing as entirely unhelpful the wealth of Western engagements with Chinese Marxist Leninist constitutionalism—precisely because at their base this literature starts from the presumption of illegitimacy and the premise that constitutionalism and Marxism Leninism is an oxymoron (and thus tell us more about the state of Western self-conceptions than of the object studied)—most commentators on the rich and quite dynamic evolution of constitutionalism in China break down into *roughly* three groups.⁵⁹ For ease of reference these may be identified as a political constitutionalism, a legalist constitutionalism, and an evolutionary constitutionalism (others sometimes tend to use the more contextually political descriptors—left, right and center constitutionalism).

Political constitutionalism refers *roughly* to a very broad spectrum of schools that center politics within normative (sometimes binding but not necessarily legal) parameters. These range from variations of the classical European Marxist approach

⁵⁶ Constitutionalism has been an important element of Chinese debate since the founding of the PRC. See, e.g., Changchang Wu, *Debates on constitutionalism and the legacies of the cultural revolution*, 227 CHINA Q. 674–96 (2016). The strong pre-1949 antecedents of Chinese constitutionalism ought not to be ignored. Glenn Tiffert notes:

The tendency in both China and abroad to treat contemporary Chinese law as discursively, even genetically, distinct from its Imperial, Republican or Maoist antecedents is therefore arresting. That many present reformers and observers of Chinese law are better versed in Jellinek, Vyshinsky, and Posner than in Shen Jiaben, Yang Zhaolong, and Zhang Youyu begs discomfiture, as does the paradox of their reluctance to take China's legal heritage seriously while simultaneously grappling with its normative and institutional legacies.

Glenn D. Tiffert, *Epistrophy: Chinese Constitutionalism and the 1950s*, eSCHOLARSHIP.ORG (University of California Digital Library) (Sept. 29, 2009), <https://escholarship.org/uc/item/0rm248nk>. On my view of constitutionalism, see Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PA. ST. L. REV. 671 (2009).

⁵⁷ See, e.g., "In 2003, an official document issued by the general office of the central agency of CPC brought about a debate on constitutional government." Zhiwei Tong, "Two Issues on Constitutional Government in China" p. 1 discussed in Larry Catá Backer, *Considering Zhiwei Tong's Essay, "Two Issues on Constitutional Government in China"*, L. AT THE END OF THE DAY (Apr. 7, 2014), <http://lcbackerblog.blogspot.com/2014/04/considering-zhiwei-tongs-essay-two.html#more>.

⁵⁸ See, e.g., Joseph Fewsmith, *Debating Constitutional Government*, 42 CHINA LEADERSHIP MONITOR 1, 1, (2013); Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the "Urgency" of Political Reform*, 11 U. OF PA. ASIAN L. REV. 337 (2016), <http://scholarship.law.upenn.edu/alr/vol11/iss3/1>; Rogier Creemers, *China's Constitutionalism Debate: Content, Context, and Implications*, 74 CHINA J. 91–109 (2015).

⁵⁹ The taxonomy of schools of Chinese constitutionalism, like Chinese constitutionalism itself, remains highly contested. See, e.g., WEN-CHEN CHANG AND DAVID S. LAW, *CONSTITUTIONAL DISSONANCE IN CHINA* (2017) Wash. U. in St. Louis Legal Studies Research Paper No. 17-03-03, University of Hong Kong Faculty of Law Research Paper No. 2017/008 (24 Sept. 2017) (three camps on whether or to what extent China has embraced constitutionalism, an explicitly skeptical camp, a making progress camp, and a varieties-of-constitutionalism camp).

that eschews any role for rules and norms and equates constitutionalism with the political program of the vanguard party,⁶⁰ to variations on approaches that center politics within constitutions, especially a dual constitutionalism with a political constitution centered on the normative constraints on vanguard party leadership and an administrative constitution through which policy is implemented.⁶¹ At one extreme it preserves old approaches that embrace a perspective suspicious of Western notions of constitutionalism and of any constitutional project as a device for the preservation of class exploitation.⁶² At the other end it suggests a development of Marxist Leninism that sees in constitutions an important device for the expression of collective leadership.⁶³

Legalist constitutionalism refers roughly to a very broad spectrum of schools that seeks to de-center the political element in favor of a legal framework for ordering politics and the state. These approaches can vary from those that would posit state constitutional supremacy governs all political organs, even if the political organs themselves are responsible for the state constitution's provisions, to variations on notions of the autonomy of the state constitution to which all other institution creating governance systems are bound.⁶⁴ Legalist constitutionalism tends to draw

⁶⁰ See, e.g., Zheng Zhixue (郑志学), Renqing Xianzheng de Benzhi (清宪政的本质) [Recognizing the Essential Nature of Constitutionalism'], Dangjian (党建) [Party Constructs] (May 29, 2013), <http://theory.people.com.cn/n/2013/0529/c83855-21652535.html>.

⁶¹ On my view of Chinese constitutionalism, see, e.g., Larry Catá Backer, *Towards a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism*, 40(2) MOD. CHINA 168 (2014); Larry Catá Backer, *Jiang Shigong 强世功 on "Written and Unwritten Constitutions" and Their Relevance to Chinese Constitutionalism*, 40 MOD. CHINA 119 (2014); Larry Catá Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30(1) B.U. INT'L L.J. 331 (2012).

⁶² See, e.g., Yang Xiaoqing (杨晓青), Xianzheng Yu Renmin Minzhu Zhidu Zhi Bijiao Yanjiu (宪政与人民民主度之比较研究) [Comparative Research on Constitutionalism and People's Democratic System], Hongqi Wengao (红旗文稿) [RED FLAG MANUSCRIPTS] (May 22, 2013), http://www.qstheory.cn/hqwg/2013/201310/201305/20130521_232618; Wang Tingyou (汪亭友), *Dui Xianzheng Wenti de Yixie Kanfa (对宪政问题的一些看法)* [A Few Thoughts on the Problem of Constitutionalism], Hongqi Wenzhai (红旗文摘) [RED FLAG MANUSCRIPTS] (June 12, 2013), http://news.xinhuanet.com/politics/2013-06/09/c_124840106.htm.

⁶³ See, e.g., Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 MOD. CHINA 12 (2010); Larry Catá Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30(1) B.U. INT'L L.J. 331 (2012); Andrew Peng, *Sinicized Marxist Constitutionalism: Its Emergence, Contents, and Implications*, 2(1) GLOBAL DISCOURSE 83 (2011).

⁶⁴ Baogang He, *Socialist Constitutionalism in Contemporary China*, in CONSTITUTIONALISM BEYOND LIBERALISM (Michael Dowdle and Michael A. Wilkinson, eds., Cambridge U. Press, 2017); Hua Bingxiao (华炳啸), *Lun Fanxianzheng de Wuchi yu Qienuo: Huiying Fanxianzheng Guandian Xilie Zhi Er (论反宪政的无耻与怯懦: 回应反宪政观点系列之二)* [On the Shamelessness and Gutlessness of the Anti-Constitutionalist Faction: Responding to the Anti-Constitutionalist Views, Part Two in a Series], Hua Bingxiao De Boke (华炳啸的博客) [Hua Bingxiao Blog] (July 8, 2013), <http://huabingxiao.blog.caixin.com/archives/58851>.

attention to the State Constitution as the centering element of the institutionalization of power, even as in some variations, it concedes the authority of the CPC as the primary source of political legitimacy.⁶⁵ Another variation sees in instruments like the State Constitution an expression of delegation of authority from the political collective to the institutional apparatus of the state,⁶⁶ sometimes with a focus on judicial authority.⁶⁷

Evolutionary constitutionalism refers roughly to a spectrum of approaches that inevitably centers people over vanguard and governmental constitutionalism over Party.⁶⁸ These schools tend to see Chinese constitutionalism as a process that will or should move toward structures in which the role of the vanguard party is diminished and a direct relationship between the masses and the organs of government are solidified, sometimes through law and sometimes through institutionalized politics.⁶⁹ Just as elements of political constitutionalism draw on old models of Soviet Marxist Leninism, variants of evolutionary constitutionalism draw on notions of Western liberal constitutionalism which sees as the inevitable end of the process of political life in China a move toward a form of Western style democratic republicanism.⁷⁰

Beyond the fairly obvious differences among these vibrant schools of constitutionalism one might point to some points of commonality. All of these schools start from or argue against a set of central documents—constitutions—even as each of them approach those documents differently, as law, politics or transitional devices. Each of them focus on the relationship among constitutional documents, law and politics. Among the most interesting developments of Chinese constitutionalism have been the mutability of these terms within a constellation of regulatory techniques that are themselves fluid. What had been a central element of constitutionalism, however, was a fidelity—within this fluid universe of meaning and uncertainty of normative orthodoxy—the idea of law and rule of law as a mechanics (process and protection against arbitrary activity and personal or institutional abuse), the binding element of law and the cage of regulation to bind officials, and of rule systems to constrain the institutional operationalization of politics. There was a measure of quite conscious ambiguity respecting the supremacy of law—within its jurisdiction. But the scope of that jurisdiction remained unclear with respect to the vanguard party.

⁶⁵ Tong Zhiwei, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case*, 53(3) SUFFOLK L. REV. 669 (2010); Zhiwei Tong (童之伟) Series: Reform of the Political System Should Start with the Party Constitution rather than the Constitution, in *Law at the End of the Day* (April 14, 2012), <http://lcbackerblog.blogspot.com/2012/04/part-xxviizhiwei-tong-series-reform-of.html>.

⁶⁶ Albert H.Y. Chen, *Toward A Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, in *RULE OF LAW: PERSP. FROM THE PAC. RIM* 13, 13–51 (2000).

⁶⁷ See, e.g., Hualing Fu, *Access to Justice and Constitutionalism in China*, in *BUILDING CONSTITUTIONALISM IN CHINA* 163 (Stéphanie Balme & Michael W. Dowdle eds., 2009)

⁶⁸ See, e.g., Killion, M. Ulric, *China and Neo-Liberal Constitutionalism*. 3 *GLOBAL JURIST FRONTIERS* (2003), <https://ssrn.com/abstract=512983>; see also, He Li, *Debating China's Economic Reform: Liberals vs. New Leftists*, 15(1) *J. OF CHINESE POL. SCI.* 1–23 (2010).

⁶⁹ See, e.g., Samson Yuen, *Debating Constitutionalism in China: Dreaming of a Liberal Turn*, 2013/4 *CHINA PERSPECTIVES* 67 (2013), <http://journals.openedition.org/chinaperspectives/6325>.

⁷⁰ For an interesting analysis in the Asian context, see Albert H.Y. Chen, *Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations*, 8(4) *I-CONN* 849 (2010).

And in any case, it was also clear that two regulatory systems might coexist—an administrative system lodged in state institutions and the overarching institutional rule system of the vanguard party. But was the political constitution of the CPC itself law? And what was the relationship between the political constitution of the CPC and the state constitution? These were the issues that tended to separate the various schools of constitutionalism in China. But what united them was a recognition that constitutions were central to the administration of the state and the CPC apparatus, and both appeared to be at the center of both the CPC Basic Line⁷¹ and the heart of the administrative constitutional order. However one approaches the issue of the validity of this emerging system for purposes of constitutional legitimacy, what becomes clear is that Chinese constitutionalism cannot be approached as a variant of a Western project grounded in the fundamental premise that the constitution of a state represents the culmination of a process of managing all of the *political* authority of sovereign power through a government to which such authority is delegated (however it might be divided within this apparatus). Political and administrative power is fused in the West and exercised through government in accordance with the constitution through which it is constituted. In China that is impossible given the Leninist logic of its own fundamental organization. Political authority and administrative obligation are two related but separate spheres of authority. Both might require the cage of regulation to ensure against arbitrary usurpation by individuals but when exercised collectively the political authority vested in the leading party is constrained by its own constitution even as that of the government is articulated through a state constitution that expresses the political values and objectives of the political constitution.

II. THE NOTION OF STATE, PARTY, AND CONSTITUTION AS IDEA AND PRACTICE BEFORE THE “NEW ERA”

Well before the engagement with constitutions in the 19th CPC Congress, the CPC has had a long history of consideration of the concept and role of constitutions in the development of the productive forces of politics and the institutions of state in China. It is useful, then, to consider the way that the CPC’s focus on constitutions has developed along with its expression in the construction of Chinese constitutionalism. For that purpose, and to develop a rough baseline, it was useful to consider the extent to which the CPC Congress reports before that of the 19th CPC

⁷¹ The CPC Basic Line is drawn from the General Program of the Constitution of the Chinese Communist Party (amended through 2012), available at <http://china.usc.edu/constitution-communist-party-china#GEN>:

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.

Congress mentioned the word constitution either with reference to the State Constitution or to the CPC Constitution (appearing in the Chinese original as 宪法 or 党章 and its variation 党章).

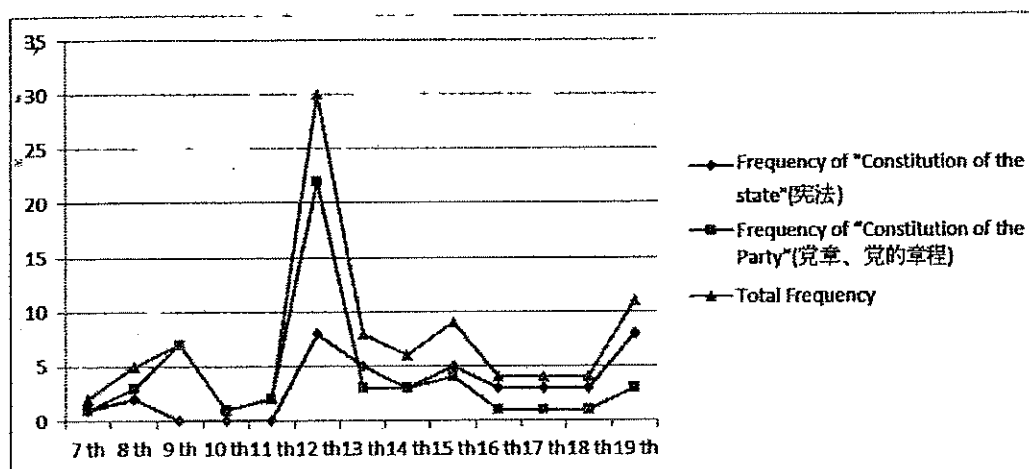


Figure 1 Frequencies of the term "constitution of the state" and "constitution of the party" in reports to each national congress of CPC⁷²

A. Before 1949

During the period in which the CPC functioned as a revolutionary vanguard (rather than as a ruling party) before the establishment of the People's Republic of China in 1949, the CPC did not focus on constitution as document or idea in the formulation of its basic line—its core principles and guiding norms. That was true both for the notion of constitution as a means of constituting the CPC itself, or at some future point, the administrative apparatus of the state. During this stage, the roles of the CPC as a revolutionary and vanguard force, and the constitution of a state apparatus, were seen as a site through which the transformation of the nation could be effectuated and in which the leading elements of the nation could be incorporated in the process of establishing socialism in China.⁷³ Initially, the focus was on the creation of temporary hybrids—a republic "under the joint dictatorship of several revolutionary classes."⁷⁴ The notion was to distinguish between the problem of the state and the problem of the normative foundation toward which the nation was to be guided under the leadership of the leading Leninist party.⁷⁵

⁷² As mentioned above, only reports to congresses since the 7th are included because the first appearance of the term constitution (either of the state or the party) was in the report to the 7th congress and in fact the report to the 7th congress was the first political report of its kind in the history of CPC.

⁷³ MAO ZEDONG, ON NEW DEMOCRACY (Jan. 1940), available at <http://www.commonprogram.science/documents/on%20new%20democracy.pdf>.

⁷⁴ *Id.* ("The question under discussion here is that of the 'state system'").

⁷⁵ *Id.* ("A cultural revolution is the ideological reflection of the political and economic revolution and is in their service. . . So far as the orientation of our national culture is concerned, communist ideology plays the guiding role, and we should work hard both to disseminate socialism and communism

During this period of state and party building, the notion of a constitution as a cage within which either project could be structured and operated was seldom used. The party seldom, almost never, mentioned the word constitution (both the constitutions of the state and the party) as the focus of the party was still fighting imperialism, feudalism and bureaucrat capitalism in the new democratic revolution (新民主主义革命) before the establishment of the People's Republic of China in 1949.⁷⁶ For the constitution of the CPC itself, armed struggle was the major approach of the period of the new democratic revolution and with it a centering on the military discipline and orders of the army which largely served the role of a functional constitution of the party in that era.

The first appearance of the constitution (either the constitutions of the state or of the party) in CPC National Congresses Reports is in Mao Zedong's report to the 7th Congress in 1945. The 7th CPC Report provided the model used thereafter for reporting to the CPC Congress the form of which survives through the 19th CPC Congress Report. The 7th CPC Report referenced a state constitution once, but in a disparaging way. Mao used the idea of constitution as a device through which anti-revolutionary parties sought to protect their interests against the revolutionary classes—and on that basis, was suspect. Specifically the reference was embedded in a criticism of Kuomintang government dictatorship through constitution.⁷⁷ The report also mentioned the "constitution of the party" once to indicate that the party is open to cooperate, or "unite" as mentioned in the original text, with any comrade as long as he or she complies with the programme of the party and the constitution of the party.⁷⁸

throughout the working class and to educate the peasantry and other sections of the people in socialism properly and step by step. However, our national culture as a whole is not yet socialist.".)

⁷⁶ The New Democratic Revolution is commonly understood to embrace the period of revolutionary struggle by the CPC that is commonly thought to have started in 1919 (with is now called May 4th Movement) led to the establishment of the People's Republic in 1949. See *New-Democratic Revolution (1919-1949)*, available at <http://www.china.org.cn/english/features/38072.htm>.

⁷⁷ Mao Zedong (Mao Tse-tung) on coalition government. The political report to the 7th NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA (Apr. 24, 1945, Yanan), available at <http://cpc.people.com.cn/GB/64162/64168/64559/4526988.html> (only Chinese version officially posted). ("不顾广大人民和一切民主党派的要求，一意孤行地召开一个由国民党反人民集团一手包办的所谓“国民大会”，在这个会上通过一个实际上维持独裁反对民主的所谓“宪法”，使那个仅仅由几十个国民党人私自委任的、完全没有民意基础的、强安在人民头上的、不合法的所谓国民政府，披上合法的外衣，装模作样地“还政于民”，实际上，依然是“还政”于国民党内的反人民集团。") ["The dishonest way is to) disregard the demands of the masses and of all the democratic parties and to insist on convening a so-called national assembly stage-managed by the anti-popular clique in the Kuomintang and have it adopt a "constitution" which in practice will be anti-democratic and will buttress the dictatorship of this clique, for the purpose of providing a cloak of legality for an illegal "National Government"—a government formed privately through the appointment of a few dozen Kuomintang members, imposed on the people and utterly devoid of any foundation in the popular will—thus making a pretense of "handing state power back to the people" while actually "handing it back" to the selfsame reactionary clique within the Kuomintang."]

⁷⁸ *Id.*

B. *From 1949 to the Start of the Cultural Revolution (1966)*

The 8th CPC Congress was held more than a decade later in 1956. It referenced the “constitution of the state” twice and the “constitution of the party” three times. The first appearance of the “constitution of the state” was to indicate that the roadmap of socialist transformation of agriculture, handicraft industry, capitalist industry and commerce and gradually achieving the socialist industrialization was enshrined to the “constitution of the state” as the general task of the whole country in the transition period from 1949 to 1956.⁷⁹ The second appearance of the “constitution of the state” was to point out that the national bourgeoisie are also supporters of the “constitution of the state,” and are political and economic allies of the proletariat; the party will “both unite and struggle with” them.⁸⁰ This echoes the Maoist framework developed earlier in *On New Democracy*.⁸¹ But it should be read in the context of the notion that the Chinese State constitution did not follow the Western model. Mao Zedong made that clear in his explanation of the necessity for a state constitution in 1954: “This Draft Constitution of ours is chiefly a summing-up of our experience in revolution and construction, but at the same time it is a synthesis of domestic and international experience. Our constitution is of a socialist type. It is based mainly on our own experience but has drawn upon what is good in the constitutions of the Soviet Union and the People’s Democracies.”⁸²

The three appearances of the “constitution of the party” were in the same paragraph and were written to clarify the CPC’s principle of collective leadership and expansion of intra-Party democracy. More specifically, the “constitution of the party” was mentioned here to reiterate the rights of party members and branches of

⁷⁹ Liu Shaoqi, The Political Report of the Central Committee of the Communist Party of China to the 8th National Congress of the Communist Party of China (Sept. 15, 1956, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64560/65452/4526551.html> (only Chinese version officially posted) (“(党在过渡时期的总路线，这就是：在一个相当长的时间内，逐步实现社会主义的工业化，逐步完成对农业、手工业和资本主义工商业的社会主义改造。党的这个总路线是在一九五二年国民经济恢复阶段终结的时候提出的，在一九五四年已经为全国人民代表大会所接受，作为国家在过渡时期的总任务，记载在中华人民共和国宪法里面。)”) [“The main line during the transition period is: for a long period of time, we gradually realize socialist industrialization, gradually complete the socialist transformation of agriculture, handicraft and commerce sector. This main line was proposed during the economic stabilization period at 1952, which was accepted by the National People’s Congress in 1954. This main task has been recorded by the Constitution.”]

⁸⁰ *Id.*

⁸¹ ZEDONG, *supra* note 73.

⁸² Mao Zedong, On the Draft Constitution of the People’s Republic of China, Speech at the 30th Session of the Central People’s Government Council, (June 14, 1954), available at https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_37.htm. (“Speaking of constitutions, the bourgeoisie was the forerunner. The bourgeoisie, whether in Britain, France or the United States, was revolutionary for a period, and it was during this period that the bourgeoisie began making constitutions. We should not write off bourgeois democracy with one stroke of the pen and deny bourgeois constitutions a place in history. All the same, present-day bourgeois constitutions are no good at all, they are bad, particularly the constitutions of the imperialist countries, which are designed to deceive and oppress the majority of the people. Our constitution is of a new, socialist type, different from any of the bourgeois type. It is far more progressive than the constitutions of the bourgeoisie even in its revolutionary period. We are superior to the bourgeoisie.”)

the party and the rules of the party's congress at the county level and above enshrined in the draft of the constitution of the party.⁸³ Thus early on there is at least the appearance of the idea that the CPC is itself constrained in its organizational operation by or through its own administrative document. Note, though, that the reference is not meant to imply that the CPC was constituted by or through its constitution, but rather that the CPC Constitution memorialized that constitution—and its principles.

C. *The decade of Cultural Revolution (1966 to late 1976)*

It should come as little surprise that one might not see the term “constitution of the state” ever mentioned in reports of the 9th, 10th, and the 11th CPC Congress between 1969 to 1977. The period marked the culmination of an ideological journey with roots in the old Marxist notions that the state apparatus was a means of solidifying capitalist power and thus inimical to the revolutionary project increasingly at the center of CPC governance. That then required a shift away from the necessary evil of “State Capitalism”⁸⁴ required at the founding the PRC, to the capture of the state apparatus by and through the CPC itself.

On the other hand, the term “constitution of the party” was mentioned in the 9th, 10th and 11th CPC Congress ten (10) times in total (7 times in the 9th Congress, once in the 10th Congress and twice in the 11th congress). The 7 appearances of the term “constitution of the party” in the 9th CPC Congress Report was in the same paragraph describing the amendment of the constitution of the party.⁸⁵ At the same time the

⁸³ SHAOQI, *supra* note 79.

⁸⁴ See, e.g., MAO ZEDONG, ON STATE CAPITALISM [Written comment on a document of the National Conference on Financial and Economic Work held in the summer of 1953] in *Selected Works of Mao Tse-tung* Marxists.org (2004), available at https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_30.htm (“It exists not chiefly to make profits for the capitalists but to meet the needs of the people and the state. . . . Therefore, this state-capitalist economy of a new type takes on a socialist character to a very great extent and benefits the workers and the state.”).

⁸⁵ Lin Biao, Report to the 9th National Congress of the Communist Party of China (Apr. 1, 1969, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64561/4429445.html> (only Chinese version officially posted) (“党的第九次全国代表大会的一项重要议程，是修改党的章程。中央已将党章草案提请大会讨论。这个草案是全党和全国革命群众共同参加起草的。从一九六七年十一月，毛主席提出由基层党组织参加修改党章以来，中央收到了几千份草案。党的八届扩大的十二中全会在这个基础上，制定了党章草案以后，全党、全军、全国广大革命群众又一次进行了热烈的认真的讨论。可以说，新党章草案是伟大领袖毛主席的英明领导和广大群众相结合的产物，反映了全党、全军、全国广大革命群众的意志，是党一贯坚持的民主集中制和群众路线的生动表现。特别重要的是，党章草案重新明确规定了党的指导思想的理论基础是马克思主义、列宁主义、毛泽东思想。这是无产阶级文化大革命粉碎刘少奇修正主义建党路线的伟大胜利，是马克思主义、列宁主义、毛泽东思想的伟大胜利。中央相信，经过代表大会讨论和通过以后，我们的党一定能够按照新党章的规定，建设得更加伟大、更加光荣、更加正确。”). [“One of the major proposal is to modify the Party Constitution. The Central Committee had already submitted the

revision of the CPC Constitution marked an important milestone in the principle that Marxism Leninism can have important and binding Chinese characteristics. "What is particularly important is that the draft party constitution clearly redefined the theoretical basis of the party's guiding ideology as Marxism, Leninism and Mao Zedong Thought. This is a great victory for the proletarian cultural revolution to shatter Liu Shaoqi's revisionist line for the founding of the party and a great victory for Marxism, Leninism and Mao Zedong Thought."⁸⁶

The only appearance of the term "constitution of the party" in the report to the 10th CPC Congress was in connection with a criticism of Lin Biao and reiterated the selection criteria of the successor of Chairman Mao. The criteria are "seek the benefit of most people in China and the world" and enshrined in the party's constitution as mentioned in the report.⁸⁷ The term "constitution of the party" was mentioned twice in the report to the 11th CPC Congress Report. The first one was in the section of the Report describing the punishment of the Gang of Four (四人帮)⁸⁸ according to the constitution of the party", as mentioned in the original text. The second appearance of the term "constitution of the party" was to reiterate that the acceptance of new members ought to conform to the regulations of the constitution of the party.⁸⁹

draft to this meeting for discussion. The draft was jointly produced by the whole party and revolutionary members of the mass. Since November of 1967, the Central Party had received thousands of comments after Chairman Mao asked to have base level party organ join the constitution modification project. Based on the extended 12th Plenary Session of the 8th Party Congress, the whole party, whole military and revolutionary members of whole nation jointed vivid discussion after the publication of the draft. Thus, the new party constitution draft is the products of great leadership of Chairman Mao and the Mass, which reflects the joint will of the party, military and revolutionary member of the whole nation, and Mass line and Democratic Centralism. It is important to note that the draft clearly stated that the guiding principle is based on Marxism, Leninism and Mao Zedong Thought. This is a great victory after the end of the Liu Shaoqi's revisionary mistake, a great victory of the Marxism, Leninism, and Mao Zedong Thought. Central Committee believes that the new draft would bring more glory and rightness to the Party after it passed with the discussion and implemented. "]

⁸⁶ *Id.*

⁸⁷ Zhou Enlai. Report to the 10th National Congress of the Communist Party of China (Aug. 24, 1973, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64562/65450/4429430.html> (only Chinese version officially posted) ("无产阶级的运动是绝大多数的、为绝大多数人谋利益的独立的运动。"毛主席把"为中国和世界的大多数人谋利益"作为无产阶级革命事业接班人的主要条件之一，并且写进了我们的党章)。["The proletarian movement is an independent movement for the welfare of the majority. Thus Chairman Mao set 'for the interests of China and majority' as one of the conditions for serving the proletarian revolution project. This condition is recorded by Party Constitution."]

⁸⁸ "The Gang of Four (GoF) was the name given to a leftist political group composed of four Chinese Communist Party (CCP) members. They wielded significant power during China's Cultural Revolution (1966-76) and were subsequently charged of various crimes. Their trial in late 1980 represented a significant change in China's history since the founding of P.R.C. in 1949." Haiping Zheng, *The Gang of Four Trial* (2010), <http://law2.umkc.edu/faculty/projects/FTrials/gangoffour/Gangof4.html>.

⁸⁹ Hua Guofeng, Report to the 11th National Congress of the Communist Party of China, (Aug. 12, 1977. Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64563/65449/4526439.html> (only Chinese version officially posted) ("党的十一届三中全会根据全党全军全国各族人民的要求，根据党章规定，一致通过决议：永远开除王洪文、张春桥、江青、姚文元的党籍，撤销他们党内外一切职务，彻底清算他们反共反人民反革命的罪行。")。["Upon the demand of all people of the nation and in pursuant to the party constitution, the 3rd plenary session of the 10th Party Congress unanimous decides to permanently remove Wang hongwen, Zhangchunjiao, Jiang qing, and Yao wenyuan from all

D. *The decade of the 1980s (political reform to 1989 Tian'anmen Incident)*

The decade after the Cultural Revolution was marked by political reform that serve as the ideological foundation of the modern state and CPC. This was the era of initial institution building, both in the context of the ideological structures of the CPC and in the reconstruction of the institutions of State and CPC. It is not surprising, then, that it is during this period that the references to constitution in the CPC Congress Reports begin to take on their contemporary forms. The frequency of the term constitution (both the constitutions of the state and the party) rocketed to thirty (30), eight (8) of which reference "the constitution of the state" and twenty-two (22) of which reference the "constitution of the party." The first appearance of the term "constitution of the state" appears in a part of the 11th CPC Congress Report touching on the building of a socialist spiritual civilization (社会主义精神文明建设) and the term "constitution of the state" was included in the argument that education about the concept of a constitution, civil rights, civil obligations and the moral of citizens should be enhanced.⁹⁰

The 2nd through 7th reference to state constitutions in the 11th CPC Congress Report all appeared in the same paragraph. But this was no ordinary paragraph—it tied the project of socialist law building with the project of constituting the state apparatus through the enactment of a "higher law" of a constitution (higher in the sense of its superiority to ordinary law but not with respect to its relation to the political framework within which the CPC operated in accordance with its own constitution). It marked a new stage of China's rule of law. What's worth notice is that this paragraph mentioned that in the new constitution of the party, the principle that "[t]he party must operate within the limits of the constitution of the state and the law."⁹¹ But that formulation could be read either as a declaration that the CPC was

party and non-party position, and revoked their party membership. Completely cleaning their crimes to the party and people."⁹⁰

⁹⁰ *Id.* ("建设社会主义精神文明，是全党的任务.....加强党的纲领、党的历史和党的革命传统的教育，加强宪法和公民权利、公民义务、公民道德的教育，在各行各业加强职业责任、职业道德、职业纪律的教育。") ["Socialist Culture is the task of the Party... strengthen party's principle, party's history and tradition education, constitutional rights and duty education, ethic education in all field."⁹¹]

⁹¹ Hu Yaobang, Report to the 12th National Congress of the Communist Party of China, 胡耀邦在中国共产党第十二次全国代表大会上的报告 [hú yào bāng zài zhōng guó gòng chǎn dǎng dì shí èr cì quǎn guó dài biǎo dà huì shàng de bào gào] (Sept. 1, 1982, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64565/65448/4526430.html> (only Chinese version officially posted) ("社会主义民主的建设必须同社会主义法制的建设紧密地结合起来..... 特别是不久即将提交全国人民代表大会通过的新宪法草案，根据党的十一届三中全会以来我国民主建设所取得的成就和已经确定的方针，作出了许多具有重大意义的新规定。这部宪法的通过，将使我国社会主义民主的发展和法制建设进入一个新的阶段.....特别要教育和监督广大党员带头遵守宪法和法律。新党章关于“党必须在宪法和法律的范围内活动”的规定，是一项极其重要的原则。从中央到

to operate “under” the state constitution (as some later argued within and outside China),⁹² or it might suggest only that the CPC was bound by the state constitution as an expression and operationalization of the CPC Basic Line which was itself required to conform to the General Program of the CPC Constitution.⁹³ The last appearance of the constitution of the state in this report was to emphasize that the party’s leadership of the armed forces of China was to be implemented by the Central Military committee in accordance with the e draft of the new constitution of the state.⁹⁴

Almost all (at least 20 times out of 22 in total) of the mentions of the term “constitution of the party” in the report are directly or indirectly used in the discussion of the amendment of the party’s constitution and the new constitution of the party.⁹⁵ These references set the stage for ordering the relations between the Party,

基层，一切党组织和党员的活动都不能同国家的宪法和法律相抵触。党是人民的一部分。党领导人民制定宪法和法律，一经国家权力机关通过，全党必须严格遵守。”。[“Socialist democratic construction must be integrated with the socialist legal system construction...the new constitution proposal includes many major changes based on the principles and reforms of the democratic development since the 3rd plenary session of the 11th Party Congress. The promulgation of this Constitution would take us into a new stage of democratic and legal system development...it is especially important to educate and supervise party cadres to obey the Constitution and law. The new party constitution principle requires “party must operate within the scope of constitution and law” is a crucial rule. All party organization and member’s activity, from top to bottom, shall not conflict with the Constitution and law. Party is part of people, party led people making Constitution and law, after the passage, all party shall strictly follow it.”]

⁹² See *infra*, pp. 188-89 and notes.

⁹³ See, e.g., Ding Xiaodong, *Law According to the Chinese Communist Party: Constitutionalism and Socialist Rule of Law*, 43(3) *Modern China* (2017); Larry Catá Backer, *Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong’s Constitutionalism*, 40 *MOD. CHINA* 168 (2014).

⁹⁴ Yaobang, *supra* note 91.

⁹⁵ *Id.* (“在社会主义现代化建设的宏伟事业中，历史把重大的责任交给了我们党。为了加强新时期党的建设，我们对十一大党章作了许多有根本意义的修改。修改党章的总的原则是，适应新的历史时期的特点和需要，对党员提出更严格的要求，提高党组织的战斗力和战斗力，坚持和改善党的领导。我们一定要按照新党章的要求，努力把党的建设成为领导社会主义现代化事业的坚强核心。现在提交大会审议的党章修改草案，清除了十一大党章中“左”的错误，继承和发展了党的七大和八大党章的优点。新党章在总纲中，对党的性质和党的指导思想，对现阶段我国社会的主要矛盾和党的总任务，对党在国家生活中如何正确地发挥领导作用，都作了马克思主义的规定。新党章对党员和党的干部在思想上、政治上和组织上的要求，比过去历次党章的规定都更加严格。它对党员的义务，写了绝对不得假公济私、损公利私，坚决反对派性，勇于支持好人好事，反对坏人坏事等内容；对各级领导干部的基本条件，写了要正确执行党的路线、方针和政策，反对党内外错误倾向，有胜任领导工作的专业知识和组织能力，坚持党的原则，同任何滥用职权、谋求私利的行为作斗争等内容，这大都是过去的党章所没有的。根据历史的经验和教训，新党章强调从中央到基层的各级组织都必须严格遵守民主集中制和集体领导的原则，明确规定“禁止任何形式的个人崇拜”。新党章对改善党的中央和地方组织的体制，对加强党的纪律和纪律检查机关，对加强基层组织的建设，都作了许多新的规定。新党章规定，党中央不设主席只设总书记，总书记负责召集中央政治局.....应当说，现在的党章修改草案，比我们党过去

the CPC Constitution, the state and its constitutional ordering—all within the context of the important ideological principle of socialist modernization. “In the grand cause of socialist modernization, history has handed major responsibilities to our party. . . . The general principle of revising the party constitution is to adapt itself to the characteristics and needs of the new historical period, to impose even more stringent requirements on party members, enhance the combat effectiveness of the party organizations, and uphold and improve the party's leadership.”⁹⁶ The references in other paragraphs are also used to show the changes the new constitution of the party had made and the advantages of those changes.⁹⁷ It is worth noting here that this joining of constitutionalism and socialist modernization, even at this early stage, suggests the all-around character of reform as a political project. Chinese constitutionalism, or an expression of its political ideology, is difficult to extract

的党章更加充实和完善。它是党的历史经验和集体智慧的宝贵结晶，是在新的历史时期把我们党的建设得更加坚强的重要保证。” [“Under great project of socialist modernization, party take the historical responsibility. To improve the party building, we made many meaningful changes to the party constitution. One of the main principle of modifying constitution is to meet the new historical development and condition, to ask party member for more, to improve the power of the party, and to improve the party leadership. We must follow the new party constitution to build a party as the solid core of socialist modernization leadership. The current party constitution cleaned the left-wing mistake and developed the many good practice from the 7th and 8th Party Congress. The preamble of the party constitution defined the party's essence, guiding principle, the main conflict and party's main task based on Marxism. The new party constitution makes stricter rules to regulate party cadre and member's mind, and political behavior. It specified that one cannot violate conflict of interest or form private faction; encourage good deed and against unethical or immoral acts. In addition, it requires all party cadres should follow the party's line and principle, against any wrong tendency in and out the party. It also requests party member follow the party principle, fight against abuse of power with competent governing knowledge and skills. The new party constitution based on historical experience and mistakes, require all levels party organs must strictly follow democratic centralism and collective leadership. It further prohibits personal cult. The new party constitution made many new changes concerning the organization and supervision system. Under the new party constitution, central committee do not establish chairman. The party secretary responsible for calling politburo meeting. . . Thus, the current party constitution is more complete. It is the products of collective wisdom and important assurance of the party building.”] (“新党章经过这次代表大会通过之后，必须在全党进行普遍教育，严格执行。每一个党员是否真正符合党章所规定的条件，能否充分履行党员的义务，将成为他是不是一个合格的党员的根本标准。在这次党章修改之前，我们党曾经制定了《关于党内政治生活的若干准则》，在党的实际生活中起了很好的作用。这个准则今后作为党章的重要补充，将继续保持它的全部效力。根据党的现状和新党章的精神，当前我们在党的建设上必须着重解决好以下几个问题。”) [“After the passage the amendment, new party constitution should be widely educated among all party members for strict implementation. The party constitution's requirement on duty and qualification is the benchmark for the qualification of a party member. Prior to this amendment, the party made *certain rules and principles concerning internal party-political life*. This publication plays an important and useful role and serves as a complement to the party constitution. Party building task need to focus on the following areas in the future.”]

⁹⁶ *Id.* (“According to historical experience and lessons, the new party constitution emphasizes that all levels of organizations from the central government to the grass-roots units must strictly abide by the principles of democratic centralism and collective leadership and clearly stipulate that “no form of personal worship should be banned.””).

⁹⁷ *Id.*

from its context in the critical elements of economic objectives and international relations.

In the 13th CPC Congress Report, there were eight (8) references to the term constitution (both of the state and the party) with five (5) of them the term “constitution of the state” and three of them the “constitution of the party.” This is the first time the frequency of the “constitution of the state” supersedes that of the CPC Constitution. And, indeed, starting with the 13th CPC Congress Report, the frequency of term “constitution of the party” has never surpassed the frequency of the “constitution of the state.” Such a change could be regarded as a confirmation of the higher status of the constitution of the state over the constitution of the party at least at the nominal level and a re-confirmation of the principle that the party must operate within the limits of the constitution of the state and the law.⁹⁸

The first appearance of the term “constitution of the state” in the 13th CPC Congress Report touched on the move toward the formation of the Chinese socialist legal system based on the state constitution.⁹⁹ The second and the third appearances of the term “constitution of the state” in the report was in the paragraph discussing of functional separation between the party and the state. Here, the report reiterated that the constitution of the state and the law are made by the people under the leadership of the party and the party shall operate within the limits of the constitution of the state and the law.¹⁰⁰ The fourth appearance of the term “constitution of the state” was in the paragraph of the reform of the cadre and personnel system. It argued that political civil servants (政务类公务员), relative to professional civil servants (业务类公务员) must be managed in accordance with the constitution of the state and the organization law.¹⁰¹ The fifth appearance was in the paragraph of the institutionalization of democratic life at the grass-roots level. The sentence mentioned the need to protect constitutional civil rights and freedom by making law on news, publications, establishing associations, assemblies, demonstrations and to establish a people’s appeal system.¹⁰² On the other hand, the first appearance of the

⁹⁸ Zhao Ziyang, Report to the 13th National Congress of the Communist Party of China (Oct. 25, 1987, Beijing), available at 赵紫阳在中国共产党第十三次全国代表大会上的报告 <http://cpc.people.com.cn/GB/64162/64168/64566/65447/4526368.html> (only Chinese version officially posted) (“党必须宪法和法律范围内活动。”) [“Party must operate within the scope of the Constitution and Law.”]

⁹⁹ *Id.* (“以宪法为基础的社会主义法律体系初步形成。”) [“A constitution based socialist legal system has been formed.”]

¹⁰⁰ *Id.* (“党领导人民制定宪法和法律，并在宪法和法律范围内活动。”) [“The mass formulating Constitution and law under party leadership, which operated within the scope of the constitution and law.”]

¹⁰¹ *Id.* (“政务类公务员，必须严格依照宪法和组织法进行管理，实行任期制，并接受社会的公开监督。”) [“Public servant in political position must strictly follow the constitution and organization law under term limits and public supervision.”]

¹⁰² *Id.* (“因此，必须抓紧制定新闻出版、结社、集会、游行等法律，建立人民申诉制度，使宪法规定的公民权利和自由得到保障，同时依法制止滥用权利和自由的行为。”) [“It is imperative

term “constitution of the party” also stressed the democratic rights of the party members.¹⁰³ The second and third appearance of the party’s constitution emphasized the obligations of the party member.¹⁰⁴

The CPC Congress Reports of this period also appear to set another contemporary practice—the growing importance of the CPC Congress Report itself for the elaboration of the fundamental development of the ideological project of Chinese Marxist Leninism and its application to the construction of the two key constituting documents of the state and of the CPC. Around that central ordering is built the description of the specific modalities of implementation in the form of objectives and specific policies to be applied by both the state and CPC governments. In other words, the CPC Congress Reports begin to serve as an important performance of CPC leadership. This template, developed by Seng Xiaoping, was carried over by his successors, Jiang Zemin and Hu Jintao.

E. *The 1990s to 2017*

The frequency of references to the term constitution (both of the state and of the party) in reports from the 14th CPC Congress through the 17th CPC Congress, delivered by Jiang Zemin and Hu Jintao, demonstrated a relatively stable pattern even though it witnessed a slight rise in the 15th national congress in 1997. This pattern continued the building of notions of socialist rule of law embedded within the state constitution, while at the same time stressing the leadership role of the CPC and its leading role in setting the political principles through which the State Constitution could be interpreted.

In the 14th CPC Congress Report,¹⁰⁵ the three references to the “constitution of the state” all appeared in the section of the Report considering the political structure

to installing laws governing news publication, civil society, marching, establishing grievance filing system to ensure the constitutional rights and freedom of the people and to prevent abuse power and rights.”]

¹⁰³ *Id.* (“要切实保障党章规定的党员民主权利，制定保障党员权利的具体条例。”) [“Fully protect democratic rights of the party member by making specific rules.”]

¹⁰⁴ Ziyang, *supra* note 98.

¹⁰⁵ Jiang Zemin, Report to the 14th National Congress of the Communist Party of China 江泽民在中国共产党第十四次全国代表大会上的报告 (Oct. 12, 1992, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64567/65446/4526308.html> (only Chinese version officially posted).

of reform,¹⁰⁶ legal system construction,¹⁰⁷ and the protection of people's rights.¹⁰⁸ The term "constitution of the party" also appeared three times with the first one indicating the protection of party members' right to voice their opinions¹⁰⁹ and the other two related to the amendment of the constitution of the party, including enshrining "building socialism with Chinese characteristics and basic party line" into the constitution of the party.¹¹⁰

The 15th CPC Congress Report¹¹¹ mentioned the "constitution of the state" five times and the "constitution of the party" four times. The first three references to the "constitution of the state" were in the paragraph discussing governance in accordance with the law (依法治国) and reiterated that the constitution of the state and the law are made by the people under the leadership of the party and the party should operate within the limits of the constitution and the law.¹¹² The fourth appearance of the term "constitution of the state" was in the paragraph discussing the construction of the legal system, claiming "uphold the integrity of the constitution of the state and

¹⁰⁶ *Id.*, (".....积极推进政治体制改革。我们的政治体制改革，目标是建设有中国特色的社会主义民主政治，绝不是搞西方的多党制和议会制。我国宪法规定，中华人民共和国国家机构实行民主集中制的原则。") ["...It is imperative to push forward reform of the political structure, bearing in mind that promotion of democracy must be closely combined with improvement of the legal system. The goal of this reform is to build a socialist democracy suited to Chinese conditions and in no respect a Western, multiparty, parliamentary system. The Constitution of our country provides that the state organs of the People's Republic of China shall apply the principle of democratic centralism."]

¹⁰⁷ *Id.* ("高度重视法制建设.....要严格执行宪法和法律，加强执法监督") ["All due attention should be given to the legal system... It is essential to enforce the Constitution and other laws strictly, to supervise their enforcement?"]

¹⁰⁸ *Id.* ("我国的宪法从根本方面保障了人民的各种权利。") ["The Constitution of our republic has given basic protection to all the people's rights."]

¹⁰⁹ *Id.* ("在党内生活中发扬讲真话不讲假话、言行一致的优良作风，支持和保护党员依据党章规定的权利发表意见。") ["In inner-Party activities we should carry on the fine tradition of speaking the truth and matching our deeds to our words. We should also encourage Party members to express their views, and we should protect their right to do so, as set forth in the Party Constitution."]

¹¹⁰ *Id.* (".....十三届中央委员会提出了《中国共产党章程(修正案)》，请代表大会审议。修正案把建设有中国特色社会主义的理论和党的基本路线的内容写进党章.....") ["...the 13th Central Committee presents for the examination and deliberation of this National Congress the draft of a revised Constitution of the Communist Party of China. This draft includes in the Constitution the theory of building socialism with Chinese characteristics and the Party's basic line."]

¹¹¹ 江泽民在中国共产党第十五次全国代表大会上的报告 Jiang Zemin, Report to the 15th National Congress of the Communist Party of China (Sept. 12, 1997), <http://cpc.people.com.cn/GB/64162/64168/64568/65445/4526285.html> (only Chinese version officially posted).

¹¹² *Id.* ("依法治国，就是广大人民群众在党的领导下，依照宪法和法律规定，通过各种途径和形式管理国家事务.....党领导人民制定宪法和法律，并在宪法和法律范围内活动。") ["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, ... The Party has led the people in drawing up the Constitution and other laws, to which it confines its activities."]

the law".¹¹³ The fifth appearance of the term "constitution of the state" was in the paragraph discussing the democratic supervision system, arguing to "enhance the supervision of the implementation of the constitution of the state and the law".¹¹⁴ For the term "constitution of the party", its first appearance was to suggest enshrining Deng Xiaoping Thought into the constitution of the party as the guiding thoughts of the party.¹¹⁵ The second appearance was in the paragraph discussing organizational construction, urging that the branches of the party at the grass-roots level should carefully perform their duties required by the constitution of the party.¹¹⁶ The third and the fourth appearance of the term constitution of the party were in the same paragraph discussing the governance of the party, reiterating the importance of the party's constitution and the criteria of acceptance of new members to the party.¹¹⁷

¹¹³ *Id.* ("加强法制建设.....维护宪法和法律的尊严, 坚持法律面前人人平等, 任何人、任何组织都没有超越法律的特权。") ["Improve the legal system... To safeguard the dignity of the Constitution and other laws, we must see to it that all people are equal before the law and no individuals or organizations shall have the privilege to overstep it."]

¹¹⁴ *Id.* ("完善民主监督制度.....加强对宪法和法律实施的监督, 维护国家法制统一。") ["Improve the system of democratic supervision... We shall strengthen the supervision over the enforcement of the Constitution and other laws to safeguard the uniformity of the legal system of the state as well as the supervision over the implementation of general and specific policies of the Party and the state to see to it that they are truly carried out."]

¹¹⁵ *Id.* ("中央建议十五大在党章中把邓小平理论确立为党的指导思想") ["[T]he Party Central Committee has proposed that the 15th Party Congress establish Deng Xiaoping Theory as its guiding ideology by stipulating in its Constitution that the Chinese Communist Party takes Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory as its guides for action."]

¹¹⁶ *Id.* ("党的基层组织都要从各自的特点出发, 认真履行党章规定的职责, 努力成为贯彻党的路线方针政策、团结和带领群众完成本单位任务的坚强战斗堡垒。") ["Grassroot level party organization, in light of their own characteristics, they should earnestly perform their duties prescribed by the Constitution of the Party and strive to become a staunch, powerful force that can carry out the Party's line, principles and policies and that can unite with the masses and lead them in fulfilling the tasks of their own units."]

¹¹⁷ *Id.* ("(从严治党, 是保持党的先进性和纯洁性, 增强党的凝聚力和战斗力的保证.....要把从严治党的方针贯彻到党的建设的各项工作中去, 坚决改变党内存在的纪律松弛和软弱涣散的现象。这就要严格按党章办事, 按党的制度和规定办事; 就要对党员特别是领导干部严格要求, 严格管理, 严格监督; 就要在党内生活中讲党性, 讲原则, 开展积极的思想斗争, 弘扬正气, 反对歪风; 就要严格按照党章规定的标准发展党员, 严肃处置不合格党员.....)") ["Tightening Party discipline is the guarantee for maintaining the Party's advanced nature and purity and enhancing its cohesiveness and fighting capacity... We should, therefore, act in strict accordance with the Constitution of the Party and in line with the Party's rules and regulations. We should be strict with Party members, leading cadres in particular, and strictly manage and supervise them. In inner-Party life we should stress Party spirit and principles, conduct active ideological struggle, encourage healthy trends and oppose unhealthy practices. We should recruit new Party members strictly in accordance with the standards provided for by the Constitution of the Party and see to it that unqualified Party members are duly dealt with. We should strictly enforce Party discipline to ensure that all members are equal before discipline."]

The 16th CPC Congress Report¹¹⁸ mentioned the term “constitution of the state” for 3 times and the term “constitution of the party” only once. The first two appearances of the term “constitution of the state” were in the paragraph discussing the development of the development of the people’s democracy. By those two terms, the report reiterated that the constitution of the state and the law is the demonstration of the unity of the party’s opinion and the will of the people, and no organization or individual is not allowed to enjoy the privilege that is above the constitution of the state and the law.¹¹⁹ The third appearance of the term “constitution of the state” was in the paragraph discussing the construction of the socialist legal system and emphasized that the party members, especially cadres, should be models to abide by the constitution of the state and the law.¹²⁰ On the other hand, the only appearance of the term “constitution of the party” was again in the discussion of acceptance of new members to the party.¹²¹

Both the 17th CPC Congress Report¹²² and the 18th CPC Congress Report¹²³ references the term “constitution of the state” three times and the term “constitution of the party” only once. The appearance of those terms in the two reports also demonstrated very similar patterns. All three times the appearance of the term “constitution of the state” in both reports was in the paragraph on governance in accordance with the law (依法治国) and both stressed the party and the members of the party should operate within the limits of the constitution of the state and the law. The report to the 18th national congress obviously put more emphasis on concept that the party as a whole shall operate within the limits of the constitution of the state and the law compared to the report to the 17th, which presented a micro-level

¹¹⁸ Jiang Zemin, Report to the 16th National Congress of the Communist Party of China (Nov. 8, 2002, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64569/65444/4429125.html> (only Chinese version officially posted). (江泽民在中国共产党第十六次全国代表大会上的报告) (jiāng zé mǐn zài zhōng guó gòng chǎn dǎng dì shí liù cì quán guó dài biǎo dà huì shǎng de bào gào).

¹¹⁹ *Id.* (“宪法和法律是党的主张和人民意志相统一的体现。必须严格依法办事，任何组织和个人都不允许有超越宪法和法律的特权。”) [“The Constitution and other laws embody the unity of the Party’s views and the people’s will. All organizations and individuals must act in strict accordance with the law, and none of them are allowed to have the privilege to overstep the Constitution and other laws.”]

¹²⁰ *Id.* (“党员和干部特别是领导干部要成为遵守宪法和法律的模范。”) [“Party members and cadres, especially leading cadres, should play an exemplary role in abiding by the Constitution and other laws.”]

¹²¹ *Id.* (“(要把承认党的纲领和章程、自觉为党的路线和纲领而奋斗、经过长期考验、符合党员条件的其他社会阶层的先进分子吸收到党内来。”) [“We should admit into the Party advanced elements of other social strata who accept the Party’s program and Constitution, work for the realization of the Party’s line and program consciously and meet the qualifications of Party membership following a long period of test, in order to increase the influence and rallying force of the Party in society at large.”]

¹²² Hu Jintao, Report to the 17th National Congress of the Communist Party of China (Oct. 15, 2007), available at <http://cpc.people.com.cn/GB/64162/64168/106155/106156/6430009.html> (only Chinese version officially posted).

¹²³ Hu Jintao, Report to the 18th National Congress of the Communist Party of China (Nov. 8, 2012), available at <http://cpc.people.com.cn/n/2012/1118/c64094-19612151.html> (only Chinese version officially posted).

statement that “the party’s organizations at each level and all members of the party shall consciously operate within the limit of the constitution of the state and the law.” The report to the 18th national congress also reiterated that “no organization or individual is not allowed to enjoy privilege that is above the constitution of the state and the law.”¹²⁴ In the report to the 18th national congress: “[t]he party leads the people in formulating the constitution and laws, and the party must act within the framework of the Constitution and laws. No organization or individual may enjoy the privilege of surpassing the constitution and the law and must never allow the law of words and the law of the people to exercise the power of pressing the law and the law of selfish occupation.”¹²⁵

But this must be read within the overall context of the Report, especially respecting references to the CPC Constitution. Both of the appearances of the term “constitution of the party” in those two reports speak to the members of the party to abide by the constitution with the report the 18th national congress emphasized on “cadres, especially major leading cadres.” In the report to the 17th national congress: “[c]onsolidate and develop the achievements of advanced education in an all-around way ... seriously study and abide by the party constitution and enhance the awareness of party members”¹²⁶ In the report to the 18th national congress: “[p]arty organizations at all levels and Party members, cadres, especially leading cadres must conscientiously abide by the Party Constitution, and consciously act in accordance with organizational principles and guidelines for party political life of the party, no one is above the organization.”¹²⁷

¹²⁴ Jintao, *supra* note 122. (“ (In the report to the 17th national congress: 加强宪法和法律实施，坚持公民在法律面前一律平等.....各级党组织和全体党员要自觉在宪法和法律范围内活动，带头维护宪法和法律的权威。”) [“We will strengthen the enforcement of the Constitution and laws, ensure that all citizens are equal before the law ... Party organizations at all levels and all Party members must act under the Constitution and laws on their own initiative and take the lead in upholding the authority of the Constitution and laws.”]

¹²⁵ Jintao, *supra* note 123. (only Chinese version officially posted) (“党领导人民制定宪法和法律，党必须在宪法和法律范围内活动。任何组织或者个人都不得有超越宪法和法律的特权，绝不允许以言代法、以权压法、徇私枉法。”) [“No organization or individual has the privilege of overstepping the Constitution and laws, and no one in a position of power is allowed in any way to take one's own words as the law, place one's own authority above the law or abuse the law.”]

¹²⁶ Jintao, *supra* note 122. (only Chinese version officially posted) (“全面巩固和发展先进性教育活动成果.....认真学习和遵守党章，增强党员意识.....”) [“Consolidate and develop all the achievements of the campaign to educate Party members to preserve their vanguard nature, and focus on strengthening primary Party organizations... We will earnestly study and abide by the Party Constitution, raise our awareness...”]

¹²⁷ Jintao, *supra* note 123. (only Chinese version officially posted) (“各级党组织和广大党员、干部特别是主要领导干部一定要自觉遵守党章，自觉按照党的组织原则和党内政治生活准则办事，任何人都不能凌驾于组织之上。”) [“Party organizations at all levels and all Party members and officials, especially principal leading officials, must willingly abide by the Party Constitution as well as its organizational principles and guiding principles for its political activities; and no one is allowed to place oneself above the Party organization.”]

Flora Sapio, in her analysis of constitutional references in pre 19th CPC Congress Reports¹²⁸ has noted:

Statements about the Party Constitution and the State Constitution contained in earlier Work Reports to the CCP Congress allow to trace the developmental trajectory leading to the current equilibrium between the political constitution of the CCP, and the administrative constitution of the State. This trajectory can be roughly divided in an earlier period (1949 - 1987), when governance was conceived as based exclusively political documents and oral directives, and in a later period, when the Party acknowledged the importance of law-based forms of governance subordinate to a broad orchestration from the Party, and yet distinct from earlier methods of governance. The latter period began between 1987 and 1992, and it is still on-going.¹²⁹

Sapio explains that by the end of the Hu Jintao leadership period, “the principle whereby the Party defines and leads all those political processes which are then concretely realized by organs of the State.”¹³⁰ If the emphasis on these processes was not directly and explicitly made in his 2007 Work Report, in 2012 Hu Jintao unequivocally stated how the Party leads the People in enacting the Constitution and the law.”¹³¹ And yet those certainties within the historical trajectory of the CPC Congress Reports were not entirely free from the ambiguities built into the language in those reports used to develop the structures of socialist rule of law as part of the socialist modernization of the state, and as an example of the construction of ideological and governance structures that could provide an international alternative to the Western model.

III. THE ALL-AROUND CONSTITUTION IN THE “NEW ERA”

How were these ambiguities and idea navigated and developed in the Report to the 19th Party Congress? Drawing on the official bilingual publication of the 19th CPC Congress Report,¹³² the word *constitution* appears in the *English version* of the

¹²⁸ Flora Sapio, *Chinese Constitutionalism in Work Reports to the CCP Congress 1949 - 2012, Law at the End of the Day* (Nov. 23, 2017), <http://lcbackerblog.blogspot.com/2017/11/chinese-constitutionalism-after-19th.html>.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Xi Jinping, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era at the 19th National Congress of the Communist Party of China* (Oct. 18, 2017) [决胜全面建成小康社会 夺取新时代中国特色社会主义伟大胜利—在中国共产党第十九次全国代表大会上的报告—2017年10月18日, 习近平] (jué shèng quán miàn jiàn chéng xiǎo kāng shè huì duó qǔ xīn shí dài zhōng guó tè sè shè huì zhǔ yì wēi dà shèng lì zài zhōng guó gòng chǎn dǎng dì shí jiǔ cì quán guó dài biǎo dà huì shǎng de bào gào nián yuè rì xí jīn píng).

19th CPC Congress Report *13 times in 9 different sections* (appearing in the Chinese original as 宪法 or its variation 章程 and 党章). At the same time, translation issues produced some anomaly. The English word *constitution* in the official translation appeared in spots that did not correspond to the use of the same term in the original Chinese with precise correspondence. Indeed, it has been assumed that though the terms 宪法 or its variation 章程 and 党章 point to similar constituting forms, they are understood to reference what can be sometimes quite distinct institutional forms. As a consequence, the English term “constitution” may flatten out the meaning of the terms in the original Chinese. Moreover, those differences might be usefully explored in the construction of state and Party constitutions as autonomous instruments of basic rules and with respect to their relationship, especially in the context of the constitutionalism of the “New Era.”

A. A First Cut

At least as a first cut at meaning, it is plausible to assume that the English translation and its use of the English word “constitution” were faithful to the general meaning of the 19th Congress Report even where a mechanical translation might have suggested otherwise. In any case, the English references to the constitution in the 19th CPC Congress Report consisted of the following:

Pg 7 BL (We have made fresh progress in work related to Hong Kong, Macao, and Taiwan.)

We have fully and faithfully implemented the principle of “one country, two systems,” and ensured that the central government exercises its overall jurisdiction over Hong Kong and Macao as mandated by China’s Constitution and the basic laws of the two special administrative regions.¹³³

Pg 8 BL (We have achieved remarkable outcomes in ensuring full and strict governance over the Party.)

¹³³Xi Jinping, Report to the 19th National Congress of the Communist Party of China (Oct. 18, 2017, Beijing), available at http://www.xinhuanet.com/english/special/2017-11/03/c_136725942.htm (only Chinese version officially posted). (“港澳台工作取得新进展。全面准确贯彻“一国两制”方针，牢牢掌握宪法和基本法赋予的中央对香港、澳门全面管治权；深化内地和港澳地区交流合作，保持香港、澳门繁荣稳定。”) [“We have made fresh progress in work related to Hong Kong, Macao, and Taiwan. We have fully and faithfully implemented the principle of “one country, two systems,” and ensured that the central government exercises its overall jurisdiction over Hong Kong and Macao as mandated by China’s Constitution and the basic laws of the two special administrative regions. We have thus boosted exchanges and cooperation between the mainland and the two regions and maintained prosperity and stability in Hong Kong and Macao.”]

We encourage all Party members to hold the Party Constitution in great esteem.¹³⁴

We have regularized and institutionalized the requirement for all Party members to have a solid understanding of the Party Constitution, Party regulations, and related major policy addresses and to meet Party standards.

Pg 22 BL (Ensuring every dimension of governance is law-based)

We must improve the Chinese socialist system of laws, at the heart of which is the Constitution; establish a Chinese system of socialist rule of law; build a socialist country based on the rule of law; and develop Chinese socialist rule of law theory.¹³⁵

Pg 25 BL (Exercising full and rigorous governance over the Party)

We must uphold the Party Constitution as our fundamental rules, give top priority to the political work of the Party, combine efforts on ideological work and institution building, and strengthen Party competence in all respects.¹³⁶

Pg 37 BL (Strengthening institutional guarantees to ensure the people run the country)

¹³⁴ *Id.* (“推动全党尊崇党章，增强政治意识、大局意识、核心意识、看齐意识，坚决维护党中央权威和集中统一领导，严明党的政治纪律和政治规矩，层层落实管党治党政治责任。”) [“We have achieved remarkable outcomes in ensuring full and strict governance over the Party. We have made sweeping efforts to strengthen Party leadership and Party building, and taken strong action to transform lax and weak governance over the Party. We encourage all Party members to hold the Party Constitution in great esteem. We urge them to strengthen their consciousness of the need to maintain political integrity, think in big-picture terms, follow the leadership core, and keep in alignment, and to uphold the authority of the Central Committee and its centralized, unified leadership. We have tightened political discipline and rules to ensure that political responsibility for governance over the Party is fulfilled at each level of the Party organization.”]

¹³⁵ *Id.* (“必须把党的领导贯彻落实到依法治国全过程和各方面，坚定不移走中国特色社会主义法治道路，完善以宪法为核心的中国特色社会主义法律体系，建设中国特色社会主义法治体系，建设社会主义法治国家，发展中国特色社会主义法治理论，坚持依法治国、依法执政。”) [“We must exercise Party leadership at every point in the process and over every dimension of law-based governance, and be fully committed to promoting socialist rule of law with Chinese characteristics. We must improve the Chinese socialist system of laws, at the heart of which is the Constitution; establish a Chinese system of socialist rule of law; build a socialist country based on the rule of law; and develop Chinese socialist rule of law theory.”]

¹³⁶ *Id.* (“必须以党章为根本遵循，把党的政治建设摆在首位，思想建党和制度治党同向发力。”) [“We must uphold the Party Constitution as our fundamental rules, give top priority to the political work of the Party, combine efforts on ideological work and institution building, and strengthen Party competence in all respects.”]

We should give better play to the role of deputies to people's congresses, and enable people's congresses at all levels and their standing committees to fully perform their functions as stipulated in the Constitution and the law, and to truly represent the people and maintain close ties with them.¹³⁷

Pg 39 BL (Advancing Law based governance)

A central leading group for advancing law-based governance in all areas will be set up to exercise unified leadership over the initiative to build rule of law in China. We will strengthen oversight to ensure compliance with the Constitution, advance constitutionality review, and safeguard the authority of the Constitution.

We will redouble efforts to raise public awareness of the law, develop a socialist culture of rule of law, and increase public awareness of the principle underlying rule of law that the Constitution and the law are above everything else and that everyone is equal before the law.

No organization or individual has the power to overstep the Constitution or the law; and no one is allowed in any way to override the law with his or her own orders, place his or her authority above the law, violate the law for personal gain, or abuse the law.¹³⁸

¹³⁷*Id.* (“更好发挥人大代表作用，使各级人大及其常委会成为全面担负起宪法法律赋予的各项职责的工作机关，成为同人民群众保持密切联系的代表机关。完善人大专门委员会设置，优化人大常委会和专门委员会组成人员结构。”) [“We should give better play to the role of deputies to people's congresses, and enable people's congresses at all levels and their standing committees to fully perform their functions as stipulated in the Constitution and the law, and to truly represent the people and maintain close ties with them.”]

¹³⁸*Id.* (“(四) 深化依法治国实践。全面依法治国是国家治理的一场深刻革命，必须坚持厉行法治，推进科学立法、严格执法、公正司法、全民守法。成立中央全面依法治国领导小组，加强对法治中国建设的统一领导。加强宪法实施和监督，推进合宪性审查工作，维护宪法权威。推进科学立法、民主立法、依法立法，以良法促进发展、保障善治。建设法治政府，推进依法行政，严格规范公正文明执法。深化司法体制综合配套改革，全面落实司法责任制，努力让人民群众在每一个司法案件中感受到公平正义。加大全民普法力度，建设社会主义法治文化，树立宪法法律至上、法律面前人人平等的法治理念。各级党组织和全体党员要带头尊法学法守法用法，任何组织和个人都不得有超越宪法法律的特权，绝不允许以言代法、以权压法、逐利违法、徇私枉法。”) [“Advancing law-based governance in all fields is a profound revolution in China's governance. We must promote the rule of law and work to ensure sound lawmaking, strict law enforcement, impartial administration of justice, and the observance of law by everyone. A central leading group for advancing law-based governance in all areas will be set up to exercise unified leadership over

Pg. 55 BL (Upholding “One Country, Two Systems” and Moving Toward National Reunification)

It is imperative too, to act in strict compliance with China’s Constitution and the basic laws of the two special administrative regions, and to improve the systems and mechanisms for enforcing the basic laws.

We will continue to support the governments and chief executives of both regions in pursuing the following endeavors: exercising law-based governance, . . . and fulfilling the constitutional responsibility of safeguarding China’s sovereignty, security, and development interests.¹³⁹

Pg 63 BL (Putting the Party’s political building first)

Every member of the Party must hold the Party Constitution in great reverence, act in strict accordance with the code of conduct for intraparty political life under new circumstances, and make intraparty activities more politically oriented, up-to-date, principled, and effective.¹⁴⁰

the initiative to build rule of law in China. We will strengthen oversight to ensure compliance with the Constitution, advance constitutionality review, and safeguard the authority of the Constitution. We will carry out lawmaking in a well-conceived and democratic way and in accordance with law, so that good laws are made to promote development and ensure good governance. We will build a rule of law government, promote law-based government administration, and see that law is enforced in a strict, procedure-based, impartial, and non-abusive way. We will carry out comprehensive and integrated reform of the judicial system and enforce judicial accountability in all respects, so that the people can see in every judicial case that justice is served.”]

¹³⁹*Id.* (“保持香港、澳门长期繁荣稳定，必须全面准确贯彻“一国两制”、“港人治港”、“澳人治澳”、高度自治的方针，严格依照宪法和基本法办事，完善与基本法实施相关的制度和机制。要支持特别行政区政府和行政长官依法施政、积极作为，团结带领香港、澳门各界人士齐心协力谋发展、促和谐，保障和改善民生，有序推进民主，维护社会稳定，履行维护国家主权、安全、发展利益的宪制责任。”) [“To maintain long-term prosperity and stability in Hong Kong and Macao, it is imperative to fully and faithfully implement the policies of “one country, two systems,” “the people of Hong Kong governing Hong Kong,” “the people of Macao governing Macao,” and a high degree of autonomy for both regions. It is imperative too, to act in strict compliance with China’s Constitution and the basic laws of the two special administrative regions, and to improve the systems and mechanisms for enforcing the basic laws. We will continue to support the governments and chief executives of both regions in pursuing the following endeavors: exercising law-based governance, uniting and leading the people of all sectors in an active and concerted effort to promote development and harmony, ensuring and improving people’s wellbeing, taking well-ordered steps to advance democracy, maintaining law and order, and fulfilling the constitutional responsibility of safeguarding China’s sovereignty, security, and development interests.”]

¹⁴⁰*Id.* (“要尊崇党章，严格执行新形势下党内政治生活若干准则，增强党内政治生活的政治性、时代性、原则性、战斗性，自觉抵制商品交换原则对党内生活的侵蚀。”) [“Every member of the Party must hold the Party Constitution in great reverence, act in strict accordance with the code of conduct for intraparty political life under new circumstances, and make intraparty activities more politically oriented, up-to-date, principled, and effective. We must guard against the rules of business

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We will foster a Marxist style of learning, and make it regular practice and an institutionalized requirement for all Party members to gain a good command of the Party Constitution, Party regulations, and related major policy addresses and to meet Party standards.¹⁴¹

This bare listing does not tell one much, but it does reveal a few potentially useful concepts. It is clear that the 19th CPC Congress did not shy away from the use of the term constitution (in English or as 宪法, 章程 and 党章). It is clear that issues of law and of constitution remain an important element of CPC policy, or, in any case, it is not clear that the CPC appears to be abandoning either the concept or the use of the constitution as a vehicle. The references to the constitution appear to be used in three distinct ways. First the constitution, strictly applied, is used as a tool to legitimate and guide policy with respect to external relations and the construction of the institutionalization of one nation two systems. Second, the notion of constitution is used to articulate the guiding ideology and frame the institutional systems of the party in power, assuming the role of paramount normative order maker. Third, the term constitution is used to refer to the supreme rules that frame the system of government instituted in China, one that reflects the application of the paramount normative order and that is guided and managed by the party in power and its United Front. These multiple uses of the term may provide a hint of the character of the emerging constitutionalism of China in the New Era.

Yet, these insights produce a further set of questions. First, if the term remains an important element of CPC leadership, what is the nature of its contribution to the political and legal order of state and Party? Second, Is Socialist constitutionalism moving away from assigning a fixed meaning to the term "constitution"—for example is there a difference between the uses of the constitution and constitutional concepts different when used to manage outward relations than inward relations; is there a difference between constitutionalism as applied for the benefit of the masses and as the system for guiding the discretionary decision making of the party in power and its United Front? More importantly, perhaps, to what extent does the 19th CPC Congress Report begin to reveal its changing character and place within the

dealings eroding intraparty conduct, and foster a healthy political atmosphere of integrity within the Party.”]

¹⁴¹*Id.* (“弘扬马克思主义学风，推进“两学一做”学习教育常态化制度化，以县处级以上领导干部为重点，在全党开展“不忘初心、牢记使命”主题教育，用党的创新理论武装头脑。”) [“We will foster a Marxist style of learning, and make it regular practice and an institutionalized requirement for all Party members to gain a good command of the Party Constitution, Party regulations, and related major policy addresses and to meet Party standards. We will launch a campaign on the theme of “staying true to our founding mission” to enable all Party members, especially officials at and above the county and director level, to arm themselves with the Party’s new theories and become more purposeful in working tirelessly to accomplish the Party’s historic mission in the new era.”]

constellation of Chinese constitutionalism, broadly understood in the Chinese context in the New Era”?

B. *Reading Constitution in Context*

What appears from a closer and more nuanced reading of these texts is the emergence of a more complex and malleable constitutionalism. It is a constitutionalism that comes closer to recognizing the dual aspects of Chinese constitutionalism, its division into a paramount political constitution and an operational administrative constitution. At the same time, it suggests as well the ordering of the hierarchy of those constitutions, the allocation of power with respect to their interpretation and application, and lastly with respect to the premises for their interpretation and use in the maintenance of the Chinese constitutional order. Briefly put—the 19th CPC Congress Report refined its focus on the CPC constitution as the paramount source of the CPC’s legitimacy and constraining force. It emphasized the distinction between the political constitution of the CPC, which is to be broadly and flexibly construed to meet the needs of the new historical era, and the state constitution, whose terms are to be strictly applied. And it strongly implied that the leadership role of the ruling party includes leadership respecting the role and application of the state constitution, which is its greatest creation tool for the fulfillment of its obligations to the people.

To that end, it might be useful to divide these references into three distinct types. For convenience, I will call the first type references to the CPC Constitution. I will call the second type references to the state constitution. And I will call the third CPC leadership references (mixed or hybrid references). To put the following considerations in sharper focus, of the 13 references to constitution in the English version of the 19th CPC Congress Report, (a) *four (4) make reference to the CPC Constitution* in four (4) different sections, (b) *only two (2) make reference to the state constitution*, in different sections, and (c) *the majority of the references, six (6) references in four (4) sections speak to mixed references, of state constitution under CPC leadership.*

References to the CPC Constitution. It might come as no surprise that the greatest number of references to constitutions are to the constitution of the Chinese Communist Party. But it is the character of those references that open a clear window into the emerging understanding of the construction of Chinese constitutionalism in the “New Era.” CPC cadres are “encouraged to hold the CPC Constitution in great esteem.”¹⁴² They are required to cultivate a “solid understanding of the CPC Constitution.”¹⁴³ These encouragements and responsibilities are developed in connection with efforts to ensure full and strict compliance over the CPC itself. The CPC Constitution appears to assume an even greater role in the context of exercising full and rigorous governance over the CPC, the paramount political force in the state. In that context, the 19th CPC Congress Report speaks to the requirement to uphold

¹⁴² Jinping, *supra* note 7, at 8.

¹⁴³ *Id.*

the CPC Constitution “as our fundamental rules.”¹⁴⁴ This requirement is not exercised in isolation, but rather as an element of centering the political work of the CPC in the context of ideological an institution building.¹⁴⁵ To that end, there is an emphasis on treating the CPC constitution (but not the state constitution) “in great reverence.”¹⁴⁶ That reverence must be translated into strict compliance with its rules (presumably including the premises and ideological lines of its General Program). And it translates into a Marxist style of learning necessary to master the CPC’s political constitution, its regulations and Basic Line.¹⁴⁷ Taken together, the references suggest both the constitutional character of the CPC Constitution, and their role in organizing and constraining the discretion of the CPC in its own political work. The language is not one that appears to advance the notion that the CPC is a purely political body without constraint. But rather the CPC itself produces the document through which it constitutes and administers its *kompetenz-kompetenz* (its power to determine the scope of its own power).¹⁴⁸ It is not so much about the devolution of power as its manifestation through rules that itself better permits the expression of collective and process based rather than personal and discretionary decision making.

Where do these references appear? Not surprisingly, these references are set out in those portions of the 19th CPC Congress Report that focus on the institutionalization of the CPC itself. The first with reference to the past.¹⁴⁹ The second with reference to CPC internal governance—its cage of regulation.¹⁵⁰ The third reference is contained in a section focusing on the centrality of CPC political building and the constraints under which that goal is undertaken.¹⁵¹ The last reference focuses on the discipline of ideology and its dissemination within the CPC itself.¹⁵² Taking this as a whole, these references to the constitution as the organizing instrument of the CPC and its guide to action suggests a further development of a move toward the constitutionalization of the CPC itself. Its character as the body corporate vested with the authority to lead the state and manage its affairs echoes Western notions not of liberal democratic governmental organs but rather the board of directors of a large complex enterprise. And it suggests a remarkable convergence, not between Chinese and Western liberal democratic theory, but between Marxism

¹⁴⁴ *Id.* at 25.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 63.

¹⁴⁷ *Id.* at 64.

¹⁴⁸ See Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, 2014 PEPP. L. REV. 17 (2014), <http://digitalcommons.pepperdine.edu/plr/vol2014/iss1/2>.

¹⁴⁹ Press briefing: party building self governance, http://www.china.org.cn/china/2017-10/20/content_41765343.htm; Jinping, *supra* note 7, at 8 (“We have achieved remarkable outcomes in ensuring full and strict governance over the Party”).

¹⁵⁰ Jinping, *supra* note 7, at 25 (“Exercising full and rigorous governance over the Party”).

¹⁵¹ *Id.* at 63 (“Putting the Party’s political building first”).

¹⁵² *Id.* at 64 (“Arming the whole Party with the Thought on Socialism with Chinese Characteristics for a New Era”).

and Western liberal enterprise constitutionalism.¹⁵³ This is an area ripe for further study and may represent the most dynamic element of constitutional evolution in the West and China for this century.

References to the State Constitution. Only two (2) of the references to constitutions are solely centered on the state constitution in its own right. Standing alone, this would certainly add weight to the intuition that the 19th CPC Congress Report points to a substantial downshifting of conventional constitutionalism. That intuition seems confirmed in this respect. Yet that downshifting of the state constitution does not necessarily mean a drifting away from constitutionalism. Rather it may appear to suggest a re centering, from administrative to political constitution, and an affirmation of the hierarchy of authority that places the state constitution below and crafted to serve the political constitution of the state. Those hints are underlined by the form of reference to the state constitution standing alone. The first reference suggests the value of the state constitution as a tool—the manifestation of a rule that must be strictly applied. That is certainly useful in the context in which it is made—referencing the rules institutionalizing the one country—two system policy.¹⁵⁴ So does the second reference. Again, deployed in the context of the adherence to the one country—two systems policy, the reference is again to acting in “strict compliance with China’s constitution.”¹⁵⁵ So, where has state constitutionalism gone? It appears that the 19th CPC Congress Report underscores the dependent nature rather than the autonomous position of the state constitution within the Chinese constitutional universe. That is, the 19th Congress Report makes clear that the state constitution cannot be understood or applied except in the context of the leadership of the CPC and under its direction. As such the state constitution loses its autonomy and derives its power not from itself but from its exercise in accordance with leadership obligations of the CPC.

Where do these references appear? The traditional references to the state constitution as an autonomous instrument legitimating and constraining power appear in two places in the 19th CPC Congress Report. But both focus on the same issue—the outward projection of constitutional premises to define the limits and character of the state system. The first reference was embedded in reports on progress in the integration of China’s autonomous regions, and specially Hong Kong, Macao and Taiwan.¹⁵⁶ The second reference was embedded in the objectives of managing the one country—two systems policy.¹⁵⁷ In both cases, the references are made in

¹⁵³ E.g., Larry Catá Backer, *Transnational Corporate Constitutionalism: The U.N. Global Compact, the OECD Guidelines for Multinational Enterprises and the Emergence of a Constitutional Order for Economic Enterprises*, LAW AT THE END OF THE DAY (Sept. 21, 2009), <http://lcbackerblog.blogspot.com/2009/09/transnational-corporate.html>; GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTSSOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012); Larry Catá Backer, *Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems* (March 1, 2010), Penn State Legal Studies Research 10-2010, available at <https://ssrn.com/abstract=1568934>; Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 IND. J. GLOBAL LEGAL STUD. 751 (2011).

¹⁵⁴ Jinping, *supra* note 7, at 7.

¹⁵⁵ *Id.* at 55.

¹⁵⁶ *Id.* at 7 (“We have made fresh progress in work related to Hong Kong, Macao, and Taiwan”).

¹⁵⁷ *Id.* at 55 (“Upholding ‘One Country, Two Systems’ and Moving Toward National Reunification”).

passing in the sense that the constitution was brought to bear as a legitimating force rather than as the central element of the discussion. In both cases, the constitution serves its role as a cage of regulation, but one that serves China's interests in the ordering of its peripheral affairs—the management of its territories. To that extent, the law—and the fundamental legitimating force of the constitution—provide the basis for action, and its justification in ways that appeal both internally and to China's foreign audience.

References to CPC leadership (mixed or hybrid references). Chinese constitutionalism for the New Era most clearly emerges from large number of references to the state constitution that are here described as mixed or hybrid. They are given this description precisely because, while they continue to uphold the now conventional Chinese principles of rule of law and the primacy of the state constitution in ordering the apparatus of government, they make those principles contingent on their exercise through the leadership of the CPC. The description is tentative though the effects are apparent from the text of the 19th CPC Congress Report. Here there is a curious mix. The normative thrust of the statements point to conventional constitutional theory—the primacy of a state constitution, the principle of equality before the law, the principle of the supremacy of the law and of the illegitimacy of abusive discretion and cults of personality. At the same time, it deviates from conventional constitutional approaches because it shifts the responsibility for those constitutional principles to a very specific political institution that itself is subject to its own paramount constitutive instrument.

Thus, the obligation to improve the Chinese Socialist system of laws, “at the heart of which is the Constitution” falls on the CPC (and exercised through its own rules and governance institutions). (BL., p. 22). Indeed, the constitution lies at the heart of a socialist rule of law system, whose principles derive from the political constitution of the nation. More importantly, the state constitution appears to be active only under the leadership of the CPC. Thus the 19th CPC Congress Report declares that “we [the CPC] must improve the Chinese socialist system of rules, at the heart of which is the Constitution”;¹⁵⁸ it further declares that “we [the CPC] should give better play to the people's congresses, and enable [them] to fully perform their functions as stipulated in the Constitution and the law.”¹⁵⁹ More importantly, it is the political organs of the state, the CPC, to which falls the responsibility “over the initiative to build rule of law in China.”¹⁶⁰ In that context, the 19th CPC Congress Report explains that “we [the CPC] will strengthen oversight to ensure compliance with the Constitution, advance constitutionality review, and safeguard the authority of the Constitution.”¹⁶¹ Where has constitutionalism migrated—the answer is plain, in and through the organs of the CPC and constituted within the principles and objectives of the political constitution whose articulation is manifested in the state constitution. It follows that it is to the CPC that the responsibility falls to “develop a socialist culture of rule of law, and increase public awareness of the principle

¹⁵⁸ *Id.* at 22.

¹⁵⁹ *Id.* at 37.

¹⁶⁰ *Id.* at 39.

¹⁶¹ *Id.*

underlying rule of law that the Constitution and the law are above everything else and everyone else.”¹⁶² That responsibility follows and clarifies the hierarchy of constituting power. The Constitution can be above all precisely because it was so created by those with the authority to make that so, consistent with its own binding fundamental rules. It is in this light that the CPC mandatory requirement (reflected as well in the state constitution) that no one and no individual “has the power to overstep the Constitution or the law”¹⁶³ can be enforced precisely because such principle serves to underscore the leadership authority of the CPC and its political constitution. To that end, it is to the CPC that the state must look “to continue to support the governments and chief executives” of Hong Kong and Macao¹⁶⁴ as a necessary aspect of “fulfilling the constitutional responsibility of safeguarding China’s sovereignty, security and development interest.”¹⁶⁵

Where do these references to what has been characterized here as “mixed references” appear? That is indeed the most curious part of the 19th CPC Congress Report. These references are all embedded in the core sections that focus on the project of the construction of socialist rule of law and socialist democracy. One would have expected that these would be the sections in which the state constitution’s autonomy would be reflected as well as its supremacy—to the extent that one gauges constitutionalism in Western terms. Yet these expressions of fidelity to the state constitution are embedded in curious form. They appear not complete in themselves but instead as a passive principle whose activation and management are dependent on the exercise of positive authority by the CPC itself constrained by its own fundamental rules. The first reference was made in the context of the CPC’s duty to ensure the implement of rule of law governance.¹⁶⁶ The statement that the Constitution is at the heart of the Chinese socialist system of laws is modified by the obligation of the CPC to improve that system. The second reference is embedded in a discussion about popular government.¹⁶⁷ But here the reference is technical—with a focus on the operation of the NCP system and of the obligation of the CPC to ensure that state officials are able to perform their duties. The third set of three references is found in the section of the Report describing the objectives of developing the constitutional system itself.¹⁶⁸ This is in a sense the heart of the state constitutionalism section of the Report—with its affirmation both of the role of the state constitution and its scope. But at the same time, it reaffirms that state constitutional supremacy is itself dependent on two factors—the exercise of CPC leadership in the implementation of the key elements of state constitutionalism and the power of the political constitution to frame that leadership. The last reference is tied to the exercise of legitimate authority in Hong Kong, Macao and Taiwan.¹⁶⁹ The most interesting aspect of that reference is the way in which the relationship between

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 55.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 22 (“Ensuring every dimension of governance is law-based”).

¹⁶⁷ *Id.* at 37 (“Strengthening institutional guarantees to ensure the people run the country”).

¹⁶⁸ *Id.* at 39 (“Advancing Law based governance”).

¹⁶⁹ *Id.* at 55 (“Upholding “One Country, Two Systems” and Moving Toward National Reunification”).

the CPC and the regional administrative leaders is framed. The CPC serves to support these officials in fulfilling their constitutional responsibilities, with the implication that this support has constitutional teeth exercised through the state constitution itself and overseen by the CCP.¹⁷⁰

C. *Extracting Meaning from Context: The Constitution in Emerging Ideal and Practice*

So, what is the state of Chinese constitutionalism in the wake of the 19th CPC Congress? It is clear that the issue of socialist rule of law, and socialist democracy remain substantial priorities for the CPC itself and a core policy of governance. It is also clear that the State Constitution remains a central instrument of governance. This is particularly the case with respect to the most sensitive items identified as central to the amendment of the State Constitution in the wake of changes to the political principles for governance now written into the CPC Constitution.¹⁷¹

But it also is becoming clearer that the fundamental constituting document of the *political order* is not the state constitution but the political constitution of the CPC. The State Constitution assumes more the character of a derivative and implementation document—the cage of regulations whose character and interpretation is in every aspect bounded by the higher principles of the CPC Constitution in general and its General Program in particular. The 19th CPC Congress did not make this declaration explicit, but it made that conclusion inevitable in its discussion of constitutionalism and its practice. The state constitution manifests the exercise of political will in operationalizing first principles. But those first principles—those that bind the organization charged with the leadership role in exercising political authority—are constituted elsewhere, in the political constitution of the nation. And thus, it follows that the primary responsibility for the protection of the constitution and constitutional order falls to the CPC on behalf of the people. Constitutionalism for the New Era thus appears not to represent a break with the past as much as a self-conscious effort to evolve beyond it. There appears to be little need to nod in the direction of Western constitutional sensibilities. For example, neither the word judge nor judiciary appear in the 19th CPC Congress Report.¹⁷² And yet the issue of the judicial role within the state constitution has been an

¹⁷⁰ See, e.g., Xinhua, *China Adopts Interpretation to Basic Law of Hong Kong SAR*, CHINADAILY, (Nov. 7, 2016, 9:34 AM), http://www.chinadaily.com.cn/china/2016-11/07/content_27293017.htm.

¹⁷¹ See RESOLUTION, *supra* note 16.

¹⁷² In the West, constitutionalism is usually conflated with the issue of judicial review and the tripartite structures of government (functional separation of powers of powers into judicial, executive and legislative functions). There is a rich literature, contentious only at its fringes. See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673 (2004); Mark Tushnet, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands South Africa*, in THE OXFORD HANDBOOK OF LEGAL STUDIES at 164 (Peter Cane & Mark Tushnet eds., 2003). For a discussion of the role of the constitutional relevance of the judiciary in China, see, Larry Catá Backer, *Between the Judge and the Law—Judicial Independence and Authority with Chinese Characteristics*, 33(1) CONN. J. OF INT'L L. 1 (2017);

important element of reform in conformity with but not as the driving structural element in the construction and operation of the state constitution.¹⁷³

That shift is most noticeable in the concentration on the building of socialist consultative democracy—a self-consciously political institution,¹⁷⁴ rather than on the construction of legalized institutions through constitutional meta-rules. So, what is Chinese constitutionalism in the New Era? Perhaps the best answer is provided in the 19th CPC Congress Report itself—an “institutionalized development of consultative democracy”¹⁷⁵ That alone will provide the CPC one of its greatest operational challenges for the New Era. To that end, the idea of a constitution becomes a more nuanced and multi-purpose instrument. The 19th CPC Congress Report uses the term in a number of ways, or better put, it identifies multiple functions and identities of constitution that together make up Chinese Constitutionalism. One form of constitution serves as the fundamental rules of the constitution of the political order. This form of constitution represents the embodiment of the highest forms of constitutional principles and the organization of political power in China. It demands great esteem, solid understanding, and great reverence. It demands the fostering of a Marxist style of learning and obligation and gives institutional expression to ideological work and institution building. It is the core of socialist democracy.

Another form of constitution serves as the heart of the socialist system of laws and the foundation of socialist rule of law theory; but not as the foundation of socialist democracy. It provides the structures for the institution of government, but not its ideology. It serves as the guide for people to better perform their societal roles in government and in society. It serves as the institutional expression of the ideological principle of equality and the subordination of discretion to rule. It serves as the public expression of the core Leninist notion of collectivity and the centering of societal interests over those of individuals. And it provides the rules respecting the operation of the government within a complex institutional structure of two systems in one nation. Over and within both, the CPC itself represents the autonomous political force. It both constitutes and is constituted by its institutionalized system of rules. It is bound by the State Constitution but also ensures that it is obeyed, and must exercise an authority to interpret and modify the

¹⁷³ See, e.g., *China issues white paper on judicial reform of Chinese courts*, CHINADAILY (Feb. 2, 2017, 2:29 PM), http://www.chinadaily.com.cn/china/2017-02/27/content_28361584.htm (“The improvement of the judicial management system and the standardization of the exercise of judicial powers will help the judicial system play a more effective role in administering the country and managing governmental affairs by operation of law, and promote the modernization of governance system and capability in our country.”). And indeed, judicial reform and the supervision of the judicial system itself may well be subsumed to some extent under current initiatives for improving governmental operation through the use of big data management and social credit. See *Supreme People's Court & 43 other central institutions commit to punishing judgment debtors*, SUPREME PEOPLE'S COURT MONITOR (April 27, 2016) <https://supremepoplescourtmonitor.com/2016/04/27/supreme-peoples-court-43-other-central-institutions-commit-to-punishing-judgment-debtors/> (“The 4th Five Year Court Reform Plan calls for “establishing a legal system for credit supervision, deterrence and punishment of those not fulfilling judgments against them.” The document analyzed in this blog post fulfills that performance target and is an important building block in the construction of China’s social credit system.”)

¹⁷⁴ Jinping, *supra* note 7, at 38.

¹⁷⁵ *Id.*

state constitution in accordance with its paramount political duty, a duty informed by its own higher law of the political constitution of the CPC itself.

Much of this emerging discourse, of course, must be read within the context of the growing prominence of democratic structures not fashioned in the Western manner but now perhaps best denominated as *socialist consultative democracy*.¹⁷⁶ But here there emerges another curiosity—the disconnect between the content of the state constitution and the construction of core principles of socialist consultative democracy. That connection appears to be strongest not within the principles of the state constitution (the expectation within Western liberal constitutionalism) but instead around the principles that constitute the political constitution of the state and the objectives (and basis for legitimacy) of the CPC as its leading force. And thus, the relationship, made clearer in the 19th CPC Report, between the overarching political principles that serve as the normative core of legitimacy and the application of those principles through the administrative apparatus of the State Constitution.¹⁷⁷ This relationship poses challenges that themselves can sometimes be quite distinct from those common in the West and Western constitutional states.¹⁷⁸

Indeed, one of the most interesting aspects of the invocation of constitution is the 19th CPC Congress Report is the potential relationship between constitution and its normative principles and the conceptualization of socialist democracy as something contextually appropriate to the Chinese political order. This socialist consultative democracy is not built around popular elections and the rise of political parties, but around engagement in governance exercised through the organs that bring together the CPC and the United Front parties. It is in those institutions that socialist democracy will be developed—an exercise in endogenous democracy in contradistinction to the West's emphasis on exogenous democratic exercise.¹⁷⁹ It is in this context that democracy is to be practiced and the meaning of the socialist democratic path is revealed:

and the meaning of the socialist democratic path is revealed:

¹⁷⁶ Jinping, *supra* note 7, at 4. Consider the notion of consultative democracy as deeply embedded within principles articulated especially over the course of the last decade or so. See HU ANGANG, *CHINA'S COLLECTIVE PRESIDENCY* (Springer 2014).

¹⁷⁷ "In that sense, the Chinese Constitution is regarded as a 'general summary of the present policy' of the Party." ZOU KEYUAN, *The Party and the Law*, in *THE CHINESE COMMUNIST PARTY IN REFORM* 77, 81 (Kjeld Erik Brodegaard & Zhang Tongnian, eds. 2006).

¹⁷⁸ See, e.g., Larry Catá Backer, *Between the Judge and the Law—Judicial Independence and Authority with Chinese Characteristics*, 33(1) *CONN. J. OF INT'L L.* 1 (2017).

¹⁷⁹ Endogenous democracy in the sense used here touches on the modalities of the expression of representative government rather than to the process of democratization within non-democratic states. I have suggested to the ideology of democracy (and its forms) in the West might blind Western scholars to the possibility of variation of democratic expression and practice beyond the fundamental exercise of democracy through voting by citizens eligible to exercise that franchise. I posited that the essence of democratic governance—the effective exercise of authority of popular representatives in a quasi-fiduciary capacity need not necessarily always be based on the practice of voting for representatives to state organs, but rather can also be exercised by officials bound to exercise their discretionary authority within government. This distinction between the exercise of democratic representation within government and the exercise of democratic representation exogenously (to government) through the practice of voting for representatives marks a fundamental ideological difference in meaning that separates emerging Marxist Leninist theory from Western democratic theory. See Larry Catá Backer, *Crafting a Theory of Socialist Democracy For China in the 21st Century*, 16 *ASIAN PACIFIC L. & POL'Y J.* 1 (2014). For the conventional

We must keep to the path of socialist political advancement with Chinese characteristics; uphold and improve the system of people's congresses, the system of Party-led multiparty cooperation and political consultation, the system of regional ethnic autonomy, and the system of community-level self-governance; and consolidate and develop the broadest possible patriotic united front. We should develop socialist consultative democracy, improve our democratic institutions, diversify our forms of democracy, and establish more democratic channels.¹⁸⁰

What is then centered is socialist consultative democracy built around the Chinese People's Political Consultative Conference.¹⁸¹ The 19th CPC Congress Report stresses: "Consultative democracy is an important way of effecting Party leadership and a model and strength unique to China's socialist democracy. . . . The CPPCC, as a distinctively Chinese political institution, is a major channel for socialist consultative democracy, and its committees are specialist consultative bodies."¹⁸² The nexus between state, CPC and United Front through the CPPCC, then, serves as the connective tissue between CPC and State constitutions, and between the political authority of the CPC and its exercise through the rule system it itself has mandated as its own political line. It expresses in contemporary form the ideals of the *New Democracy* thinking embraced by the CPC before the founding of the PRC.¹⁸³ CPC leadership is normative and self-reflexive (within the constraints of the Mass Line);¹⁸⁴ this is a primary duty of the vanguard reflected in the leadership paragraphs of the General Program of the CPC Constitution.¹⁸⁵ The operation of the state, the place where norms are operationalized through the state apparatus, however, is a broader consultative space now emphasized by the 19th CPC Congress focus on consultative democracy under the leadership of the CPC as the basis of the project of developing socialist democracy.¹⁸⁶

debate *see, e.g.*, Charles Boix and Susan C. Stokes, *Endogenous Democratization*, 55 *WORLD POLITICS* 517-49 (2003).

¹⁸⁰ Jinping, *supra* note 7, at 22.

¹⁸¹ *Id.* at 38.

¹⁸² *Id.*

¹⁸³ ZEDONG, *supra* note 73.

¹⁸⁴ The revised General Program of the CPC Constitution provides in that respect: ("The Party follows the Mass Line in its work, doing everything for the masses, relying on the masses in every task, carrying out the principle 'from the masses, to the masses,' and translating its correct views into action by the masses of their own accord.") <https://china-social-credit.com/2017/10/general-program-constitution-communist-party-china-2017-revisions/>. *See generally* Flora Sapio, *General Program and the Constitution of the Communist Party of China, Table of Amendments 2017*, COALITION FOR PEACE & ETHICS BACKGROUND PAPER (2017) <http://www.thecpc.org/wp-content/uploads/2017/10/cpc-constitution-table-amendments-2017.pdf>.

¹⁸⁵ CPC Constitution, General Program Oct. 24, 2017 ("In order to lead the people . . . the [CPC] must adhere to its basic line, the Party must rule the Party, and the Party must be comprehensively and strictly rules, strengthen its government capability, advanced nature and purity, and comprehensively carry forward the great new undertaking to build itself in the spirit of reform and innovation"). *Id.*

¹⁸⁶ CPC Constitution, General Program Oct. 24 2017 (the CPC "advances the extensive, multi-level, and institutionalized development of consultative democracy"). *Id.*

In China's political life, our Party exercises leadership. Strengthening the centralized, unified leadership of the Party on the one hand and, on the other, supporting the people's congresses, governments, committees of the Chinese People's Political Consultative Conference (CPPCC), courts, and procuratorates in performing their functions and playing their roles in accordance with the law and their charters, form a unified pair.¹⁸⁷

The direction of change to both the political principles through which the state is organized and governed (and the discretion of the CPC itself is constrained) and its implementation through the administrative rule system of the State Constitution are already becoming visible. In its resolution on the revisions to the CPC Constitution,¹⁸⁸ the 19th CPC Congress began the process of distilling the evolutionary (e.g., "New Era") elements of the fundamental political norms that guide and constrain the vanguard political organs of the nation (until again changed in accordance with the rules of the CPC itself).¹⁸⁹ As most commentators noted, the Resolution provided for the formal addition of Xi Jinping New Era Thought as a core element of the guiding principles in the CPC Constitution.¹⁹⁰ It extends the scope of the political authority of the CPC to include the culture of socialism with Chinese characteristics.¹⁹¹ It embeds the political notion of national rejuvenations and the Chinese Dream as objectives-based principles that guide both the CPC and its state apparatus.¹⁹² More importantly, it suggests the pyramidal structure of constitutional authority in the incorporation of the doctrine of the new fundamental contradiction facing Chinese society, a product of the development of Marxist Leninist Theory that now guides the exercise of political authority by the CPC, the exercise of which shapes the contours of the provisions of the State Constitution and its objectives.¹⁹³

¹⁸⁷ Jinping, *supra* note 7, at 71.

¹⁸⁸ See RESOLUTION, *supra* note 16.

¹⁸⁹ Sapio, *supra* note 183. Cf. Osakwe, *supra* note 24, at 162.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* ("The Congress approves the incorporation of the culture of socialism with Chinese characteristics into the Party Constitution, along with the path of socialism with Chinese characteristics, the theoretical system of socialism with Chinese characteristics, and the system of socialism with Chinese characteristics.")

¹⁹² *Id.*; see HU ANGANG, CHINA IN 2020: A NEW TYPE OF SUPERPOWER 213 (Brookings Institution Press 2011); Larry Catá Backer and Keren Wang, "What is China's Dream?" *Hu Angang Imagines China in 2020 as the First Internationally Embedded Superpower* (Consortium for Peace & Ethics, Working Paper No. 2013-2, 2013) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223279.

¹⁹³ Resolution, *supra* note 116.

The Congress holds that a major political conclusion is drawn in the political report to the 19th Party Congress that the principal contradiction facing Chinese society has evolved and is now that between the people's ever-growing needs for a better life and unbalanced and inadequate development; it reflects the realities of the development of Chinese society, and serves as an important basis on which we formulate major policies and long-term strategies for the Party and the country. The

The CPC Constitution guides the CPC toward the objectives to “to improve and develop the system of socialism with Chinese characteristics, to modernize China’s system and capacity for governance, and to pursue reform in a more systematic, holistic, and coordinated way.”¹⁹⁴ The CPC Constitution incorporates the goal of governmental reform as an obligation of the CPC in the organization of the state and state power,¹⁹⁵ and the assertion of its soft power globally.¹⁹⁶ It is to the CPC rather than to the state that the military is to look to leadership.¹⁹⁷ And it is to the CPC Constitution, rather than to the State Constitution, that the CPC orders its own self-discipline and imposes obligations respecting the assertion of political authority. “The Party must constantly strengthen its ability to purify, improve, reform, and excel itself.”¹⁹⁸ To that end a comprehensive approach to discipline and inspection is required—one which is political in origin but with implications for the operation of the state and the use of state authority to enhance political discipline of the political community represented by the CPC itself. That is a critical concept of the overarching principle of CPC political authority: “[t]he Congress holds that the leadership of the Communist Party of China is the most essential attribute of socialism with Chinese characteristics, and the greatest strength of this system; the Party exercises overall leadership over all areas of endeavor in every part of the country.”¹⁹⁹ The State Constitution will be amended to reflect these normative political choices embedded into the political constitution of the vanguard Party.²⁰⁰ It

Party Constitution is revised accordingly to provide important guidance for us to better understand the new historic juncture in China’s development and its particular features in the current stage and to further advance the cause of the Party and the country.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (“We shall give play to the decisive role of market forces in resource allocation and ensure the government plays its role better; advance supply-side structural reform; establish a system of socialist rule of law with Chinese characteristics; advance extensive, multilevel, and institutionalized development of consultative democracy.”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (“The inclusion of these statements will help ensure the Party’s absolute leadership over the people’s armed forces, modernize national defense and the military, promote ethnic unity, and develop an open economy of higher standards.”).

¹⁹⁸ *Id.* (“Party must firmly exercise self-supervision and practice strict self-governance in every respect; strengthen the Party’s long-term governance capacity and its advanced nature and purity; and take enhancing its political building as the overarching principle and make comprehensive efforts to ensure that the Party’s political work is stressed, ideology is strengthened, organizations are consolidated, conduct is improved, discipline is maintained, institutional development is always emphasized, and the fight against corruption keeps going.”).

¹⁹⁹ *Id.*

²⁰⁰ Mo Jihong, Executive Vice President of the Constitutional Law Society of the Chinese Law Society noted: “If a major change does not have a constitutional basis, the continuity and authority of the constitution will be hurt. But the constitution is not rigid and constant, it needs to adapt to the evolving reality. The reform of the supervision system advances orderly under the leadership of the party, we cannot say it is not in conformity with the objective of the constitution because the constitution itself as the fundamental law of the state must meet the policy requirement of the party. It could seem as rigid to assert that a supervision organ cannot be set if the constitution is not revised.” 莫纪宏等：宪法、行政法、刑事诉讼法三角度解读监察法草案 [Mo Jihong, Interview of Southern Weekly: Three aspects of the interpretation of the draft law: the constitution, the administrative law, the criminal complaint law], Source

will serve as the basis for the expression of social consultative democracy in which the United Front Parties, representing the full range of the institutional organization of political power can function within a government. That government will practice endogenous democracy through the mechanism of the mass line, under the guidance of the vanguard party (whose ideological norms guides all decisions).

And it is in that process of translation from the exercise of political discretion bounded by the CPC Basic Line to its implementation in concrete form through the State Constitution that lies the complex and rich interplay of the CPC, state and individuals, especially those intellectuals who seek to ensure conformity of political and state constitution with the principles of the Basic Line.²⁰¹ These will likely include the transposition of the political principle of discipline of state and CPC officials.²⁰² In a sense the extent of this transposition from CPC to State Constitution guided by the 19th CPC Congress documents is already taking place. Chinese authorities are setting the stage through public commentaries published on the State

website of Chinese Academy of Social Science, Institute of Law, available at <http://www.iolaw.org.cn/showNews.aspx?id=61936>.

²⁰¹ See, e.g., 提高宪法贯彻实施水平 回应人民对美好生活向往 [Han Dayuan, *Improve the Implementation of the Constitution* (Dec. 7, 2017)], http://www.qstheory.cn/politics/2017-12/07/c_1122074914.htm.

²⁰² See, e.g., 刘松山：制定监察法，不宜先修改宪法 [Liu Songshan: The Development of Supervision Law, Should Not Amend the Constitution], <http://www.aisixiang.com/data/107157-2.html>. ("The Supervision Law is a reform legislation which means there are much uncertainties about it. We should focus on the lawmaking process of the supervision law instead of revising the constitution. We shall give play to the adaptability, inclusiveness, explanatory ability and expansibility of the constitution and fit the National Supervision Committee into the People's Congress System which is included in the constitution now. There are spaces for explanation and inclusiveness in Article 2, Article 3, and Article 62 of the Constitution."); Zhiwei Tong: On "The State Supervision Law Legislation Need Further Improvement" 国家监察立法预案仍须着力完善 English Translation and Original Chinese Version, Law at the End of the Day (Nov. 14, 2017), <http://lcbackerblog.blogspot.com/2017/11/zhiwei-tong-on-state-supervision-law.html>; 秦前红：国家监察体制改革宪法设计中的若干问题思考 [Qin Qianhong, *Some Thoughts on the Constitutional Design of National Supervision System Reform*, (Jan. 3, 2018, available at <http://www.aisixiang.com/data/107631.html>).

Constitution²⁰³ and in the Communiqué of the 2nd Plenum of the 19th CPC Congress.²⁰⁴

CONCLUSION

For those who looked for an expansion of the authority and autonomy of the state constitution within Chinese constitutionalism, the 19th CPC Congress Report confirms a downshifting from that objective. But that downshifting does not produce a diminution of constitutionalism. The opposite appears to be true. It is just that constituent power continues to be driven by and institutionalized within the political constitution of the CPC rather than the administrative constitution of the state. Within that complex, the greatest challenge for the New Era will lie in the further development of the relationship between the CPC and its Basic Line. These, at any rate, are what may be suggested by the references to the constitution in the 19th CPC Congress Report. The conclusions are tentative. They are meant to suggest possible trajectories. The next five years may better reveal the contours of the development of Chinese constitutionalism. If this 19th CPC Congress Report is any guide, then that development points to greater deviation rather than closer convergence with Western constitutional traditions. Yet at the same time, it appears to suggest a convergence between the democratic ideals and practices of global enterprises in the West—complex overlapping systems lead by a collective (as a board of directors) and subject to a charter that vests substantial discretion that is bounded only by clear but broad constraints that all members of the vanguard (and especially the leading collective) are bound to comply (Leninist fiduciary duty or fidelity to the Basic Line mandates)²⁰⁵ It is to the divergences between Chinese and Western public law

²⁰³ My thanks to Flora Sapio for this insight. Five official commentaries may be found at 人民日报评论员：宪法修改必须依法按程序进行——五论学习贯彻党的十九届二中全会精神 [People's Daily Commentator: Constitutional Amendments Must Be Processed According to Law - On the Spirit of Studying and Implementing the Second Plenary Session of the 19th Central Committee] (Jan. 24, 2018), http://www.xinhuanet.com/2018-01/24/c_1122310285.htm. (“守程序是法治之始。党的十九届二中全会强调，作为事关全局的重大政治活动和重大立法活动，修改宪法必须在党中央集中统一领导下严格依法按程序进行。这既是对宪法和立法规律的尊重、对以往立法经验的汲取，也是为了让党和人民的意志更好体现在宪法之中。”) [“The procedure is the beginning of the rule of law. The Second Plenary Session of the 19th Central Committee of the CPC stressed: As a major political activity and a major legislative activity related to the overall situation, the revision of the Constitution must be conducted strictly in accordance with the law under the centralized and unified leadership of the Party Central Committee. This not only respects the constitution and the law of the legislature, but also draws lessons from past legislative experiences as well as makes the will of the party and the people better reflected in the constitution.”]

²⁰⁴ See 中国共产党第十九届中央委员会第二次全体会议公报，（2018年1月19日中国共产党第十九届中央委员会第二次全体会议通过）[COMMUNIQUE OF THE SECOND PLENARY SESSION OF THE 19TH CENTRAL COMMITTEE OF THE COMMUNIST PARTY OF CHINA, (Adopted by the Second Plenary Session of the 19th Central Committee of the Communist Party of China on January 19, 2018)] available http://www.xinhuanet.com/politics/2018-01/19/c_1122286278.htm.

²⁰⁵ CHANG AND LAW, *supra* note 59, at 18 (“Whichever of these views one finds most persuasive, it should be obvious that China offers an interesting and important test case for competing definitions of core concepts.”).

theories and the growing convergence between Chinese and Western private law constitutionalism that one should turn one's attention.

