

## A Constitutional Court for China Within the Chinese Communist Party: Scientific Development and a Reconsideration of the Institutional Role of the CCP

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There are great shifts in constitutional thinking taking place today in China among elite Chinese constitutional scholars. Among this group of influential constitutional law scholars, Hu Jintao's concept of scientific development (科学发展观)<sup>2</sup> has taken a concrete turn in the advancement of theories of Chinese constitutionalism under its current normative framework.<sup>3</sup> One of the more highly debated issues within Chinese constitutional law circles is constitutional review. The debate centers on the viability of transposing some version of the current parliamentary model of constitutional review into the Chinese constitutional system.<sup>4</sup> Western models of constitutional review seem to insist on the necessity of an independent judiciary with a constitutionally

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2. See Joseph Fewsmith, *Promoting the Scientific Development Concept*, CHINA LEADERSHIP MONITOR, No. 11 (2004), available at <http://www.hoover.org/publications/clm/issues/2904171.html>.

3. See Lin Feng, *Modern Constitutionalism in China*, in THE RULE OF LAW: HISTORY, THEORY, CRITICISM 633-46 (Pietro Costa and Danilo Zolo eds., 2007); Ma Xiaohong, *A Reflection on the History of Chinese Constitutionalism of Last Century*, in 2 FRONTIERS OF LAW IN CHINA 44-70 (2007) (translated from Shanghai Shifan Daxue Xuebao (Zhexue Shehui Kexue Ban) 上海师范大学学报 哲学社会科学版, available at 4 JOURNAL OF SHANGHAI NORMAL UNIVERSITY 30-41, (2004)).

4. See Zhenmin Wang, *Constitutional Review in China: Strengthening Government Accountability and Human Rights*, Remarks at The Asia Pacific Law Association of McGill (Mar. 22, 2006), available at <http://lsa.mcgill.ca/aplam/Constitutional%20Review%20in%20China2.pdf>; see also Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. 533, 535 (1993) (concluding Western model of constitutionalism requires judicial control and supervision); M. Ulric Killion, "Building Up" China's Constitution: Culture, Marxism, and the WTO Rules, 41 LOY. L.A. L. REV. 563, 578-79 (2008) (noting power of judicial review in China lies with National People's Congress). As Zhenmin Wang explained:

Although the Constitution is the Supreme Law of China, suggesting constitutional supremacy as in Canada, constitutional review has been the responsibility of the NPC and its Standing Committee, suggesting a parliamentary/congressional supremacy as in the U.K. The NCP, a 2975-member body which meets for 2-3 weeks once a year, makes laws and supervises constitutional enforcement and Standing Committee decisions; the Standing Committee, a 175-member body which meets for a week every other month, interprets the Constitution and national, provincial/autonomous region, and municipal legislation and decisions.

Wang, *supra*.

sanctioned supervisory role over administrative and political organs as a condition precedent to constitutional legitimacy.<sup>5</sup> The Chinese constitutional system is criticized for its lack of such a robust system of judicial review. As one commentator recently noted:

As for judicial review powers, Amended Article 5 of the 1982 Constitution reads, “the People’s Republic of China governs the country according to law and makes it a socialist country ruled by law,” and Article 127 provides that the Supreme People’s Court is the highest judicial organ. However, constitutionalism in action and text reduced a potential for a rule of law rubric to a non-rule of law rubric, reduced a potential for legal accountability to political accountability. This left China’s judicial system without a positive discursive machinery for judicial review: neither constitutional review or constitutional court, nor decentralized (or diffused) or centralized (or concentrated) constitutional review.<sup>6</sup>

For Western observers of Chinese constitutionalism, the conclusion to be drawn is that there is no proper form of constitutional (or judicial) review. The remedy for such a deficiency—and thus for notions of constitutional illegitimacy within the Chinese systems—might be found by implementing any one of a number of possible changes that would produce an appropriate institutional mechanism for the exercise of review authority. That authority would be exercised by some organ of state power that is either housed within the judicial power or otherwise in a properly constituted body within the organs of state power yet separate from the legislative organs of the National People’s Congress.<sup>7</sup>

But the notion of judicial review itself veils a certain variation in its application in Western governmental systems.<sup>8</sup> At one extreme is the Anglo-American model, grounded on memorializations of common-law principles of “higher law” notions protected by a self constituting and heavily socialized lawyer-judicial class.<sup>9</sup> This model, powerful and stable, tends to be heavily dependent on the cultural framework of customary law systems, and as a result has found few state adherents outside of states with common-law traditions. At the other extreme is the political model of constitutional review—ranging from

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5. Keith J. Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People’s Republic of China*, 45 COLUM. J. TRANSNAT’L L. 114, 148-53 (2006). See generally Thomas E. Kellogg, *Constitutionalism With Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT’L J. CONST. L. 215, 215-246 (2009); Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT’L L. & BUS. 383 (2000).

6. See Killion, *supra* note 5, at 578-79.

7. See generally JIANG JINSONG, THE NATIONAL PEOPLE’S CONGRESS OF CHINA (2003).

8. Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 155-56 (2009).

9. Edward S. Corwin, *The ‘Higher Law’ Background of American Constitutional Law*, 42 HARV. L. REV. 149, 153 (1928) (outlining historical development of American constitutionalism).

the now discarded French system of review of *lois* by the Constitutional Council<sup>10</sup> to systems in which the legislature or some other political organ is vested with power to interpret the validity of its own actions. Most states, however, have embraced a compromise model of sorts. This model, developed in modern form from the writings of Hans Kelsen,<sup>11</sup> posits the creation of a distinct organ of state, the constitutional court, that merges the institutional forms and behavior of judicial institutions with the limited political task of interpreting the constitution generally and the legitimacy of actions by other state organs (including the judicial organs) and private parties. But even this model has engendered criticism over the last century.<sup>12</sup> Still, eminent Western commentators have suggested the possibility of a culturally contextualized form of constitutional review that invests some organ or another of the state apparatus with the power to deploy the constitution against all constitutional actors.<sup>13</sup>

The Chinese analysis of constitutionalism and rule of law in the context of constitutional review mechanisms is interesting both because of its sensitivity to Western academic and political criticism and also because of its ambiguity even as it insists on following the internal logic of the current governance framework within China.<sup>14</sup> Yet these sensitivities and ambiguities create both a tension and a certain blindness to the possibilities for reform within the current Chinese political framework that are well worth exploring. This is particularly the case with respect to judicial review. Western academic and political theory suggests judicial review as a foundation of legitimate constitutionalism, consisting of both a state organ with authority to legitimately interpret the meaning of the constitution (as a system of process and substantive values norms), and determine whether any action by the state apparatus (or others) exceeds their authority to act under that framework.

This short essay draws on the recent work of three Chinese scholars to sketch the contours of the current foundation of one facet of the internal Chinese debate on judicial review. For that purpose it starts with a consideration of a set of papers presented at the same time by three contemporary Chinese scholars, Tong Zhiwei, Dong Heping, and Hu

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10. See generally JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 143-67 (2d ed. 2008)(providing analysis of French constitutional law).

11. See generally HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., Russell & Russell) (1961) (providing general theory of positive law); Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, 4 J.L. & POL. 183, 200 (1942).

12. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004)(analyzing increasing role of judiciary system worldwide); see also EDOUARD LAMBERT, LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LEGISLATION SOCIALE (1921).

13. Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 LAW & SOC. INQUIRY 763, 764 (2002) (suggesting the development of constitutional review in Korea and Taiwan as a model).

14. See generally Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 557 (2007) (countering Western criticism of author's book).

Jinguang.<sup>15</sup> Their papers, representing a recent face of debates about Chinese constitutionalism, were presented at the Conference on Constitutionalism in China in the Past 100 Years and Its Future, organized by the School of Law, City University of Hong Kong Centre for Chinese and Comparative Law and its director Lin Feng.<sup>16</sup> That debate focuses on the institutionalization and bureaucratization of politics within emerging conceptions of Chinese constitutionalism. It suggests the importance of authoritative and legitimate mechanisms for constitutional interpretation within the emerging rule of law framework of Chinese constitutionalism, understood as the framework both for constituting a government (and its organs) and for organizing the political community through the Chinese Communist Party (CCP). This conversation is then contextualized within a broader discussion of the nature of Chinese constitutionalism and is tied to the substantive values of scientific development of rule of law harmonious society within China's political-constitutional system.<sup>17</sup>

Within this broader framework, it is possible to posit that the difficulty of conventional approaches to constitutional review in China is rooted in an insistence on seeking to fit it within the governmental apparatus created under the Chinese Constitution. That approach is misguided to the extent it seeks to situate review in the wrong place within the Chinese constitutional order. Constitutional review is possible within China, and on Chinese terms, but only

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15. Dong Heping, *The Route and Procedure for Constitutional Reform in China*, Address at the City University of Hong Kong School of Law: Conference on Constitutionalism in China in the Past 100 Years and Its Future (October 18, 2008); Hu Jinguang, *Evolution and Challenge of Review of Public Authority in China*, Address at the City University of Hong Kong School of Law: Conference on Constitutionalism in China in the Past 100 Years and Its Future (October 18, 2008); Tong Zhiwei, *Assessment of Short-Term Trends in China's Constitutional Development*, Address at the City University of Hong Kong School of Law: Conference on Constitutionalism in China in the Past 100 Years and Its Future (October 18, 2008).

16. See Ellen Chan, *SLW Holds Constitutionalism Conference*, CITYU NEWS CENTRE, Oct. 20, 2008, available at <http://www6.cityu.edu.hk/puo/CityUMember/Story/Story.aspx?id=20081020163404>.

17. The elaboration of these ideas were announced by Hu Jintao in his report to the 17th Chinese Communist Party National Congress in 2007. See Hu Jintao, *Hold High the Great Banner of Socialism With Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in All*, Part IV, Report to the Seventeenth National Congress of the Communist Party of China (Oct. 15, 2007). Hu's address stated:

The theme of the congress is "to hold high the great banner of socialism with Chinese characteristics, follow the guidance of Deng Xiaoping Theory and the important thought of Three Represents, thoroughly apply the Scientific Outlook on Development, continue to emancipate the mind, persist in reform and opening up, pursue development in a scientific way, promote social harmony, and strive for new victories in building a moderately prosperous society in all respects . . . ."

*Id.* The term is usually referred to in the West as a "political slogan." See Li Jing, *China's New Labor Contract Law and Protection of Workers*, 32 *FORDHAM INT'L L. J.* 1083, 1131 (2009). It is better understood as a "guiding doctrine". See Cao Jianming, *Comprehensive Strengthening of Intellectual Property Adjudication Will Provide Powerful Judicial Guarantees for Constructing an Innovation-Based Country and Harmonious Society*, 18 *PAC. RIM. L. & POL'Y REV.* 97, 98 (2009) (Josef Rawert, trans.). Yet it is also a guiding doctrine with constitutional dimension.

within the highest organs of power under the Chinese constitutional system. Those organs are not located within the state apparatus, but rather are vested by the Chinese constitution itself in the CCP. This insight provides a foundation for a pragmatic and Chinese basis for resolution of the tensions between the current governance framework in China and the organization of judicial review that permits a continued adherence to current political norms. Specifically, it proposes that for judicial review of constitutional questions to be successfully implemented in China, judicial review ought to be constituted within an organ of political rather than state power within the CCP apparatus. The CCP is the highest organ of political authority within the Chinese constitutional system, charged with the obligation to provide leadership (*lingdao*) to the state apparatus and the people under the Constitution. Constitutional review would represent an institutionalization of the leadership role of the CCP in a form that would be true to the rule of law principles inscribed in the Chinese Constitution. Though this institutionalization can take any number of forms, the essay suggests a constitutional institution—court or chamber—with French sensibilities, where a written constitution is regarded “as a means to enshrine . . . and control political reality.”<sup>18</sup> In this way, the tension between the state apparatus, the position of the CCP in governance over the state apparatus, and the need for rule of law based institutionalism might be resolved within a rule of law framework.

More importantly, this approach will institutionalize the actual positions of the CCP as the party in power within a constitutionalist system. Justifying the power of the CCP would fold the current oversight role of the CCP within the constitutional framework of the current constitution, provide an institutional framework for the assertion of the CCP’s authority to determine political values, create a mechanism for transparent and regularized political expression, and institutionalize relations between the state apparatus and the CCP as the party in power. At the same time, justifying the political role of the CCP at the constitutional level would not necessarily limit the CCP’s political role generally as the party in power.

#### I. INTERNAL CHINESE DEBATE: A SNAPSHOT GLIMPSE

There have been some mixed signs over the last decade that Beijing was moving in the direction of making some form of constitutional review a reality. In 2000, the NPC adopted the PRC Legislation Law, which provided citizens the specific right to “propose” that the Standing Committee review administrative regulations and rules that are deemed to conflict with the constitution or national law.<sup>19</sup>

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18. See BELL ET AL., *supra* note 10, at 139.

19. Thomas E. Kellogg & Keith Hand, *NPCSC: The Vanguard of China’s Constitution?*, 2 CHINA BRIEF 4 (2008).

Yet this may suggest more about the foreign academics who watch China, and who cannot conceive of legitimate constitutional systems in the absence of some sort of constitutional review mechanism, than it does about the Chinese themselves.<sup>20</sup> Still, there is some movement toward consideration of mechanisms for disciplining constitutional discourse within Chinese academic circles.

Three contemporary Chinese constitutional scholars nicely frame the debate about constitutional review in China.<sup>21</sup> This debate is possible now because of the development of constitutionalism in China.<sup>22</sup> That variant of constitutionalism is grounded on rule of law in both of its aspects—process and values rule of law.<sup>23</sup> Constitutional review in China, and the debate about it, appears to be split in two. The more lively debate is focused on the construction of systems of judicial review of administrative action, and even action by state organs.<sup>24</sup> Less often discussed is the idea of institutionalizing a system of constitutional review by developing a set of doctrines and ideas upon which an understanding of constitutional law may be grounded beyond its application to state organs.<sup>25</sup>

Though the three views present substantially different solutions to the problems of institutionalization they share an important element in common: the three speak of the necessity of establishing a framework for the *bureaucratization of politics in China*. The push toward bureaucratization fits in nicely both with the Three Represents principles of Jiang Zemin<sup>26</sup> and Hu Jintao's scientific development and Harmonious Society concepts officially acknowledged in the 17th Party Congress. This focus on bureaucratization is a natural extension of some of the most important applications of Hu Jintao's

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20. Cf. Michael W. Dowdle, *Dicey, Lubman, and Bagehot: Chinese Law in the Common Law Mind*, 19 COLUM. J. ASIAN L. 72, 78 (2005) ("Similarly, the fact that American legal academia has unexpectedly embraced Chinese legal studies is interesting not so much for what it says about scholars of Chinese law as for what it says about American legal academia.")

21. The three scholars are Tong Zhiwei, East China University of Law and Political Science, Dong Heping, North-West University of Political Science and Law, and Hu Jinguang School of Law, Renmin University.

22. See Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the "Three Represents"), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 J. OF TRANSNAT'L L. CONTEMP. PROBS. 29, 61-80 (2006) (arguing recent ideological campaigns provided foundational norm for Chinese constitutionalism).

23. See Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case Of China*, 35 N.Y.U. J. INT'L L. & POL. 1, 11-12 (2002) (arguing China's increasing conformity with core aspects of constitutionalism); see also RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 65 (2002) (noting general agreement on rule of law requiring procedural rules for legislation, accepted by majority).

24. For an excellent discussion of constitutional review within the NCP system, see Fu Yulin and Randall Peerenboom, *A New Analytic Framework for Understanding and Promoting Judicial Independence in China*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 95-133 (2009).

25. See generally Backer, *supra* note 8 (outlining views of constitutionalizing China).

26. See Backer, *supra* note 22.

concept of scientific development, in the form of an institutionalization of governance generally within China. “To thoroughly apply the Scientific Outlook on Development, we must work energetically to build a harmonious socialist society. Social harmony is an essential attribute of socialism with Chinese characteristics.”<sup>27</sup> The concept of scientific development is intimately tied to the project of institution building and stability within all aspects of Chinese governance—public and private. “Scientific development and social harmony are integral to each other and neither is possible without the other.” It is also a long-term project involving all aspects of the political organization. “Building a harmonious socialist society is a historical mission throughout the cause of socialism with Chinese characteristics, as well as a historical process and the social outcome of correctly handling various social problems on the basis of development.”<sup>28</sup>

Professor Tong Zhiwei, at East China University of Law and Political Science, suggests the difficulties of judicial review. He argues that judicial review is impaired by the relationships of the judiciary to the CCP. He would limit the political intervention of the CCP to “sensitive” cases, and pointed to the 1954 Chinese Constitution as a stronger basis for strengthening the judiciary. The object is to increase the rate of a judiciary firmly entrenched in the state apparatus. This might present a fair reading of Hu Jintao’s suggestion of the nature of scientific development in the context of state governance construction.

We must uphold and improve the system of people’s congresses, the system of multiparty cooperation and political consultation under the leadership of the CPC, the system of regional ethnic autonomy, and the system of self-governance at the primary level of society. All this will promote continuous self-improvement and development of the socialist political system.

For Professor Tong, then, the framework of analysis can be appropriately limited to the oversight of the actions of the state organs. Judicial review is meant to serve as a mechanism for the self-discipline of state organs within the

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27. See Hu Jintao, *supra* note 17. The concept has ancient roots, the overtones of which are well understood. See John Delury, “*Harmonious*” in *China*, 148 *POLICY REVIEW* 35 (2008). Delury’s insight is useful even without the irony:

Who doesn’t want harmony, after all? Who could object to the general definition repeated frequently by Hu Jintao and Wen Jiabao: “The socialist harmonious society we want to build should be democratic and ruled by law, fair and just, trustworthy and fraternal, full of vitality, stable and orderly, and maintaining harmony between man and nature”? To gentle critics of the Hu-Wen administration, “harmonious society” is a shibboleth signaling that the author is willing to work for reform within the ideological framework provided by the state.

*Id.* at 39.

28. See Hu Jintao, *supra* note 17.

limits of their functional role within Chinese constitutionalism. But that role is limited the way the authority of state organs are limited. That is, within the limited role accorded to state organs under the Chinese Constitution, there ought to be a judicial power co-extensive with that power, the object of which is to ensure a proper use of power. But the sovereign power, the political power of the nation is greater than the power accorded to state organs under the constitution. The CCP, as the vanguard party in power, is accorded a constitutional role beyond that of the state organs. Yet the judicial power as constructed by Professor Tong neither reaches that power nor includes it within a system of institutionalized self-discipline grounded in the need to adhere to the party line. This is thus administrative review of a French sort but not necessarily a proposal for an institutionalized constitutional review system.

In contrast, Professor Dong Heping of the North-West University of Political Science and Law would look elsewhere for a constitutional review framework. For Professor Dong, the start of the analysis is a core principle of Chinese constitutionalism, scientific development, and harmonious society.<sup>29</sup> As such, the appropriate core constitutional focus is the welfare of the people, but the implementation of that welfare is viewed as the responsibility of the state organs and the National People's Congress. Professor Dong advocates a stronger role for the NPC, and he suggests that the NPC might serve to ensure CCP compliance with its own norms. For Professor Dong, reflecting a strain of Chinese constitutionalism going back to the early decades of the People's Republic, the ideal state structure is one in which the CCP is subsumed within the system of state organs and together with them comprise the totality of power within the Chinese state. Overall, it is possible to erect an institution that would discipline the political and legal framework enshrined in the constitution.<sup>30</sup> To that extent, Professor Dong might favor an institution sensitive to political realities, for example, one recognizing the different forms of authority vested in the CCP, the NPC, and other state organs subsumed within the constitutional system. In effect, then, is the need to establish a constitutional court on Kelson's model, yet the CCP has strongly rejected this approach in the past.<sup>31</sup>

This last point is taken up by Professor Hu Jinguang of the Renmin University School of Law. He focuses on a critical issue of the nature of judicial review. Professor Hu correctly distinguishes between judicial review and constitutional review. He too focuses on the principles of scientific development, in his case focusing on the centrality of economics as a

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29. *Id.* at Part III.

30. Lin Laifan, *Xianfa buneng quanran meiya* [The Constitution Can't Be Toothless Forever], *Faxie* 6 LEGAL SCI. 90 (Nov. 6, 2004); Teng Biao, *Jihuo xianfa* [Activating the Constitution] (July 7, 2004) available at [http://www.boxun.com/hero/tengb/18\\_1.shtml](http://www.boxun.com/hero/tengb/18_1.shtml).

31. *Beijing Rules Out Constitutional Court To Protect Human Rights And Private Property*, ASIA NEWS.IT, May 22, 2004, available at <http://www.asianews.it/index.php?art=840&l=en>.

foundational framework for state organization. Professor Hu suggests that a central element of state power is state power over the economy, and that is sensible in light of the Marxist-Leninist emphasis on economics as *urtext* for politics and social order. A consequence (also consistent with Marxist-Leninist theory) is a necessary focus of state organs on the executive power, and on administrative law in a rule of law context. In that context, the constitution vests the National People's Congress Standing Committee as the supreme organ of constitutional interpretation for administrative law and its application by state organs. Since 1979, the focus has been on shrinking the ambit of direct involvement of government organs in economic direction as the movement to private economic activity advanced. Still, while the breadth of authority of state organs is shrinking, the public authority over all activity should be growing. That power is founded on the role of the CCP as the vanguard party. In a sense then, the extent of political authority contemplated under the Chinese Constitution does not give rise to an organ of state that has interpretive power of equal breadth outside the CCP.

The approaches of these three eminent authorities are firmly grounded in an understanding of current constitutional realities. Principally among them are the notions that the state organs do not define the entirety of national power, that the constitution distinguishes between state power (vested in the state organs) and national political power (vested in the CCP), that while the elaboration of state power may be bureaucratized within well defined institutions, the elaboration of political power remains outside either institution or bureaucracy, and that the institutionalization of the CCP's own governance is internal to it and beyond the direct regulatory power of the constitution. It suggests a distinction between the framework for the constitution of state organs subject to constitutional constraints and the locus of law, and that of the CCP and its own internal governance (and external power). The latter is subject to constitutional liberty because it is grounded in its constitutional role as the party in power. As such, the constitution appears to favor a two paths approach, one based on the distinctive roles of state and party apparatus.

The discourse is developed under an ambiguity in the current constitution. The constitution vests the Standing Committee of the National People's Congress with the power to interpret the constitution.<sup>32</sup> What this means in practical terms has caused some debate within China. Part of that debate is fueled by the differences between this form of constitutional vesting of interpretive power and that generally found in the constitutions of other states. And, of course, there is always the suspicion that there is no difference between modern Chinese constitutionalism and the gesture constitutionalism of the former Soviet Union. At least three alternatives have been proposed. The first suggests the establishment of a constitutional oversight organ within the NPC.

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32. XIAN FA, art. 67, §1 (1982) (P.R.C).

The other suggests the extension of a constitutional review power in the Supreme People's Court.<sup>33</sup> The later proposal is grounded in a purported application of separation of powers principles to the Chinese Constitution. But while it might be clear that the legislature is hardly in the best position to review the legitimacy of its acts,<sup>34</sup> it is not clear why the judiciary ought to be assigned the task under a Chinese constitutional system that does not adopt Western separation of powers principles. Moreover, scholars have suggested the creation of a constitutional court as well, among them, Li Zhong.<sup>35</sup>

These lacunae and ambiguities help explain the decisive rejection of a constitutional court model for China by the authorities in 2004. At the time of its rejection, Zhang Chunsheng, from the Law Committee of the 10th National People's Congress, explained the reasons a constitutional court was not under consideration.

"The system in China is different from that in America or European countries," he said. "They have the division of three powers-constitutional, legislative and executive-so their constitutional courts have the right to supervise the executive and legislative bodies." But on the mainland, only the National People's Congress and its Standing Committee had the legal entitlement to supervise the implementation of the constitution. "So we cannot put in place a constitutional court or supreme court to supervise the implementation of the law," he said.<sup>36</sup>

Difference among legal and constitutional systems, standing alone, is hardly an adequate reason for rejecting a judicial model for an organ charged with constitutional interpretation. Recourse to the constitutional assignment of a review power in the National People's Congress is not necessarily an impediment under the constitution when read on the basis of its framework principles.

To the extent that the NPC is the supreme organ of state power, with

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33. JIANG JINSONG, *THE NATIONAL PEOPLE'S CONGRESS OF CHINA* 256, 281-89 (2003).

34. Ulric Killion has noted the distinction between the judicial power in Chinese constitutionalism and the power to interpret the constitution for state organs:

However, constitutionalism in action and text reduced a potential for a rule of law rubric to a non-rule of law rubric, reduced a potential for legal accountability to political accountability. This left China's judicial system without a positive discursive machinery for judicial review: neither constitutional review or constitutional court, nor decentralized (or diffused) or centralized (or concentrated) constitutional review. The NPCSC has legislative interpretation power, or the sole power to interpret the constitution, laws of China, and China's legislative procedure law.

M. Ulric Killion, "Building Up" *China's Constitution: Culture, Marxism, and the WTO Rules*, 41 *LOYOLA L.A. L. REV.* 563, 578-79 (2008).

35. JINSONG, *supra* note 33, at 283-84.

36. *Beijing Rules Out Constitutional Court To Protect Human Rights And Private Property*, *ASIA NEWS.IT*, May 22, 2004, available at <http://www.asianews.it/index.php?art=840&l=en>.

constitutional authority at its level, that authority remains inadequate to review any greater power. This remains an open question in China. Some scholars believe that under the constitutional system the CCP must be under the constitutional review authority of the NPC. “Cai Dingjian further argues that the Communist Party is the only party in power and participates directly in decision making and management of state affairs. Therefore, the Communist Party must respect the law and put itself under the oversight of the people’s congresses.”<sup>37</sup> And, indeed, an insistence to follow Western patterns of seeking to locate review powers within the state apparatus marks much of the current movement for constitutional review within China. The efforts to force the hand of the NPC over the Sun Zhigang incident nicely evidence the application of this view in practice among Chinese scholars and activists.

Chinese legal reformers viewed the controversy over Sun Zhigang’s death as an opportunity both to challenge the C&R system and to establish a precedent for constitutional review in China . . . . Legal scholars hoped that by filing the Review Petition, they would breathe life into this mechanism. “This is not aimed just at the Sun Zhigang case,” said Xu Zhiyong. “We are concerned about the system itself. A mechanism for reviewing violations of the Constitution should be established and initiated in order to root out abuses and innovate continually.” Scholars expressed strong support for the Review Petition and concluded that its filing was as significant as the Sun Zhigang case itself.<sup>38</sup>

But importantly, others within China suggest that the NPC’s constitutional oversight is limited to equal or inferior organs and that, as a consequence, such oversight cannot include the CCP. “First, the Constitution provides for the Communist leadership over the state. Second, the Constitution expressly lists those under the NPC’s oversight and does not include the Communist Party.”<sup>39</sup>

The consequences are easy to discern: institutionalization of a judicial function must necessarily remain tied to the administrative aspects of governance. But such a judicial function cannot be understood as including a power sufficient under the current constitutional framework to support judicial review of constitutive elements of the constitution itself. That function lies outside of the administrative apparatus that is the sum of the National People’s Congress system. Constitutional review beyond a power to determine whether administrative actions fall within the powers vested in them under the constitution implicates the extent of the authority of the state apparatus itself. Under the Chinese model, that sort of analytical and interpretive authority cannot lie within that state apparatus itself, but must lie elsewhere. As such,

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37. See JINSONG, *supra* note 33, at 256.

38. See Hand, *supra* note 5, at 124-25.

39. *Id.*

this model vests power in substantial contrast to the patterns of power inscribed in the American Constitution, which supports both the notion of judicial supremacy within the scope of its function and the possibility of characterizing the interpretation and review function as historically judicial.<sup>40</sup> Despite efforts to the contrary,<sup>41</sup> Chinese constitutionalism is unlikely to readily incorporate any form of the judicial model of constitutional review that is embedded in the state apparatus. Such a pattern is essentially incomprehensible in Chinese constitutionalist terms and inimical to the basic postulates of the Chinese political organization in which the state apparatus is assigned an important but not all-encompassing role. It follows that the focus on an amorphous power of constitutional interpretation vested in an organ of state power can lead to a view that constitutional review, and perhaps the constitution itself, is an embodiment of principle rather than a bureaucratization and institutionalization of state and political power.

Some Chinese scholars, however, would disagree.<sup>42</sup> The discussion of constitutional review, then, can best be understood in contemporary China as a search for systems of testing disputes over legal rights derived from the constitution. The process of constitutional review, as such, remains a political task of the vanguard party within the framework of its own internal institutional systems. It is possible to develop systems that test state organ's fidelity to law, but not systems that reduce the power of the CCP to serve as the embodiment both of the political will of the people and of the values enshrined in the constitution. Therein lies the great difficulty of Chinese constitutionalism—the incorporation of the CCP within the framework in a way that realistically acknowledges its position within the hierarchy of constitutional actors. As long as the focus remains on the state and its organs, constitutionalism will remain confused. It is to the issue of the CCP's leadership (*lingdao*) within the Chinese constitutional state and its relevance for constitutional review that this essay turns next.

## II. THE BUREAUCRATIZATION OF CONSTITUTIONAL INTERPRETATION IN THE CCP IN THE FORM OF A CONSTITUTIONAL COURT?

Chinese constitutionalist discourse focuses its bureaucratization process discourse on the organs of state power and administrative regulation. There is a sound theoretical foundation for that limited discourse.<sup>43</sup> As Michael Dowdle

40. See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

41. See Tahirih V. Lee, *Exporting Judicial Review From The United States To China*, 19 COLUM. J. ASIAN L. 152, 160-61 (2005) (explaining restrictions on judicial review in Chinese legal system).

42. See Zhu Suli, *supra* note 14, at 540 (noting CCP's pervasive influence in working of Chinese judicial system).

43. See Deng Xiaoping, *Help the People Understand the Importance of the Rule of Law*, in SELECTED WORKS OF DENG XIAOPING (1986). Thus, for example, in the mid-1980s, Robert Heuser noted that “[s]ince the end of the 1970s there have been strong efforts for a decartelization of the offices of the Party and the state bureaucracy.” Robert Heuser, *The Legal Status of the Chinese Communist Party*, 4 OCCASIONAL

nically explained over a decade ago, there has been a deliberate movement to create a division between the state apparatus and the CCP.

The NPC's institutional emergence owes much to a corresponding decrease in the CCP's own willingness to intervene in or otherwise oversee a wide range of constitutional activities. For the first 30 years of the "New China," constitutional operations were officially subordinated to the CCP's political authority. . . . In the 1980s, however, this situation began to change. Official control over constitutional operations increasingly migrated from the CCP over to the appropriate constitutional structures. . . . This move generally limited the CCP's legislative input to one of broad policy direction, and increased the NPC's role in the legislative process.<sup>44</sup>

Yet, that retreat only effected administrative and state operations. But ceding authority over the details of legislation, or even legislative choices, ought not to be read as the retreat of the CCP from a constitutional role. "Thus, the fact that the CCP also does not want to intervene in the constitutional operations of the NPC is highly significant, as this is the same fundamental force that disciplines political actors and institutions in more developed constitutional systems."<sup>45</sup> But the constitutional autonomy of the NPC system within the ambit of its constitutionally delimited authority need not be read as writing the CCP out of either the constitution or governance.

To suggest then, that the rise of the role of the NPC within the state system, and even the guarantee of its autonomy, produces a constitutional limitation of the overall role of the CCP over the interpretation of the constitution itself may be too self-limiting. It may be possible to justify a system of institutionalized constitutional review within the strictures and value systems of the Chinese Constitution and its political framework without distorting that system. For that purpose, it is necessary to apply the higher law principles of constitutionalism and its elaboration at the appropriate level of national

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PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES 1, 7 (1987).

44. See Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1, 13-14 (1997).

With regards to the NPC, this transition was made overt by an internal party document issued in 1991 misleadingly entitled "Several Opinions of the Central Committee on Strengthening Leadership over Lawmaking Work." In that document, the CCP for the first time set out explicit normative limits on its own authority to oversee legislative drafting.

*Id.*

45. *Id.* at 17-18. Stanley Lubman describes the instrumentalist character of Chinese rule of law. "The last two decades of the twentieth century saw the Chinese leadership begin to use law as an instrument of governance in a manner relatively more sophisticated than the crude and formalistic copying of Soviet law in the early 1950s or the blunt instrumentalism--and worse--that had followed." Stanley Lubman, *The Study of Chinese Law in the United States: Reflections on the Past and Concerns About the Future*, 2 WASH. U. GLOBAL STUD. L. REV. 1, 3 (2003).

governance. That level is not within the state apparatus, but within the highest institutional expression of constitutionally sanctioned political power in China, the organs of the CCP itself.<sup>46</sup> “The Chinese state is an aggregate, a fusion of outward and inward institutional manifestations of power, of CCP and State within China . . . .”<sup>47</sup> In that regard, Jiang quite usefully noted that it cannot be denied that “the Constitution is the paramount criterion to be cited in overseeing the other constitutional branches.”<sup>48</sup> However, the consequence of this understanding is not necessarily the constitution of the organs of the state apparatus as either the highest organs of national power, or the supreme institutional manifestation of sovereign power under the constitution. Instead, I believe that the constitution itself vests that position and authority in the CCP. To that extent, the CCP, rather than the inferior organs of state power, may be the appropriate place under the constitution to vest paramount constitutional review, as well as the elaboration of constitutional values.<sup>49</sup>

This constitutional arrangement is quite evident within the construction of the Chinese Constitution itself. The crux of that arrangement is bound up in the division of authority recognized in the constitution, between the construction of a state apparatus and the relationship of that construct to the Party. That relationship is cast in terms of hierarchy under the concept of leadership (*lingdao*) and substantive governance principles subsumed under the concept of the framing of the scope and content of ideological “guidance” with constitutional effect.<sup>50</sup> Leadership thus acquires a constitutional meaning bound up in the “authority of the CCP to set directions for practice and surveillance of all organs of the state (the economy and society), a practice which is not formally reflected by the organizational laws of the state organs.”<sup>51</sup> It is well understood within the traditions of Chinese constitutionalism that the limited reference to the CCP and its leadership role within the Preamble to the Constitution is not meant to write the CCP out of the

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46. Larry Catá Backer, *The Party as Polity, the Communist Party and the Constitutional State: A Theory of State-Party Constitutionalism*, 16 J. CHINESE & COMP. L. 101 (2009).

47. See Backer, *supra* note 22, at 60.

48. See JINSONG, *supra* note 33, at 257.

49. See generally Backer, *supra* note 46.

50. See XIAN FA pmbl. (1982) (P.R.C.) (examining preamble to Chinese Constitution).

Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory, and the important thought of ‘Three Represents,’ the Chinese people of all nationalities will continue to adhere to the people’s democratic dictatorship, follow the socialist road, persist in reform and opening-up, steadily improve socialist institutions, develop a socialist market economy, advance socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defense and science and technology step by step to turn China into a powerful and prosperous socialist country with a high level of culture and democracy.

*Id.* (including 2004 amendments).

51. See Heuser, *supra* note 43, at 8.

Constitution. Instead, it is meant to emphasize the division of power within the constitutional system in a framework in which “the spheres of competence of the leading organs of the Party and the political power organs of the state are strictly separated from each other and (that) the principle of the separation of Party politics and state systems is established.”<sup>52</sup> The essence of the Chinese constitutional settlement, then, recognizes as fundamental *within* the constitutional system the division between state apparatus and Party. As Randall Peerenboom cogently suggests: “The main role of the Party is to determine major policies, which are then transformed into state laws and regulations, and interpreted and implemented by state actors, subject to supervision by a combination of Party and state (and increasingly non-state) mechanisms.”<sup>53</sup> This parallels the commonly understood notions of leadership within the state apparatus. For example, notions of leadership frame the relationship between the judicial function of the Chinese state and the paramount authority of the NCP within the state apparatus.<sup>54</sup>

Within China, of course, the ubiquity of the CCP, and its place within the framework of separate spheres of political and institutional governance recognized by the Constitution, is hardly worth comment. And that is where the difficulties come for outsiders seeking to engage Chinese constitutionalism. Zhu Suli noted accurately that

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52. See Wang Jingrong, *On the Strengthening and Improvement of Leadership of the Party*, in ZHANG YOUYU ET AL., *COLLECTION OF CONSTITUTIONAL ESSAYS* 40 (Beijing 1982).

53. Randall Peerenboom, *Social Foundations of China's Living Constitution*, available at <http://ssrn.com/abstract=1542463>. There is an underlying difference between leading (*lingdao*) and supervising (*jiandu*). See Stanley Lubman, *Dispute Resolution in China After Deng Xiaoping: 'Mao and Mediation' Revisited*, 11 COLUM. J. ASIAN L. 229 (1997) (in the context of the judicial system, describing the difference in the way in which lower courts might seek guidance from higher courts); see also *id.* at n.396 (discussing He Weifang, *Zhongguo Sifa Guanli Zhidu de Liangge Wenti's Two Problems of the Chinese System of Judicial Administration* and *Zhongguo Shehui Kexue's Social Sciences in China*).

54. Tahirih Lee recently usefully described this relationship and its connection to the CCP:

Chinese jurists interpret the constitutional status of the NPC to mean that it rules over the court system as it does every other branch of government. Chinese jurists characterize this hierarchical relationship with the Chinese verb for leadership or direction ( << 领导 >>, *lingdao*). One Chinese jurist propounds the theory that the NPC Standing Committee may decide a conflict between the decisions of the Supreme People's Court and the Supreme People's Procuratorate, which are considered equals in the Chinese governmental hierarchy. The Procuratorate is a Soviet-style institution whose main responsibilities are prosecuting criminal cases and publicizing the Chinese Communist Party's ("CCP") policies on crime. The NPC Standing Committee has not resolved any conflict between the courts and the procuratorates. This might suggest that there is, in some practical sense, an ultimate quality to the decisions of the Supreme People's Court. However, the more likely explanation is that the power of the NPC over the Court, or perhaps the power of the CCP over both the Court and the Procuratorate, is so complete as to induce the Court to incorporate the views of its ultimate reviewing authority in its own process of judicial formulation.

Tahirih V. Lee, *Exporting Judicial Review From the United States to China*, 19 COLUM. J. ASIAN L. 152, 160-61 (2005).

Despite the many political differences between the CCP and its former arch-rival, the Nationalist Party (known as the Guomindang or GMD) and despite the fact that the CCP never used the GMD's often deployed concept of the "party-state," in practice, the CCP inherited the political tradition, initiated by Sun Yat-sen and pursued by the GMD, comprised of a "party construction of the state," "party rule of the state," and "party above the state." Indeed, eventually, the CCP's influence over society and the machinery of the state would far exceed that achieved by the GMD.<sup>55</sup>

Zhu accurately understands the nature of political—and now owing to the constitutional development in China, the legal—hierarchy and its implications for the development of a legal system founded on the rule of law. "In contemporary China, nearly every political force has either been integrated into the CCP, or, as in the case of former and present capitalists, counter-revolutionaries, bad elements, and rightists during the Cultural Revolution (1966-1976), denied political expression."<sup>56</sup> The CCP is an integral part of the governance structure of the Chinese nation. Its role is not merely that of a factional party on the Western model. This role has been acknowledged within China as a framework for understanding the development of democratic institutions.<sup>57</sup> Instead, state and party are integrated through their own legal and normative framework within the structures of the constitution itself. As Jiang Shigong recently noted, "In fact, such integration has in fact specified the constitutional structure in which the NCP and the CCP interact and cooperate with each other. This indicates that the people must exercise sovereignty under the Party's leadership; that the Party's leadership must be inline with the written constitution; and that since the written constitution establishes the people's congress system, the Party's political sovereignty (*zhengzhi zhuquan*) must be legally recognized by the NCP before it becomes a state sovereignty (*guojia zhuquan*)."<sup>58</sup>

The institutional role of the CCP has been increasingly broadened in a constitutionalist sense since the establishment of the principles of the Three Represents within the substantive framework of Chinese constitutionalism. "The Three Represents suggests that in China, the CCP exists in two guises simultaneously. First, the CCP serves as a supreme political party. Second, the CCP serves as the paramount institution of state power; it is both a political (the Party) and governance (the State) entity."<sup>59</sup> Usually dismissed as mere

55. See Zhu Suli, *supra* note 14, at 535.

56. *Id.* at 538 (propounding pervading presence of CCP in Chinese politics).

57. See Lin Feng, *Constitutionalism in China Under the Leadership of the CPC: Is it Possible?*, Address at the City University of Hong Kong School of Law: Conference on Constitutionalism in China in the Past 100 Years and Its Future (October 18, 2008).

58. Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, (2009) (manuscript available on file with author).

59. See Backer, *supra* note 22, at 72 (denoting state and political organization subsumed within structure

ideological propaganda in the West where different patterns of discourse prevail, these ideas are meant to provide, in condensed form, a fundamental understanding of a legal order in which the organs of government do not sit at the very top of the political order, but instead serve as an inferior component of a greater enterprise. This is an idea that is both frightening and largely incomprehensible in the West, and therefore is dismissed as unworthy of study.

Nevertheless, the Three Represents and the principles of scientific development also point to a form of democratization within Chinese rule of law principles. The origins can be traced to Deng Xiaoping theory. “Deng was interested in defining a middle path, using ‘reform and opening up’ to oppose ‘leftism’ and using the ‘four cardinal principles’ to oppose ‘bourgeois liberalization.’”<sup>60</sup> That middle path produced a system in which state organs would be given substantial administrative authority, but the political authority and the framework for the political system would be retained by the higher organs of the CCP, all under the constitution.<sup>61</sup> Zhu also nicely understands the implications for democratic governance and the development of democratic principles as contextually applied. “[I]n the more than two decades since China began its reform and ‘opening up’ in 1978, and especially following the inclusion of the concept of the ‘the three representatives’ in the Party’s and PRC’s constitutions, the CCP has pursued becoming a governing party that represents the basic interests of the greatest number of people and that has daily strengthened its ability as a governing party.”<sup>62</sup>

The current scholarship on constitutional institutionalization in China thus continues to reflect the fundamental difficulties in fashioning a bureaucratization of politics with Chinese characteristics true to the values framework of the Chinese national political system, where the CCP thus represents the entire political power, and political citizenship within China.<sup>63</sup> The problem essentially reduces itself to the mechanics of legitimating rule of law constitutionalism while preserving the vanguard status of the CCP. “The problem of the rule of law in China can be understood as concentrating on the resolution of the questions of the long-term fundamental role of the CCP in China, and of the relationship between the CCP and the State apparatus it has created—and now dominates—in the service of the masses.”<sup>64</sup> The difficulty flows from a conceptual error—the attempt to bring over from Western political and constitutional theory the idea that there is a necessary equation between state power and law. The Chinese have suggested a different approach, one in which the state authority is subject to a higher law power—the

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of CCP).

60. JOSEPH FEWSMITH, *CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION* 27 (2001).

61. See generally Backer, *supra* note 46.

62. See Zhu Suli, *supra* note 14, at 538.

63. See Backer, *supra* note 46, at 107-10.

64. See Backer, *supra* note 22, at 73.

CCP—itself obligated to develop democratic principles and representative policies within its established values framework.<sup>65</sup>

Recent developments in Chinese constitutional theory have made clear that the CCP is not above the great governance principles of the Three Represents or Scientific Development through construction of a harmonious society. As an American commentator noted at the time:

Chinese scholars often worry that the country suffers from an eroding system of beliefs and a lack of common aspirations and values. To help build a new values system, the party's objective "is to try to perfect the socialist democratic legal system," one in which "the rule of law is to be carried out completely, and people's interests and rights are to be respected and guaranteed."<sup>66</sup>

Hu Jintao made that very clear as well:

To thoroughly apply the Scientific Outlook on Development, we must strengthen our efforts to build the Party in earnest. As is required by the Party's lofty mission of governing and rejuvenating the nation, our efforts to improve the Party's governance capability and maintain and develop its vanguard nature must serve our task of directing scientific development, promoting social harmony, guiding development and progress in China and better representing and realizing the fundamental interests of the overwhelming majority of the people.<sup>67</sup>

This involvement has found expression in the structure of Party discipline, especially in connection with the campaigns against corruption. As Fewsmith nicely explains:

Efforts to institutionalize procedures—and enhance the "governing ability" of the CCP—were extended to the party in February 2004 with the promulgation of the "Regulations of the Communist Party of China of Inner-Party Supervision (Trial)" and the "Communist Party of China Regulations on Disciplinary Measures." The regulations try to institutionalize several procedures of inner-party life, including requiring voting (but not necessarily secret voting) for major decisions (Article 13) and requiring party standing committees and discipline inspection commissions at all levels to make annual reports on their activities to the relevant plenary sessions (Article 19).<sup>68</sup>

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65. See Backer, *supra* note 46, at 108-09.

66. Maureen Fan, *China's Party Leadership Declares New Priority: 'Harmonious Society' Doctrine Proposed by President Hu Formally Endorsed*, WASH. POST, Oct. 12, 2006, at A18 (internal quotation marks omitted) (discussing CCP's endorsement of Hu's "harmonious society" doctrine).

67. See Jintao, *supra* note 17, at Part III.

68. See Fewsmith, *supra* note 2, at 5.

It is clear then, that one of the great successes of the Three Represents theory, as refined by the principles of scientific development and the objective of building a harmonious society, has produced a set of powerful values in China with political effect, core, constitutional values.

It is also clear that bureaucratization is meant to encompass not merely the elements of state organization but also the overarching authority of the CCP within the Chinese constitutional system. As Hu Jintao noted, under the constitutional system, the CCP must:

Improve the mechanism of restraint and oversight and ensure that power entrusted by the people is always exercised in their interests. Power must be exercised in the sunshine to ensure that it is exercised correctly. We must have institutions to govern power, work and personnel, and establish a sound structure of power and a mechanism for its operation in which decision-making, enforcement and oversight powers check each other and function in coordination. We will improve organic laws and rules of procedure to ensure that state organs exercise their powers and perform their functions and responsibilities within their statutory jurisdiction and in accordance with legal procedures. We will improve the open administrative system in various areas and increase transparency in government work, thus enhancing the people's trust in the government.<sup>69</sup>

The suggestion is clear: as a constitutive and vanguard element of Chinese constitutionalism, the CCP has a vital institutional role to play within the constitutional system. That role is grounded in the bureaucratization and institutionalization of rule of law governance.

We will focus on tightening oversight over leading cadres and especially principal ones, over the management and use of human, financial and material resources, and over key positions. We will improve the systems of inquiries, accountability, economic responsibility auditing, resignation and recall. We will implement the intra-Party oversight regulations, strengthen democratic oversight and give scope to the oversight role of public opinion, pooling forces of oversight from all sides to make it more effective.<sup>70</sup>

The role is political, but its expression can be institutionalized. Furthermore, perhaps that institutionalization is necessary to continue to develop both the CCP and the State; from a system in which the CCP represents a collection of individuals who together comprise a revolutionary vanguard (to which political power over the State and its organs might be appropriate) to a system in which

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69. See Jintao, *supra* note 17, at Part VI.

70. See Jintao, *supra* note 17, at Part VI.

the CCP becomes the source and protector of the core values of Chinese society to which an ever broadening base subscribes. That is, the CCP moves from a revolutionary vanguard party outside of the system, becoming the system itself—the values and principles that ground the construction and operation of all organs of political power in the nation.<sup>71</sup>

For that purpose, the CCP cannot continue to rely on the forms and behaviors of the time it existed outside the state. As the guardian of national values—now legitimized through law in the constitution—it must adopt the forms of inside governance. It is no longer adequate to rely on revolutionary forms of governance suitable for a vanguard party out of power, whose legitimacy is endangered.<sup>72</sup> It can no longer be true that “[p]arties become a quasi-constitutional structure in another sense as they serve as an alternative for or a necessary stage on the road toward constitutionalism; within the party, party discipline and guiding principles perform the function of law and statutes.”<sup>73</sup> Constitutionalism has already been attained, and its forms adopted as a core party line.<sup>74</sup> Rule of law is now internal to the CCP as well as external to the organs of state government. As Jiang Zemin suggested in the Three Represents, the revolutionary movement in China has shifted from outside to inside. The object is now to inculcate the appropriate fidelity to Chinese Constitutionalism and the political values it enshrines among all the people.<sup>75</sup> The methodology for that revolutionary goal is derived from the principles of scientific development in the service of a harmonious society.<sup>76</sup> Its form is that of democratic centralism, positing both participation and obedience within the elite structures of the CCP.<sup>77</sup> This is a concept at the heart

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71. See Backer, *supra* note 46, at 126 (describing transition from outside vanguard party).

72. William C. Kirby, *Renshi 20 Shiji zhongguo* [Understanding China in the 20<sup>th</sup> Century], 2001 21ST CENTURY 10, 114-24 (2001) (P.R.C.), available at [http://www.usc.cuhk.edu.hk/wk\\_wzdetails.asp?id=1523](http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1523).

73. See Zhu Suli, *supra* note 14, at 551.

74. See Backer, *supra* note 22, at 29.

75. See generally Backer, *supra* note 22.

76. Consider Deng Chenming’s insight:

The harmonious socialist society must be an orderly society . . . . Order on political side involves the administration of power - and its acceptance by the people - that meets the requirements of democratic procedure with a complete and effective system of supervision of authority. . . . The Communist Party of China always pays great attention to the reform of the political system, putting it forward actively and steadily. The basic principle of the reform of China’s political system is to combine organically the assertion of the leading role of the Communist Party of China with the people being the master of the nation, and ruling the country under the law, adapting to the demands of building the socialist market economic system, perfecting it, and at the same time offering the guarantee of law and regulation for the development of socialist democracy.

Deng Chenming, *Basic Concepts of the Harmonious Socialist Society*, 20 NATURE, SOCIETY, AND THOUGHT 199, 202 (2007).

77. STIG THØRSON, *Parasites or Civilizers: The Legitimacy of the Chinese Communist Party in Rural Areas*, in BRINGING THE PARTY BACK IN: HOW CHINA IS GOVERNED 192-216 (Kjeld Erik Brødsgaard and Zheng Yongnian, eds., 2004).

of the innovative direction of CCP governance. “Institutionally, we will emphasize improving democratic centralism.”<sup>78</sup> At last we come to the substantive value of bureaucratization within the values framework of emerging constitutionalism.

The institutionalization of the interpretive function of political power requires a collective body dedicated to that purpose. The object is to elaborate systems that serve to legitimize the expression of political values consistent with the constitutional system. The state organs or additional organs created at that level are inadequate to the task. Their scope of power is essentially administrative. Political power is ultimately vested in the CCP. It seems logical to propose a bureaucratization of political power over the interpretation of a constitution, not in the state, but in the CCP itself. “When a given legal system includes a constitution, the ‘rule of law’ requires that the sovereignty of the constitution be protected.”<sup>79</sup> The Chinese Constitution vests the state organs with administrative power and the CCP with a superior authority to supply and protect the substantive values of the constitutional order. Those values, under which all provisions of the Constitution must be interpreted, include Marxist-Leninist Mao Zedong thought, Deng Xiaoping Theory, and the important thought of the Three Represents. This, in the aggregate, constitutes the political *gründnorm* of the Chinese constitutional state.<sup>80</sup> “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.”<sup>81</sup> *The Chinese Constitutional framework thus provides an important insight, one that is worth emphasizing—under the Chinese Constitutional system, the CCP is and ought to be recognized as the authoritative institutional interpreter of the constitution and the constitutional order over which it presides and under which it is bound.* And indeed, the constitutional framework itself makes that role explicit. It is within notions of leadership (*lingdao*) itself that constitutional interpretive supremacy can be understood. *Lingdao* has always been expressed through the Party line as effectively centering the development and elaboration of the great substantive constitutional principles within the Party apparatus. That leadership must be exercised through the constitutional framework of the Party itself.<sup>82</sup> This also suggests the difficulty of developing a political—that is

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78. See Jintao, *supra* note 17, at Part XII.

79. CA 6821/93 *United Mizrahi Bank Ltd. V. Migdal Village* [1995] IsrSC 49(4) 221 (noting the importance of protecting constitutional system).

80. See KELSEN, *GENERAL THEORY*, *supra* note 11, at 124 (describing the development of constitutions through legal norms).

81. See Jintao, *supra* note 27, at Part VI, §3.

82. See Backer, *supra* note 22, at 91-99 (on the role of the CCP within the state apparatus and the application of constitutional rule of law elements within the governance structures of the CCP itself); see also Randall Peerenboom, *Social Foundations of China's Living Constitution* 34-38, available at <http://ssrn.com/abstract=1542463>.

constitution defining or leadership (lingdao)—role within the judicial organs of state power.<sup>83</sup>

That leaves us with the question—what form should that institutionalization take within the CCP? It is possible that a committee form, for example a special committee of the highest organ of the CCP, might be an appropriate place for institutionalization of the interpretation function. There is some appeal to this approach. It mimics the current suggestions for organizing an interpretation function within the NPC apparatus. And it retains the bureaucratization forms that privilege the political character of interpretive decision-making within the Chinese constitutional system—the great ideological campaigns through which substantive constitutionalism has developed over the last quarter century.<sup>84</sup>

But *constitutional values formation and interpretation are distinct functions*. Interpretation—including the application of constitutional norms to the organs of the state apparatus, is distinct from the process of formulating constitutional values. Interpretation goes to the bureaucratization of politics to which the current Chinese scholarship, described above, points. For that purpose the institutional *form* of a constitutional court, perhaps better understood as a Party constitutional chamber, would be useful.<sup>85</sup> An institution that is part of the highest level of political power, and independent of the institutions that actually exercise governmental power directly through law, is best situated to offer the constitutional system a necessary protection from abuses of power, internal and external, individual and institutional. It is not that the function of this institution is juridical in the traditional sense. The opposite is truer, the function is essentially political and in the service of the constitutional order. As a constitutional court, the CCP would incorporate another aspect of collective governance within the organ of the nation most legitimately able to exercise the power. The determinations of that body would remain political, and the touchstone would have to be the normative grounding of Chinese constitutionalism as specifically set forth in the Constitution—including the vanguard status of the CCP and the principles under which the CCP must function. Thus the creation of an institutional body within which constitutional interpretation rests—that is where issues of the understanding of the application of the constitution by the state apparatus in conformity with the Party line and its core substantive values—would institutionalize an important aspect of the CCP's leadership function specifically with respect to the meaning and application of the constitution.

But the forms of this institutionalization within the CCP can be both elastic

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83. Such efforts would effectively invert the current form of the Chinese constitutional order. See Zhu Suli, *The Party and the Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 52-68 (Randall Peerenboom, ed., 2009).

84. See Backer, *supra* note 22, at 29.

85. See Kelsen, JUDICIAL REVIEW, *supra* note 11, at 184.

and recognize the important role of the NCP for constitutional interpretation in the functioning of the state apparatus. The form of a constitutional court or chamber requires an implantation that fits within the values understanding of the political unit which it is meant to serve. The form of an English common law court is perfectly suitable in the United States and Australia. The old form of *Parliaments* might better suit the French.<sup>86</sup> An institution charged with the review of conformity to the constitution does not have to be disguised in the robes of Western judges to suit the prejudices of Western legal academics and theorists. Nor need it operate like the judicial branch of the Chinese state apparatus. It must be functionally differentiated like any other department. And it should be staffed with people who are charged with a leadership role within the CCP. But the form of the organization matters less than its function and placement within the Chinese political (note I did not say state) system.

Its principal function would be similar to that reserved for the first modern constitutional court—the control of legislative discretion in line with constitutional limits (including the limits of state power organs under the guidance of the CCP). “Kelsen recognized the need for an institution with power to control or regulate legislation. In the case of post-World War I Austria, the concern was mostly for maintaining federal arrangements, that is, regulating the relationship between the national and provincial governments.”<sup>87</sup> In the case of China, the constitutional court or chamber might, in the first instance, be most useful in maintaining the arrangement between state power and political power—that is, between the NPC architecture and the CCP. But it would maintain this constitutional division of power in an institutionally legitimate way—under the Constitution, now understood as creating a separation of functions substantially distinct from that in the West—separation of power with Chinese characteristics. “So, constitutional judges as they function now, in Europe and elsewhere, regulate legislative production, administrative production, and judicial action. That is their position.”<sup>88</sup> This might serve as a valuable insight with utility for a Chinese model developing bureaucratized forms of legitimacy in its own context. In line with contemporary Chinese notions of the relation of the Constitution to state organs, the constitutional court might serve to review the legitimacy of administrative and state organ activity (including statutes, decisions, policies and the like). That sort of review might be narrowly available. For example, review might be triggered only by the application of a majority of members of the NCP Standing Committee. It might assert this authority only within a very short time after the enactment of the offending actions. But it would have no

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86. Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court*, 34 AM. J. COMP. L. 45, 70 (1986).

87. John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 52 (2002).

88. *Id.* at 53.

authority to hear appeals from individuals. That this sounds like the old French *Conseil Constitutionnelle* is no coincidence.<sup>89</sup> The object, of course, is to ensure that the CCP retains effective authority as the “Party in Power” in a way that institutionalizes that role and bureaucratizes its procedures. It is not necessary to constitute it like a common-law court, or even a Western style politico-judicial constitutional court in the modern sense. But it is important to add legitimacy to the role already embraced by the CCP.

In this context, incrementalism that conforms to current understanding of the basic constitutional environment is crucial for conceiving plausibly successful systems. The institutionalization of constitutional review that conforms to Chinese constitutional principles, rather than those privileged elsewhere, is the only approach that can make sense. The argument about the form of institutionalization of that review must be conducted in Chinese terms, rather than in those of other states.<sup>90</sup> As Randall Peerenboom noted:

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89. As the French themselves note:

La mise en place d'un contrôle juridictionnel de constitutionnalité de la loi est une création récente dans l'histoire constitutionnelle française. Longtemps refusée du fait de la souveraineté absolue de la loi, “expression de la volonté générale”, selon les termes de l'article 6 de la Déclaration des droits de l'homme et du citoyen de 1789, l'existence d'une institution chargée d'examiner la conformité de la loi à la Constitution est une innovation de la Vème République. La Constitution du 4 octobre 1958 lui consacre un titre VII et pas moins de 7 articles. Cette création se caractérise aussi par son originalité: sur bien des points le Conseil constitutionnel est différent des autres Cours constitutionnelles. Conçu initialement comme un arbitre ayant principalement pour fonction de contrôler le respect du domaine de la loi par le législateur, le Conseil s'est transformé en juge de la conformité de la loi à l'ensemble des règles et principes à valeur constitutionnelle.

Conceil Constitutionnelle, Le Conceil Hier, *available at* <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/le-conseil-constitutionnel/le-conseil-hier/le-conseil-hier.25723.html>. The English translation:

The establishment of a judicial review of constitutionality of the law is a recent innovation in French constitutional history. Long denied because of the absolute sovereignty of the law, as “expression of general will,” according to the terms of Article 6 of the Declaration of Human Rights and Citizen of 1789, the existence of an institution to examine the compliance of the law to the Constitution is an innovation of the Fifth Republic. The Constitution of 4 October 1958 devotes a Title VII and not less than 7 items. This creation is also characterized by its originality: in many respects the Constitutional Council is different from other constitutional courts. Conceived as an arbitrator whose primary function of monitoring compliance in the field of law by the legislature, the Council transformed itself into a judge of the compliance of law all the rules and principles to constitutional values.

90. See Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823, 864-65 (2006). I am reminded here of an insight from Randall Peerenboom:

In China's case, reforms have been relatively successful, although there remains much to be improved. While most commentators portray political ideology as the main obstacle to establishing rule of law in China, the biggest obstacles at present are systemic in nature and involve the lack of institutional capacity. In the future, economic factors, the interests of key institutional and social actors, and ultimately political ideology (if China remains a single-party socialist state) are likely to exert the most influence on legal reforms and their likelihood of success. This suggests that when

[c]ourts in China also do not have the power to strike down abstract acts in administrative litigation suits; in other words, courts may not overturn a generally applicable administrative regulation or rule simply because it is inconsistent with the Constitution or higher level court decisions. Although the court may apply the higher level law in the particular case, the conflicting lower level regulation remains in place.<sup>91</sup>

But this is precisely what an institutionalized constitution-interpreting organ of the CCP ought to be able to do, beyond the jurisdictional limits of the state organs written into the Chinese Constitution itself. It makes no sense for the judicial arm of the state to have a leadership role in the construction of constitutional interpretation; but it makes perfect sense for a dedicated organ of the Party to institutionalize this role.

The point is not to create a judicial arm through which citizens might constitutionalize political power, but to create an institutional mechanism to legitimate the expression of that political power as constituted within the framework of the Chinese Constitution itself. This is a critical distinction. Indeed, it is possible to conceive of a system, which, in its inception, ought to be constituted as a means through which citizens may complain to the appropriate Party officials who might then refer matters of constitutional interpretation to the appropriate central authority.<sup>92</sup> But that system need not embrace the additional power to review the activities of state organs generally for compliance with the Constitution at the behest of individuals. The judicial power can remain administrative and within the organs of the state system.<sup>93</sup>

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political will for change is present, reforms aimed at improving institutional capacity will likely prove beneficial. Reforms, however, must be sequenced to avoid overtaxing the existing institutions.

*Id.* at 864.

91. Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?*, 19 COLUM. J. ASIAN L. 185, 219 (2005). He notes that, "The absence of an effective constitutional court or review entity has further reduced the importance of the Constitution as a source of rights protection."

*Id.* But he suggests that even the establishment of a constitutional court would not necessarily produce a Western style constitutional jurisprudence:

Even if there were a constitutional court or similar entity, it is doubtful that the Constitution would be interpreted in a liberal way given the prevailing statist socialist conception of rule of law, the existing threats to social order combined with support from both the ruling regime and broad public for stability, and the non-liberal orientation of the majority of Chinese citizens."

*Id.*

92. See generally Carl F. Minzner, *Xifang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. L. REV. 103 (2006) (setting forth alternative system to formed Chinese legal institutions).

93. See Chen Jianfu, *The Revision of the Constitution in the PRC: A Great Leap Forward or a Symbolic Gesture?*, 53 CHINA PERSPECTIVES at n.47 (2004), available at <http://chinaperspectives.revues.org/document/2922.html#ftn47>. He reproduces a statement by Hu Jintao:

However, even this might require a hard review of the relationship between the Supreme People's Court, as an adjudicative body, and the Constitution as the fundamental basis for its determinations when individuals dispute the application of law or actions of state organs.<sup>94</sup> And it remains a civil-law type system, where the value of individual cases may be limited.<sup>95</sup>

Yet, we had already noted that it has long been a strongly held position by scholars and officials, as well as within the CCP, that the CCP exercising state powers has not been considered.<sup>96</sup> This essay does not disagree with that position. The CCP, as Deng Xiaoping explained, has no business projecting itself directly into the state apparatus as a competitive organ of government.<sup>97</sup> Yet, it is precisely because constitutional review under the Chinese constitutional system is not merely a state function, that is, it is not merely an aspect of the organization and operation of state organs, that constitutional

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[I]t is desirable to promote the Constitution extensively in society so that it is known to every household and penetrates to the people's heart, which will lead the broad masses of people to the notion that the Constitution is not only a norm every citizen should observe in behavior, but also a legal weapon with which they can safeguard their citizens' rights.

*Id.*

94. See Sanzhuan Guo, *Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects*, 8 CHINESE J. INT'L L. 161, 171 (2009). As Sanzhuan Guo noted:

In 1955, China's highest court, the Supreme People's Court (SPC), issued a reply to the Xinjiang High Court saying that "the PRC's Constitution is not proper to be the legal basis of conviction and punishment in criminal judgment". Although this reply referred only to the inappropriateness of using the Constitution as a legal basis in criminal judgments, it has become the main reason Chinese courts hesitate or refuse to apply the Constitution in all cases--including civil and administrative litigation. In addition, another SPC reply to the Jiangsu Provincial High Court in 1986 listed standardized documents Chinese courts can cite as legal bases when making judgments, omitting the Constitution.

*Id.* The reference was to the Supreme People's Court's *Reply on People's Courts Using Standardized Legal Documents When Making Judgments*, available at <http://cecc.gov/pages/newLaws/standardLegalDocs.php?%20PHPSESSID=074622a55e0c2660f1ae1ad1639e485b>.

95. Zuo Haicong, *Legal Education in China: Past, Present and Future*, 34 OKLA. CITY U. L. REV. 51, 56 (2009) (noting Chinese Supreme Court only recently emphasized regular publication of case law).

96. See *supra* note 31 and accompanying text.

97. See Deng Xiaoping, Remarks at the Meeting of the Political Bureau of the Central Committee of the Communist Party of China in 2 SELECTED WORKS OF DENG XIAOPING (Aug. 18, 1980), available at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1460.html>. Deng Xiaoping explained,

[i]t is time for us to distinguish between the responsibilities of the Party and those of the government and to stop substituting the former for the latter. Those principal leading comrades of the Central Committee who are to be relieved of their concurrent government posts can concentrate their energies on our Party work, on matters concerning the Party's line, guiding principles and policies. This will help strengthen and improve the unified leadership of the Central Committee, facilitate the establishment of an effective work system at the various levels of government from top to bottom, and promote a better exercise of government functions and powers.

*Id.*

review seems precisely the sort of activity that is inherently the sort of leadership activity that requires CCP action. This distinction becomes critically important as important elements of Chinese scholars and lawyers continue to seek constitutional review within the apparatus currently available.<sup>98</sup> The exercise of constitutional review within the framework of the Chinese Constitution's state-party constitutional model is not an exercise of state power within Chinese constitutional theory.<sup>99</sup> It might be more useful to think of constitutional interpretation as a power existing above that of the competence of the state apparatus and beyond an exercise of state power as that concept was understood by Deng Xiaoping and other important persons. Because the constitution elaborates both state power (through the NPC system) and political oversight (through the CCP), it should not make sense for an inferior constitutional organ (the state apparatus, including the Supreme People's Court) to have interpretive authority over a constitutional framework that included superior authority (the guidance of the CCP as party in power). Moreover, principles of democratic centralism,<sup>100</sup> equally applicable to both Party and CCP apparatus, would suggest that no organ of the NPC would have the authority to legitimately interpret a constitution that binds the CCP. This would be a contradiction and turn the hierarchy of power set out in the constitution upside down. As such, the only institutional body with legitimate authority to definitively interpret and apply the constitution against the activity of inferior organs (of state or otherwise) would be the CCP. However, within the power devolved to the state organs—those involved in running the state for the benefit of the people, the courts ought to be able to apply constitutional principles to determine public rights, and the NPC is the appropriate organ for the interpretation and implementation of state based administrative rights and duties. For that purpose, Zhiwei Tong's excellent proposal is quite insightful.<sup>101</sup>

Constitutional power ought to be collegially administered within an appropriate institutional form. The issue, as modern Chinese scholars note, is bureaucratization, the development of appropriate institutional frameworks for regularizing the hierarchy of lawful authority recognized under the Chinese Constitution. In this sense, the judicial system can serve as the focal point of the constitutionally permissible application of law to citizens. This function

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98. See Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT'L J. CONST.L. 2, 215-46 (2009) (describing the impetus inside China for constitutional development and suggesting how state actors are responding indirectly to such efforts with the effect of raising rights consciousness among the people).

99. See Backer, *supra* note 46.

100. See Carlos W.H. Lo, *Deng Xiaoping's Ideas on Law: China on the Threshold of a New Legal Order*, 32 ASIAN SURV. 649, 653 (1992)(describing democratic centralism).

101. See Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to the Qi Yuling Case*, 43 SUFFOLK U. L. REV. 669 (2010).

could be understood as administrative and under the Constitution.<sup>102</sup> Constitutionality itself is the core question underlying political power in the ordering of the state and would remain the province of the “Party in Power”, though institutionalized within its organizational framework. This is not bringing the Party into the government, instead it is extracting political questions of the highest orders from state organs for the higher-level consideration of the Party. Thus, “although the CCP has its own ideology and exercises significant influence on the judiciary, taken as a whole, this ideology is not necessarily incompatible with the general view of justice shared by ordinary people.”<sup>103</sup>

And lastly, where might this institutional interpretive function of the CCP be located? Perhaps from within or drawn from an organ of the CCP’s Central Committee as a constitutional court for the nation. This essay does not seek to wrestle with the specific issues of implementation. It notes that implementation would require a coordinated effort to reform the Chinese Communist Constitution, within which implementation would be centered, and adds to clarify the Chinese Constitution. Hu Jintao himself might help us on this score as well:

We will strictly implement democratic centralism, improve the system that combines collective leadership with division of responsibilities among individuals, and oppose and prevent arbitrary decision-making by an individual or a minority of people. We will introduce a system of voting for use by local Party committees in discussing and deciding on major issues and appointing cadres to important positions. . . . All Party members must firmly uphold the centralized and unified leadership of the Party, conscientiously abide by the Party’s political discipline, always be in agreement with the Central Committee and resolutely safeguard its authority to ensure that its resolutions and decisions are carried out effectively.<sup>104</sup>

Democratic centralism, CCP organization and the need to advance the position of rule of law practices within the CCP as well as in the state organs<sup>105</sup> point to an organ of the Central Committee as the most likely place within the CCP to place this interpretive and disciplinary rule of law function. A constitutional court will serve as an excellent site for a true practice of democratic centralism—“freedom of discussion, unity of action”<sup>106</sup>—not its

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102. This is a more useful way of thinking about the need for an “as applied” mechanism because it assures people that the organs of state and its administration, are all acting only in accordance with the law. *Cf. Hand, supra* note 5, at 148-53.

103. See Zhu Suli, *supra* note 14, at 543.

104. See Jintao, *supra* note 27, at Part XII.

105. See Jintao, *supra* note 27, at Part VI.

106. Vladimir Lenin, *Report on the Unity Congress of the R.S.D.L.P.*, MARXISTS.COM., 1906, available at <http://www.marxists.org/archive/lenin/works/1906/rucong/viii.htm>.

Soviet style empty gesture, where the centralism is emphasized at the expense of democratic deliberation within the CCP. In this, a constitutional court mechanism would enhance the democratic leadership of the CCP within the constitutional framework.<sup>107</sup>

The CCP expresses the highest political power in the nation. It, like the organs of state, is now committed to the rule of law based on the construction of values and procedures that implement a certain values vision of the state and guard against the assertions of personal power against the collective. The form of a institutionalized constitutional court might serve as a useful form of institutionalizing the exercise of political power constitutionally vested in the CCP. But that need ought to be expressed in a way that acknowledges the structure of the political order in China, rather than the aspirations of Western states with distinctive constitutional traditions.<sup>108</sup> The injection of Western sensibilities in the debate over the development of rights mechanisms and institutionalized rule of law protections against the excesses of state organs, has created great tension within Chinese academic and activist circles.<sup>109</sup> Hu Jintao has suggested the CCP has an obligation to

[c]ontinue to strengthen the Party's governance capability and focus on building high-quality leading bodies. Strengthening the Party's governance capability has an overall impact on Party building and the cause of socialism with Chinese characteristics. In building the leading bodies at all levels, we must focus our efforts on promptly and effectively improving their art of leadership and governance capability. Following the requirement of scientific, democratic and law-based governance, we will improve the way of thinking of leading bodies, the governing competence of leading cadres, their styles of leadership and governance, the leadership system, and the working mechanisms of the leading bodies of local Party committees that have had their staffing restructured.<sup>110</sup>

The bureaucratization of constitutional power, centered on the CCP and grounded in democratic centralism, lends itself strongly to the forms of a constitutional court, which itself represents the Western essence of democratic centralism. As one author recently put it:

The strengthening of the party's role in China runs counter to the ruling paradigm in contemporary China studies, which through the 1990s, have

107. See Feng, *supra* note 57.

108. For a similar discussion in the context of Western exportation of advocacy legal work, see Michael William Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Aid in China*, 24 *FORDHAM INT'L L.J.* 56 (2000).

109. See Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 *FORDHAM INT'L L.J.* 1209, 1213-23 (2007).

110. See Jintao, *supra* note 27, at Part XII.

focused on the societal aspect of party/state-society relations, resulting in a plethora of studies on civil society, social organizations, private entrepreneurs and other forms of non-governmental development. In fact, this focus on society and social movements has pushed the party out to the ruling paradigm. It is high time to bring the party back in.<sup>111</sup>

A constitutional court within the CCP may be the next natural step in the evolution of constitutionalism with Chinese characteristics. More importantly, perhaps, it will represent another step in the scientific development of Chinese constitutionalism by placing the CCP within the overall construction of a constitutional system which acknowledges the CCP as the source of political citizenship and the state apparatus working under its guidance in the construction of a well run and constitutionally limited administrative state.

### III. CONCLUSION

One of the great current debates in Chinese constitutional law is the role of constitutional review within the Chinese legal-political system. This essay has sought to take a fresh look at the issue. The basis of the analysis has been the work of contemporary Chinese constitutional scholars who have analyzed the thrust of that debate. This contemporary scholarship rightly focuses on the institutionalization and bureaucratization of politics as a hallmark of the scientific development of rule of law notions within China's political system. This bureaucratization and institutionalization has important ramifications for institutionalizing constitutional interpretation as a viable legitimating tool within this developing Chinese constitutionalism. However, the essay has suggested that focusing the constitutionalist discourse solely on the institutions of the state—on the state apparatus alone—critically misdirects the analysis. That focus, correctly built on a then necessary implication of Deng Xiaoping's development of the line for state-party governance in China after the post-Mao Zedong era, unnecessarily ossifies what was clearly meant to serve as an important first stage in the scientific development (科学发展观) applied of the state-party apparatus itself. As such, the essay has suggested that limiting consideration of constitutionalist options to state institutions, principally the National People's Congress, as the place from where the constitutional interpretation function ought to be exercised, whether implemented in the form of a court or some other collective unbalances the relationship between state and party in the state-party system enshrined in the Chinese Constitution.

Taking that as its starting point, the essay examines the potential value of alternatives. Reading modern Chinese constitutionalism holistically supports the idea that the constitutional interpretation function ought to be exercised

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111. See Kjeld Erik Brødsgaard, *Management of Party Cadres in China*, in BRINGING THE PARTY BACK IN: HOW CHINA IS GOVERNED 87 (Kjeld Erik Brødsgaard and Zheng Yongnian, eds., 2004).

through the highest level of *political* rather than state authority in China—the Chinese Communist Party. The Chinese constitutional framework provides an important insight that frames this analysis. The Chinese constitutional system is divided into two distinct spheres—that of state institutional power and that of political and national power. The apparatus of state remains subject to the guidance of the political (and sovereign) power represented by the CCP. In this sense, the institutional role of the CCP can be understood. Its role as guide to the elements that make up the state apparatus suggests the sort of role played in the West by the constitutional court or related oversight systems. In this sense, the CCP can be understood as the highest institutional body within the Chinese constitutional system. It makes sense that as the Chinese constitutional system develops, that guidance role ought to be institutionalized. The institutionalization of that constitutional role for the CCP might take a variety of forms. This essay suggests one approach. Any number of others may be viable. The objective is not to reproduce the judicial forms currently popular in the West for the containment of this interpretive function, but rather to situate the function within an institutional framework that avoids perversion of the current constitutional settlement represented by the Chinese Constitution.<sup>112</sup>

For all that, I am well aware that the suggestion made in this essay is highly unconventional as measured by both Chinese and Western standards. Chinese officials have emphatically rejected the idea that the state establish a constitutional court or that the state would allow review of constitutional issues in its courts.<sup>113</sup> Western critics still measure legitimacy against a presumption that government defines the limits of state power and the judicial quality of constitutional interpretation.<sup>114</sup> Yet, this essay suggests that those positions are

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112. Zhang Lihong has noted with respect to recent efforts of the Chinese Supreme Court in that regard:

In a certain sense, the Supreme Court's systematic comments on a law and its directive opinions related to general legal solutions constitute the deformed exercise of legislative power—a power not granted to such a judicial body under China's constitutional law. Today, even in the face of criticism from the legislative body and scholars, the Supreme Court continues to issue many judicial interpretations. So far, China has no independent body, like a constitutional court, to ensure the constitutional legitimacy of laws and judicial interpretations. Consequently, conflict, and even contradiction, among Chinese laws and their related regulations or judicial interpretations is a frequent occurrence. Such conflicts serve as serious obstacles to the realization of the rule of law in China.

Zhang Lihong, *The Latest Developments in the Codification of Chinese Civil Law*, 83 TULANE L. REV. 999, 1006 (2009).

113. See Keith J. Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TRANSNAT'L L. 114 (2007). "Official statements in December 2004 confirmed the citizen right to petition the NPCSC, but also stated that China would neither establish a constitutional court nor allow judicial review of constitutional issues." *Wo guo you renda jiandu xianfa shishi, xianfa reng buneng chengwei susong genzhu* [China Will Implement the Constitution with Legislative Supervision, The Constitution Still Cannot Constitute a Basis for Litigation], Renmin wang [People's Net], DEC. 2, 2004.

114. Jerome Cohen has noted:

essentially correct within the framework of the Chinese Constitution. Traditional constitutional courts or a constitutional role for judicial institutions, that equate the state apparatus with the whole of the political power encompassed within the constitution, are not compatible with the constitutional order itself. The CCP already exercises the role of supreme interpreter of the constitution as part of its constitutionally recognized leadership (lingdao) authority. Yet, as Stanley Lubman reminds us, “the need for laws has grown, so has the need to revise law-making institutions.”<sup>115</sup> An institutionalization of this leadership role CCP, that is, an institutionalization of the role of Party leadership within the Chinese constitutional framework, in the form of a constitutional court or similar collective organization within the CCP may thus represent the most appropriate way of further legitimating constitutionalism within the Chinese legal order.

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Judicial review of the constitutionality of legislation and regulations seems out of the question without a constitutional amendment. Moreover, such an amendment would be impossible to achieve in the current political climate. Yet would there be any better chance of acceptance for a constitutional amendment that would establish a separate and independent Constitutional Court to deal with such questions, along the lines of the German model that influenced the Republic of China on Taiwan and the Republic of Korea? Many reformers recognized that the Party leadership is not prepared to endorse such a radical institutional move toward the rule of law.

Jerome A. Cohen, *Law in Political Transitions: Lessons From East Asia and the Road Ahead for China*, 37 N.Y.U. J. INT'L L. & POLITICS 423, 434 (2005); see also Jonas Grimheden, *The Reform Path of the Chinese Judiciary: Progress or Stand Still?*, 30 FORDHAM INT'L L.J. 1000 (2007).

115. Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 27 (2006).