

# Chinese-Style Constitutionalism: On Backer's Chinese Party- State Constitutionalism

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## **Abstract**

Currently, besides traditional national constitutionalism, there are three general approaches to constitutionalism in the world: transnational constitutionalism, theocratic constitutionalism, and party-state constitutionalism. The focus of this article is on Larry Backer's research concerning China's party-state system. Party-state constitutionalism is rooted in Marxism-Leninism, and was initially put into practice by the former Soviet Union. The People's Republic of China in its early years largely followed in the USSR's footsteps and developed its constitutional system under the traditional Soviet framework. However, since 1982, the Chinese party-state constitutional system has undergone several major reforms, and China has been gradually transforming into a "single-party constitutional state." Grounded in the separation of powers between the party and the state, this new constitutional model serves to further the rule of law, reaffirm the paramount authority of the constitution, and dynamically balance the Chinese Communist Party's (CCP's) leadership position with the rule of law. The CCP, being an articulator of social norms and values, provides the substantive norms and values that form the basis of the rule-of-law constitution. The constitution, in turn, serves to limit the behavior of the party, so that the CCP will be subject to the constraints of the constitution and the rule of law.

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How can we understand the current Chinese constitutional system? Does constitutionalism exist in China at all? During the past few decades, questions like these have emerged, both explicitly and implicitly, in Chinese academic discourse. At the same time, such discourse has been taking place against the backdrop of Western thought.

From the eighteenth century onward, when modern states began to organize themselves under constitutions, the concept of constitutionalism has been used to represent a form of polity where the state apparatus is both organized under and operates within a constitutional framework. The constitution, being the highest law of the land, reflects a country's highest pursuits and values. In the aftermath of World War II, ideological opposition among states—first between liberalism and fascism, then between liberalism and socialism during the Cold War—has dominated the global system. Consequently, the liberalist camp began to emphasize the substantive values associated with the constitution in order to defeat other, competing value systems. The concept of “constitutionalism,” therefore, has evolved beyond the legal concept of the “constitution” and has transformed into a specific value framework. When discussing constitutionalism from the perspective of values and norm structures, we may categorize constitutional systems into five different forms: traditional nationalist constitutionalism, transnational constitutionalism, natural law constitutionalism, theocratic constitutionalism, and rationalist constitutionalism (Backer, 2009b).

As an outcome of World War II and the Cold War, liberalism as a set of constitutional values has gained a certain degree of universality among various value frameworks associated with constitutionalism. Consequently, liberalism has become the ideological benchmark for measuring the legitimacy of constitutional systems. In addition to the core principles of freedom, liberty, and individual rights, more specific notions such as limited government, separation of powers (*trias politica*), legal independence and judicial review, multiparty rule, democratic elections, and so on, all have become criteria for an ideal constitutional polity (Henkin, 1993). By this constitutional standard, any constitutional framework that embodies alternative value systems may be illegitimate or even anti-constitutional. Therefore, “constitutionalism” has become a discursive tool for the claiming of ideological legitimacy (Backer, 2009a: 112). Under the influence of the Cold War mentality, Western academia labeled China's political system a form of authoritarianism analogous

to Soviet-style totalitarianism, and dismissed both as illegitimate constitutional systems. The twentieth-century criticism of the Chinese socialist polity shares the same genealogical line with the nineteenth-century Western criticism of China's "oriental despotism." This lineage represents an important component of Western-centrism.<sup>1</sup>

From a historical perspective, we can contextualize the Western skepticism of the constitutional system of the People's Republic of China (PRC) within the process of the formation of modern Western thought. The liberalist ideology, being a product of the Judeo-Christian tradition, sought domination through the repudiation of various incompatible ideological systems that are found both within (such as communism) and outside (such as Chinese and Islamic traditions) of Western culture. This endeavor to construct a unified "Western" ideological totality is reminiscent of China's own effort to oust all other schools of thought in favor of Confucianism during the Han dynasty. The modern ideological project that began in seventeenth-century Europe reached its zenith after the Cold War, when nations of the "Free World," under the leadership of the United States, united under a totalizing Western ideological construct. The so-called "end of history" was announced under the assumption that all ideological fronts and value frameworks had been unified under Western thought.<sup>2</sup> It follows that with the "great unification" of the Western world, endeavors to create different governing systems are no longer necessary, as the Western-style democratic constitutional system has proven to be the most ideal form of government for all. Such an ideological perspective has provided the basis for the formalist approach to constitutional scholarship.

After the Cold War, the main objective for the West has been to find ways to "integrate" Chinese and Islamic civilizations into the unified Western-centric framework. It is against this background that the United States began to push its "globalization" ideology, and mobilized "societal forces" in the former Soviet states so that the remaining socialist state entities could be eliminated. Western academia also seized their Cold War victory and normalized the Western theoretical orthodoxy, whereby "market economy" and "civil society" became theoretical instruments that serve to counter and displace traditional notions of "nation-states." With this theoretical background, terms such as freedom, human rights, public sphere, social movement, rule of law, constitutionalism, and democracy became buzzwords for the dominant discursive paradigm.<sup>3</sup> These words then became intertwined with notions of "soft power," "peaceful evolution," and "new wars"—all of which form the cultural landscape of the post-Cold War era.

However, as Western academic circles continued to advocate an antagonistic conceptualization of the "society-against-the state" power relationship,

clandestine social forces such as Al-Qaeda emerged and sought to counter the globalized state apparatus through the most extreme means. The 9/11 attacks fundamentally reshaped the direction of Western academic discourse, so that the pressing issue is no longer how civil society should act as a counterbalancing force to the state apparatus, but instead how the secular world should face the resurgence of global religious fundamentalism. The old notion of the “end of history” was mostly replaced by the concept of “the clash of civilizations” as the traditional “state-society” paradigm began to fade from Western scholarship (Huntington, 2002). Changing realities compelled many Western scholars to revisit political philosophy and adopt a more historically oriented perspective in order to have a deeper understanding of other civilizations as well as their own.<sup>4</sup>

At the same time, discussions of the “Chinese model” began to surface in Western academic circles as more and more scholars began to see China in a different light (Wang, 2011). China did not collapse with the USSR and other Eastern European socialist states. On the contrary, it managed to reboot its economy and achieve spectacular growth through market reforms and globalization. China’s success story suggests that the Chinese system must be distinguished from the traditional Soviet model. This calls for a renewed understanding of China as a unique constitutional state. On one hand, traditional Chinese thought should not be viewed as anti-constitutional, but as a positive resource for developing a Chinese-style constitutional tradition. On the other hand, the Chinese Communist Party (CCP) should no longer be seen as a symbol of dictatorship or totalitarianism, but instead as an organic component of a party-state constitutional framework (Lu, 2011; Shambaugh, 2008). It is against this background that some Western academics are calling for bringing the CCP back into the focal point of their understanding of China (Brodsgaard and Zheng, 2004). Even Francis Fukuyama, who once championed the “end of history” concept, has joined the “China model” discussion and has articulated the universality of the Chinese political order (Fukuyama, 2011).<sup>5</sup>

In discussing the China model, it is important to note that the uniqueness of the Chinese political order primarily arises from the leadership position of the CCP. According to American scholar Larry Catá Backer, China is evolving toward a “single-party constitutionalist state” that is grounded in its unique form of “party-state constitutionalism.” Backer argues that the Chinese constitutionalist state differs from the Western model in that the CCP plays a central role in the Chinese constitutional order (Backer, 2009a: 101–68). Backer is a Cuban-American law professor at Pennsylvania State University. He is also the director of the Coalition for Peace & Ethics, a non-governmental organization based in Washington, D.C. Although Backer

typically lectures on various traditional law school subjects such as corporate and comparative law, his research is unique in that it tends to transcend traditional disciplinary boundaries. Instead of taking a legal-formalist approach, Backer expands his inquiry to various political, economic, cultural, and religious organizations when studying the ordering of individuals through legal frameworks and power relations. Thus, constitutions, religious texts, corporate documents, and even marriage traditions can all be considered “legal” in nature. It can be said that Backer’s legal research embodies a theoretical approach that is more commonly found in social science, since he engages in the study of legal frameworks from both their process aspects (the development of a mechanics of rule making, enforcement, interpretation, and the like), and their substantive aspects (generally the ideologies that produce and sustain the moral and ethical framework inscribed as or in law).<sup>6</sup> Perhaps due to his social science research approach, his works do not share the ideological assumptions associated with traditional Western legal academic research. Likewise, Backer’s involvement in the non-governmental organization Coalition for Peace & Ethics can be understood as his attempt to avoid partisan political influence and to maintain ideological neutrality.

Professor Backer is neither a sinologist nor a “China expert.” His interest in Chinese constitutionalism is derived from his larger interest in the study of various power/law frameworks. Thus, his understanding of contemporary Chinese politics at times may seem somewhat simplistic. That being said, Backer has been able to step outside of the Western-centric ideological framework and constructively critique China’s political system in a tone both politically and ideologically removed. By comparing various constitutional frameworks (such as the Chinese, American, and Iranian constitutional models) in terms of their operating mechanisms and substantive values, Backer has offered innovative insights into China’s constitutional system and its socialist rule of law.

According to Backer, besides traditional national constitutionalism, currently the constitutional systems in the world can be generally divided into three frameworks or traditions. The first is what he calls “transnational constitutionalism,” exemplified by the post-World War II reconstruction of Germany and Japan. The American-led effort to craft the post-conflict constitutions of Germany and Japan can be seen as the projection of American constitutional values on a global scale. Such an effort facilitated the recognition of individual liberty and personal rights as universal constitutional values, which in turn solidified into a transnational legal norm structure. At the core of this transnational legal structure is the use of international human rights norms as a means of constraining the exercise of national sovereignty, so that individual states are subjected to this liberalist constitutional

framework. The influence of transnational constitutionalism can also be seen from the post–Cold War reconstruction of the former socialist Eastern European states. The second framework is “theological constitutionalism,” exemplified by the 1979 Iranian constitution. Like its Western counterparts, the Iranian constitution also organizes a state apparatus, imposes limits on the government, and even provides some protection against the arbitrary use of state power. Yet, unlike the constitutions adopted under the post–World War II framework, the Iranian constitution embraces religious (Islamic) as opposed to liberalist secular values. Interestingly, we can see the proliferation of the Iranian model from the recent adoption of post-conflict constitutions in Afghanistan and Iraq. While the two constitutions still bear many features from the post–World War II framework, they nonetheless incorporate many Islamic principles as their highest substantive values, and thus can be seen as theocratic constitutions. The third framework is China’s “party-state constitutionalism,” which is grounded in Marxist-Leninist principles. While Backer considers such a Marxist polity a “rationalist” constitutional framework, he also suggests that Chinese constitutionalism is similar to the Iranian framework in that the CCP represents the highest constitutional value and is both above and beyond the written constitution. Like the transnational constitutional framework, the CCP-led Chinese constitutionalist state also embraces and promotes substantive values that are grounded in certain universal “doctrines.” But ultimately, Backer believes that both the American and Chinese constitutional systems belong to the archaic national constitutional tradition that is grounded in the absolute supremacy of national sovereignty. In his view, there is still much uncertainty with regard to the future of national constitutionalism given the emergence of both secular and theocratic transnational constitutionalism (Backer, 2008, 2009b).

This article does not seek to provide a definitive answer to the kind of constitutional framework the Chinese model belongs to; nor does it seek to perform a comprehensive critique of Backer’s entire oeuvre on Chinese constitutionalism. The goal instead is to open up new discussion and debate on China’s constitutional system by introducing Backer’s unique and innovative perspective, and bring Chinese constitutional research to the next level.

## **The Origin and Development of the Party-State System**

Modern states are products of revolution against traditional regimes. Events such as the Glorious Revolution, the American Revolution, the French Revolution, the Bolshevik Revolution, and the Chinese Communist Revolution precipitated a global wave of modern state transformation.

Despite the ideological differences between socialist and capitalist states, the two governing systems are products of the same modern political project. For instance, by seeking to expand the freedom and liberty of the bourgeoisie to the proletariat, the October Revolution inherited the spirit of the French Revolution. Structurally, both socialist and capitalist states are constructed from the same foundation—both seek to organize the rights and duties of their citizens and their governmental power under a constitutional framework. The difference, however, is that the socialist states are organized under the leadership of the Communist Party, which has given rise to the party-state model of governance.<sup>7</sup>

### *The Roots and Difficulties of the Party-State Model*

The theoretical foundation for the party-state model of governance can be found in Lenin's *The State and Revolution*. In his book, Lenin discussed in detail the relationship between the proletarian revolution and the state. In classical Marxist theory, the state is understood as the external representation of social relations. It follows that the state apparatus, being a product of class struggle, can be seen as an instrument of violence in the service of class rule. If the state is to be understood as some sort of apparatus or instrument, albeit a political one, then in what ways can the proletariat take advantage of this apparatus to achieve its goals? For instance, the working class may seek to improve their welfare through legal means by staging their struggles within the framework of a parliament. In fact, such an approach has been persistently advocated by various communist movements in Europe. Engels and Lenin criticized this approach as "revisionist," because it presupposes the legitimacy and immutability of the state apparatus and its corresponding institutions (such as legal rights and parliamentary systems). In their view, the working class' effort to promote their interests through the old state apparatus is an unacceptable compromise with the fundamental principles of Marxism.

*The State and Revolution* was a product of Lenin's ideological struggle against revisionism. Lenin reiterated the Marxist state-legal conception—that the state apparatus is neither "value neutral" nor equally accessible for all (as this is precisely where the hypocrisy of bourgeois rights and the bourgeois constitutional state lies). He claims that the nature of the state is an instrument of violence in the service of class rule—a tool used by the minority exploiting class to oppress the working masses. Therefore, the state is seen as a symbol of tyranny and injustice. The state apparatus not only serves to maintain minority rule, but also structurally buttresses the advantages of the ruling minority against the majority through unjust means (such as

exploitation). Class exploitation is then legitimized and reinforced through the process of legalization (the bourgeois rights system), thus leading to further class inequality.

In the theoretical context of Marxism, the state is an external formal representation of social relations, but also an instrument—an instrument of oppression. Just as the term “oppression” signifies injustice, the state, too, signifies inequity and subjugation. Marx believed that a society organized by free individuals should be classless, free from oppression, thus obviating the need for a state. It follows that in order for the proletariat to realize universal and permanent social justice, its ultimate goal must be the elimination of classes and the state. The violent state apparatus is no longer needed in a universally just society, as social relations will be bound by the free association of individuals. This means that the proletariat must search for a new collective way of life after abolishing the state system.

Therefore, under Marxism-Leninism, an antagonistic relationship will persist between the proletarian party and the state. On one hand, before the elimination of class struggle, the proletariat must take advantage of the state apparatus to serve its political goals. After the failure of the Paris Commune, even Marx himself suggested the need for the proletariat to develop a new form of state apparatus after overthrowing the old state order. On the other hand, the state apparatus itself contains elements of corruption. Even if the revolution successfully toppled the old regime, it is possible that certain people will seek to benefit from the revolution by creating a new state apparatus for themselves, thus forming a postrevolutionary “new class” (Djilas, 1957).

As the realization of communism is a distant goal, and socialism is the initial stage on the road to communism, it is impossible to completely bypass the state apparatus during the proletarian revolution. In order to minimize the potential tension between the party and the state, the proletariat must organize a new form of socialist state apparatus. In Lenin’s view, when the proletariat establishes a national regime, it must use state power to eliminate class opposition, thus facilitating the transition to communism. Therefore, the socialist state must distinguish itself from the capitalist state model—it must temper violent state functions and improve the managerial capabilities of the state. And during the lengthy transitional period from a socialist state to the final abolishment of the state, the proletarian party must maintain its leadership role as the vanguard of future development.

Therefore, “the idea of the Party as vanguard and its entanglement with the state is central to the idea of transformation of governance” (Backer, 2009a: 118). According to Backer, the party has a central role in a socialist constitutionalist state. It follows the Marxist-Leninist notion that the vanguard party would use the state as an instrument of its own obliteration. The



vanguard party itself would also dissolve once the state apparatus is rendered obsolete, thus integrating the state and the party into the masses. The biggest challenge for this party-state mode of governance, however, is that the vanguard party may turn itself into the class party it sought to replace. The class party would in turn strategically utilize the state apparatus by using it as an instrument of violence, and therefore turn the temporary dictatorship of the proletariat into a new reigning paradigm—the oppressive “democratic” rule of one class over the other.

Unfortunately, the experience of the Soviet Union under Stalin vindicated Lenin’s concern. The Communist Party of the Soviet Union, while trying to develop a socialist constitutionalist framework, abandoned its revolutionary ideals and lost touch with the masses by turning itself into a special interest group. Intra-party democracy was curbed and “democratic centralism” became centralism without democracy. All that remained was personal dictatorship. At the same time, the Communist Party became completely imbedded in the Soviet state apparatus, and further strengthened the state’s function as an instrument of violence. Instead of functioning as a vanguard party that promotes socialist transformation through mass appeal, the Soviet Communist Party attempted to eliminate dissenting forces through physical violence and mass coercion. The results were catastrophic. The state’s violence was not constrained by the law, and unrestrained political power turned into willful, blatant violence. Thus, the Soviet party-state system stressed dictatorship, bureaucracy, absolute obedience, and a unified state structure. The lack of intra-party democracy and rule of law led the USSR to fall prey to totalitarianism (Backer, 2009a: 120–22).

Backer believes that the Soviet Union’s failure to accommodate basic constitutional principles such as the rule of law played an important role in its eventual downfall. According to Backer, rule of law is the basic premise for constitutionalism. Rule of law implies that the legal system itself embodies dual governing properties of stability and malleability. The legal structure can promote stability by legitimizing the existing social order, but the law can also be modified to suit changing social realities. Within the context of socialist constitutionalism, rule of law means that the vanguard party must accurately reflect the will of the masses and actively adjust the legal structure accordingly. In this sense, the socialist rule-of-law framework harmonizes the party-state relationship and dynamically balances the future ideal with functional reality.

### *A New Advancement in the Party-State Model: “Single-Party Constitutional State”*

Backer’s interest in Chinese constitutionalism derives from his earlier inquiry into the failure of the Soviet constitutional model. Backer has been mostly

focusing on the development of Chinese constitutionalism that took place after the 1978 Chinese economic reform. Although he has not provided a detailed narration of the early stages of Chinese constitutional development before the 1982 Constitution, Backer nonetheless has perspicaciously pointed out the key distinction between the Chinese and the Soviet approaches to managing party-state relations: "It was both the tentativeness of the state apparatus, and its characterization as tool rather than institution that post-Revolutionary China embraced for long periods after 1949 and in heated form between the late 1950s and the late 1970s" (Backer, 2009a: 124). Here Backer echoes American sinologist Stanley Lubman's research by pointing out how China managed to achieve its political objectives through the flexible application of legal instruments (Lubman, 2000).

In recent years, the practice of highlighting the differences between New China and the Soviet Union has become a commonplace within the academic community. What Backer fails to fully comprehend, however, is that the Chinese constitutional model, from its inception, has been fundamentally different from the Soviet approach.

First, despite the few setbacks from strategic adjustments during certain periods, the CCP has always maintained its role as the vanguard party by not abandoning its revolutionary political ideals. Around the same time that Khrushchev denounced Stalin and began to advocate peaceful competition with capitalism, the CCP also began to criticize Khrushchev's policies as "revisionist." One of the underlying ideological causes of the Soviet-China split was the two parties' disparate views of the relationship between socialism and capitalism, and between revolution and reconciliation. Khrushchev's call for an "all people's party" failed to bring back the vanguard party; instead, the Communist Party of the Soviet Union (CPSU) completed its transition to a class party under Khrushchev's leadership. This accelerated the corruption of the CPSU and led to its eventual downfall. In contrast, because of the constant political movements and revolutions prior to the Chinese economic reform, the CCP never had the chance to experience Soviet-style bureaucratization, thereby preserving its vanguard properties. As a result, the CCP avoided the fate of the CPSU, and was able to effectively manage the party-state relationship during the economic reforms. In fact, the early divergence of the Chinese model from its Soviet counterpart provided the critical foundation for China's subsequent development of rule of law.

Second, although the CCP is embedded within the state, unlike its Soviet counterpart, it has not completely sunken into the state apparatus. Throughout its history, the CCP has been wary of the potential pitfalls of bureaucratization. Maintaining its close connection with the public has always been the CCP's top priority—the party must fulfill its duty to serve the masses by

immersing itself within the masses and assuming the responsibility of educating the public. Being a party rooted in the masses, the CCP exists both within and beyond the state. This means that the CCP and the state will always be bound together in dynamic tension. The dissolution of the USSR demonstrates the danger of bureaucratization and abandoning the masses. Learning from CPSU's mistakes, the CCP has been able to maintain its high public support by reemphasizing the need to link with the masses.

Lastly, the fact that the CCP is above and beyond the state does not imply that the party has rejected the fundamental notions of rule of law. Aside from a brief period of interruption during the Cultural Revolution, the CCP has always been aware of the importance of the constitution and the rule of law for the party and the country. It follows that while the CCP as a political entity transcends both the constitution and the rule of law, the actions of party organizations and cadres are still subject to laws and the constitution. Such an arrangement certainly has incorporated basic rule-of-law elements. There is no doubt that the 1954 Constitution provided the critical foundation for the constitutional revision and the socialist rule-of-law reconstruction that took place after Deng Xiaoping's economic reform. However, it is important to note that a new party-state of governance was established after the Chinese economic reform. The post-economic reform Chinese party-state system differs not only from the Soviet model but also from the previous postrevolutionary Chinese constitutionalism. The adoption of the 1982 Constitution marked a critical conceptual transformation in the development of Chinese constitutionalism. "Understanding that conceptual transformation is the key to understanding both the emergence of a post-Mao Zedong conception of the relationship between state, Party and government, and the organization of that relationship within a rule of law framework" (Backer, 2009a: 126). In addition to the transformation in legal and constitutional concepts, the CCP has also experienced corresponding shifts in its functions:

Much more than an embrace of rule of law and a constitutionalist *Weltanschauung* was at stake in this enterprise. The movement from a revolutionary mass movement denominated a "party" to a governing apparatus at the heart of state and nation also denominated "party" has taken over half a century. But the contours of that change are becoming clearer. There is now a growing gulf between the self-conception of the CCP as a revolutionary band well outside any form of legitimate power and the immense political movement overseeing a state apparatus as it seeks to maintain its role as the supreme embodiment of political authority. The movement from a conception of Party within rather than outside the state, without the embrace of the individualist turn of the Soviet model, suggests that the CCP has chosen a different and plausible path inherent in Marxist-Leninist theory at its inception more than a century ago. Anti-constitutionalism was the status quo in 1979; by 2008 the

theoretical framework of something different—a single party constitutionalist state—could be discerned. And from this “something different,” it may be possible to discern the foundations of a uniquely developing theory of governance. (Backer, 2009a: 126)

In order to articulate his conception of the “single-party constitutionalist state” as a new model of constitutionalist governance, Backer has delineated the genealogy of the Chinese party-state system that began with Mao Zedong and was subsequently improved and strengthened through the work of Deng Xiaoping, Jiang Zemin, and Hu Jintao. Backer acknowledges that Mao Zedong Thought has had a profound impact on the shaping of China’s constitutionalist system, especially with regard to the idea of the party’s role as an outsider. “The CCP was not merely a vanguard party, but for a long time a revolutionary party. Even after the end of the civil war, the CCP continued to think of itself as outside the apparatus” (Backer, 2009a: 127). Therefore, in terms of the relationship between the CCP and the state, there was a lengthy process of internalization where the party as an outsider became internalized into the state. This internalization is closely related to the periods of political turmoil that took place after the founding of the PRC. The party as an outsider to the state apparatus implies the dictatorship of the proletariat, which emphasizes the mass line and deinstitutionalization. Up until the adoption of the 1982 Constitution, the CCP primarily focused on political and ideological problems instead of institutional building and state construction, a political tendency that culminated in the Cultural Revolution.

After the Cultural Revolution, Deng Xiaoping redirected the focus of the CCP toward institution development. The state apparatus continued to improve after the adoption of the 1982 Constitution. The development of the “Three Represents” thought during the Jiang Zemin era further indicated that the CCP had transformed itself from a revolutionary party to a ruling party. Evidently, the CCP is becoming highly integrated with the state, and the party has become a central component in the operation of the state apparatus. Therefore, in order to understand constitutionalism and rule of law in China, we must start by looking at the CCP and seriously examine its theories and operations.

### *Reexamining the CCP: Substantive Values and Political Citizenship*

Political parties are the most important force in modern politics. In fact, it is impossible to grasp the notion of modern politics without first understanding the nature of political parties.<sup>8</sup> Two types of political parties emerged from

modern political developments: electoral parties and Leninist parties. Electoral parties are products of competing political interest groups or factions. Under Western political pluralism, political factions function as electoral parties when they are organized under a voting system. As I said in an earlier publication, “electoral parties, in the legal sense, are structured like corporations. First, there are members, and the members then would organize themselves into a company. As Weber suggested, the purpose of a private company is to gain profits, and the purpose of a political party is to gain power” (in Wang, 2012: 315). This kind of interest group or “faction” was repeatedly criticized by the Federalists during the founding of the United States. Similarly, during the Yan’an Rectification Movement, Mao Zedong also voiced his disapproval of what he called “factionalism.” In constructing a unified nation, what is needed most is the united will of the people, not crippling “partisan politics.”

The Leninist party, on the other hand, developed from the Marxist party of the proletariat. This type of political party is based on a set of ultimate values and is organized for the purpose of realizing its values. Unlike Western electoral parties, as I have said, a Leninist party

does not begin with party members coming together to form the Communist Party and then to try to seize political power. Instead, the logic is reversed: first there is a political ideal, or a “Mandate from Heaven,” and there is a prophet or teacher who has realized his or her or mandate. The teacher would then cultivate his disciples among the elite groups of society, thus forming a vanguard organization. This vanguard organization would transform into a political party that seeks to mobilize the masses. (In Wang, 2012: 315)

This kind of political party bears resemblance to religious organizations that promote doctrines of salvation. The difference is, rather than simply trying to save the hearts and souls of individuals, a Leninist party’s ultimate aim is to seize the state apparatus and to establish communist society by abolishing both state and party systems.

Backer is fully aware of the difference between the CCP and Western-style political parties. The legitimacy of the CCP, unlike that of its Western counterparts, is based not on election procedures but on the substantive values the party embodies. These substantive values are beyond the scope of the government, and even the state apparatus does not have the authority to control or amend them. In this sense, Backer has pointed to a similarity between the Chinese and Iranian constitutions. Under the Iranian constitutional order, the state apparatus is under the ultimate leadership of the Supreme Leader, and the Supreme Leader in turn is constrained by and subject to the theological

value framework of Shia Islam. Likewise, while the Chinese government is under the paramount leadership of the CCP, the party itself is also under the constraint of Marxist principles, Mao Zedong Thought, Deng Xiaoping Theory, the Three Represents, and the important concept of Scientific Development. "In both cases, this superstructure sits atop the state apparatus. That apparatus is charged with the direct governance of the people. But its power is subject to the guidance of the superior political authority of the Guardian Counsel (a politically constituted religious body) in Iran and the CCP in general and the politburo in particular in China" (Backer, 2009a: 146). At the same time, both the Iranian and Chinese constitutions have incorporated basic elements of constitutionalism and the rule of law.

Although Backer has identified certain functional similarities between the Chinese and Iranian constitutions, he is nonetheless more interested in the differences between the two. In his words:

The difference—and a critical one to be sure—is the source of the norms constituting those boundaries of governance and the mechanisms for engaging with those norms. Unlike secular transnational constitutions that look to the consensus among the community of nations for the binding set of universal governance norms, or theocratic constitutions that look to the commands and rules of a particular universalizing religion, the Chinese constitutionalist state looks to a contextually relevant application of the universalizing norms of Marxist Leninist theory that focuses on the construction of a political citizenship vested in the Communist Party and the filter through which the common good is understood and applied. (Backer, 2009a: 144–45)

It follows that the Chinese constitutionalist system embodies an open value framework, of which the "doctrines" can be understood as pragmatic and adaptive to China's practical concerns. Unlike traditional transnational constitutionalism and theocratic constitutionalism, the Chinese constitutional model tends to emphasize progressivism and pragmatism rather than universality and immutability. Common political catchphrases in China, such as the "Sinicization of Marxism," "emancipating the mind," "theoretical innovation," and most importantly, "Chinese characteristics," have all captured the intrinsically progressive and pragmatic attitude of Chinese constitutionalism. Such an open-value framework reflects the high priority of the "common good" in the Chinese constitutional order. And the CCP plays a crucial role in formulating the common good—by integrating various incongruent or conflicting social interests through the political citizenship of the CCP's members. Under this framework, it is important to understand the relationship between the "political citizenship" of party members and the "socioeconomic

citizenship” of the masses. The distinction between these two types of citizenship under the party-state system gives rise to the need to formalize the party-state relationship through the separation of powers between the party and the state.

## **Separation of Powers between the Party and the State**

The 1982 Constitution rationalized the party-state relationship, thus marking the beginning of a “single-party constitutionalist state.” “The first was to separate the Party apparatus from the State. The second was to formalize the relationship of apparatus—both state and Party apparatus—to law” (Backer, 2009a: 128). Organizing the party-state relationship within the constitutional framework ensures that both the CCP and the state are subject to the rule of law.

### *Between Form and Reality: Separating Party and State Powers*

The separation of the party and state apparatus implies the need to redefine the functions and duties of the two entities, which led to a division of powers. Backer is fully aware of Deng Xiaoping’s thoughts concerning the separation of powers between the CCP and the state. For instance, Deng cautioned that the CCP should not be involved in the judicial process, that the party should limit itself to intra-party disciplinary matters, whereas legal issues should be handled by state judicial authorities. As the state apparatus needs adequate room to operate effectively, Deng believed that the CCP should release some of its powers and avoid micro-management.

In investigating the party-state relationship in China, rather than focusing on the specific terms of the division of power stipulated by Deng Xiaoping, Backer instead emphasizes Deng’s call for “building the national system”:

The CCP is to provide a model for the society it is seeking to lead eventually to a pristine Marxist stateless system as well as serve as the source of those political values through which state action can be understood, applied, and state power interpreted. In this context, Deng’s emphasis on both the Four Cardinal Principles and on the separation of state from Party becomes more understandable. The state is to serve the people in their everyday affairs but the Party is to serve the state by providing it with the values system critical to a proper application of the rules of law through which it is to operate. (Backer, 2009a: 130)

From this we can see that Backer has based his analysis on the problem of disjunction between form and reality in modern politics. That is, the

increasingly idealized formal political value frameworks no longer reflect how political power actually operates. Various competing political ideologies continue to engage in this “battle of the gods” despite the rationalization of power operations on the ground. By framing the CCP as the repository of fundamental political values, Backer sees the state apparatus as a rationalized power structure. Under this arrangement, the party-state relationship can be understood as a complex interplay between “ideology” and “state institutions”:

If we accept the CCP as playing a critical role in governance, then I would posit that our understanding of the State becomes more complicated. Between State and Party, the apparatus of the State is split into two parts: one largely following the pattern of institutionalized governance in the West, and the other following the understanding of the fusion of government and politics inherent in the construction of State socialism in China since 1949. This split is very important, as it shows the difficulties of constructing institutions that can at the same time serve to communicate with other states, and remain true to the substantive basis of the social and political order of the state. The formal organization of the institutions of State power is the Western-style manifestation of the government of a proper political entity with all the indicia of state institutions in a form understandable by the community of nations. This is the face of public organization—what the rest of the world expects to see—and the place from which they apply the standards of appropriate conduct. (Backer, 2006: 58)

While the Chinese style party-state separation of powers is structured differently from the Western approach, Backer nonetheless believes that the two approaches share similar functions. It follows that

administrative power rests with the state and its institutions—all to be limited by and exercised through law. Political power and the protection of the values inherent in the constitutional framework and the values on which the nation is organized rests with the CCP. The Party may not directly exercise administrative authority—that is now a function of the NPC and exercised according to law. But the interpretation and preservation of the Constitution and its values rests with the CCP and its organs. (Backer 2009a: 131–32).

It is important to note that the “administrative power” mentioned by Backer is not the same as the “executive power” under the Western *trias politica* principle; rather, it is a rearrangement of the traditional distinction between “politics” and “administration.” The classical notion of *trias politica*, or the separation of powers into three branches, implies that all political activities contain both “political (policy-making)” and “administrative



(implementation)” elements. Such a presumption hardly reflects today’s political reality. Under contemporary Western party politics, parties function as policy makers, whereas the implementation of policies is the prerogative of the state apparatus (including legislative, executive, and judicial branches) (Goodnow, [1900] 2011). Backer correctly identifies the incongruence between the formal and functional separation of powers in modern politics. From this premise, he has suggested that the party, as the repository of fundamental values for the political state, can be seen as the basis for the rationalized operations of the state’s institutions.

In fact, one of the key challenges faced by the CCP today is how to provide a well-established political value framework in an increasingly pluralistic society. Given the post–Cold War global recession of the communist movement, it is increasingly difficult for the CCP to rely on communism as the theoretical and ideological impetus that drives the party forward. Without the political cohesion of shared values, the vanguard party can easily degenerate into a class party, which would inevitably lead to corruption. With the announcement of the “Three Represents” and the transition of the CCP from a revolutionary party to the ruling party, the legitimacy of the CCP is facing unprecedented challenges. Given these pressing difficulties, the CCP must seize ideological and theoretical innovations. This requires not only a reinterpretation of the “Three Represents” but also a projection of the “progressiveness” of the CCP as a vanguard party, and the provision of populist explanations for important thoughts such as the “Three Represents” (Holbig, 2009).

### *The Mechanism for Party-State Separation of Powers: “Indirect and Flexible Governance by the Party”*

Separation of powers has always been a sensitive topic for the party-state constitutional system, because it touches on the fundamental problem of the relationship between the party and the state. Under the leadership of the CCP, separation of powers typically takes place vertically between the central leadership and local authorities. Mao Zedong’s “On the Ten Major Relationships” speech, for example, specially discussed the problems of distributing central and local powers. After the Chinese economic reform, talk of “fiscal federalism” has also entered the national discussion on decentralization (Su, 2004: chap. 5; Wu and Zheng, 1995).

Although Deng Xiaoping saw the drawbacks of a highly integrated party-state system and suggested separating the party from the state, this does not imply that he went against reality on the ground and applied an arbitrary

system with a binary division of power. If the 1982 Constitution provides the formal basis for the separation of the party from the state, then Deng Xiaoping's 1980 speech "On the Reform of the System of Party and State Leadership" can be seen as the political preamble to the 1982 Constitution. In this classic constitutional text, Deng proposed constitution reforms as a part of his larger effort to redirect the CCP toward economic development. As the separation of party and state powers stands as a core component in Deng's reform of the national constitutional system, the 1982 Constitution therefore can be seen as a "constitution of decentralization."<sup>9</sup> In his 1980 speech, Deng said the following on the division of powers:

We have tried several times to divide power between the central and local authorities, but we never defined the scope of the functions and powers of the party organizations as distinct from those of the government and of economic and mass organizations. I don't mean that there is no need to emphasize centralism and unification by the party, or that it is wrong to emphasize them under any circumstances, or that there is never any need to oppose decentralism or the assertion of independence. The problem is that we have gone too far in these respects, and we have even failed to clarify what we mean by decentralism and assertion of independence in the first place. Now that ours has become the ruling party in the whole country, and especially since we have basically completed the socialist transformation of the ownership of the means of production, the party's central task is different from what it was in the past. Now that we are engaged in the extremely difficult and complicated task of socialist construction, over-concentration of power is becoming more and more incompatible with the development of our socialist cause. (Deng, 1994: 329)

In terms of party-state separation of powers, Deng Xiaoping stressed the need to solve the problems of "not distinguishing party and the administrative functions" and "using the party to substitute for the administration." Specifically, Deng's concept for the separation of powers includes the following two aspects: first, the party gradually withdraws from economic and social micro-management; instead, the party will function as the provider of fundamental political values in these areas, and promote the effective functioning of the society and the economy through party mobilization. Second, in terms of macro-policy management at the national level, the party will no longer assume the functions of the government and party committees will no longer directly control state affairs. Instead, party committees will support state functions by providing general roadmaps and policies guidelines, and directly manage state affairs through the appointment and removal of state officials.

If the so-called "unified leadership of the CCP" (also known as "the unified leadership of the Revolutionary Committee" for a period of time) during

the Cultural Revolution can be described as the “direct and rigid governance of the party,” the party-state governance structure after Deng Xiaoping’s reform, then, can be described as the “indirect and dynamic governance of the party.” The CCP leadership approach is moving from direct and total management toward indirect, hidden, and flexible inducement and control, and both the state apparatus and the public sphere are being granted a greater degree of autonomy and discretion.<sup>10</sup> As a result of this reorientation of power relations between the party, state, and society, a new dynamic power-restricting mechanism is formed. In my view, this new framework of power distribution has the following three fundamental characteristics.

First, the party will be responsible for making major policy decisions, and its policies will be implemented by state and social organizations. The state and the public will have greater autonomy and discretion when exercising their implementation powers under the constitutional framework; furthermore, the important role of the constitution will be reinforced through the routine operation of the state and the public. This power arrangement checks and balances the political (policy-making) power of the CCP with the executive (implementation) power of various state institutions (such as the National People’s Congress [NPC], local governments, and judicial authorities). As the administrative authority of modern government bureaucracies has become increasingly expansive, and administrative power in itself is an amalgamation of various legislative and policy-making powers, this power overlap invariably creates tension between different authorities and thus gives rise to a system of checks and balances. It is no secret that both the CCP and the State Council play important roles in national economic planning. The rivalry we are seeing today between the party’s Central Committee and the State Council is similar to the emperor-chancellor power relation in imperial China, as both relationships are organized under a system of checks and balances. The difference is, however, that the current system of restricting powers is far more sophisticated than the classical imperial division of powers.

Second, the state apparatus should self-operate in accordance with the constitution and other legal provisions. The party, on the other hand, will indirectly manage state operations through its constitutional authority to participate in the selection, training, vetting, and appointment of state officials. In this way, there is a kind of check and balance between the Party and the state, like between an emperor and the cabinet under a prime minister in the feudal Chinese constitution. For example, the CCP’s organizational principles require the party to vet and approve important appointed officials. At the same time, the standing committees of the people’s congresses at various levels have been vested with the constitutional power to elect their corresponding level state officials. Under this constitutional framework, the

exercise of the appointment power by the CCP is preconditioned on the approval of the people's congresses, thus limiting the party to appointing only state officials that can be confirmed by the people's representatives. Once inside the state apparatus, the official will be vested with his or her constitutional powers and duties, and may fulfill his or her state duties within the bounds of the constitutional and legal framework. That being said, the CCP's political leadership role implies that state officials at all levels must follow the party's lead. As Deng Xiaoping declared, "When our party selects officials, we should pay attention to those who are endowed with both virtue and ability. 'Virtue' means of good political quality, which above all means upholding the socialist road and following the party's lead" (Deng, 1994: 326). Therefore, as the state apparatus exercises its powers under the constitutional framework, it is also in fact circuitously operating under the indirect leadership of the CCP.

Third, the party will no longer directly handle micro-economic and social affairs, but the party's organizations will permeate throughout society, so that the CCP and its unifying value system will serve to counterbalance increasingly divergent values and socioeconomic interests in the public sphere. As the CCP relinquishes its control over micro-economic and social matters, special interests promoting various value systems will organically emerge from the unbridled socioeconomic conditions. This process of socioeconomic diversification will aggravate the conflict of interests and values between the rich and the poor, and between different social classes, ethnicities, localities, family clans, religions, and sexual orientations. Rather than crudely suppressing these divergent social forces, the CCP should immerse itself within this increasingly pluralistic society, and strive to consolidate disparate interests through negotiations and consensus-building. As various external interests and values are harmonized within the party apparatus, the CCP will in turn externalize its policies and value expressions back to the public sphere.

Therefore, Backer's narrative of the party functioning only as the provider of fundamental political values oversimplifies the complex division of powers framework of the party-state model. Deng Xiaoping's idea for "separating the party from the state" should not be seen as dividing powers in a mutually exclusive fashion, but rather as a "measured readjustment" of the excessive use of party powers. This strategic readjustment of party-state functions is practically designed to adapt to changing realities on the ground instead of strictly bifurcating party and state powers into two fixed parts. Even after Deng Xiaoping's reforms, the CCP has periodically reassumed its direct leadership position when responding to major natural disasters and during "Yanda," or "sweeping campaigns against grave illegal and criminal activities." When the party and the state temporarily become highly integrated in

the face of an exigency, this response mechanism is commonly referred to as “juguo tizhi,” or the “system of national mobilization.”

## **The Institutionalization of the Party-State Relationship: Constructing a Rule-of-Law Constitutionalist State**

Constitutionalism, in essence, serves to restrain political authority under the constitution, so that political power can operate only within constitutional and legal frameworks. Therefore, the key to constitutionalism is the rule of law, that is, the constitution is above political power and the exercise of political power must adhere to the constitution and relevant legal provisions, thus preventing the arbitrary use of power. Rule-of-law constitutionalism implies the predictable and rational operation of political power. In the case of the party-state rule-of-law constitutionalism, the “rule of man” will be replaced by the rule of law when the party-state relationship is organized under the constitution, and the constitution is recognized as the highest authority.

### *The Institutionalization of the Party-State Relationship: Two Constitutional Texts*

The reason the party-state system is often considered anti-constitutional is because of the extra-constitutional and extra-judicial nature of the vanguard party, that the ruling vanguard party would either position itself outside of the constitution and the law, or use its political ideology to dismantle the pre-existing constitutional order and the rule of law. Backer’s rationale for grouping pre-1979 Chinese constitutionalism with the Soviet constitutional model is perhaps based on his observation of the Cultural Revolution, when Mao Zedong mobilized his political authority to destroy the constitutional system that he had created. Backer sees the post-1979 constitutional development in China as a turning point in party-state constitutionalism, as China has gradually formalized and institutionalized the CCP and state power under the legal framework of the constitution, thus reshaping China into a “single-party constitutionalist state.” The constitution, therefore, has become the highest legal authority of the land, and the party-state relationship has become institutionalized under the constitution, so that the exercise of political power is confined within constitutional parameters. This development provided the basis for the Chinese constitutionalist state and has steered China toward the rule of law.

The institutionalization of the party-state relationship is reflected in the Chinese constitution. The Preamble of the 1982 Constitution provides that

the state must operate “under the leadership of the Communist Party of China”; however, the Preamble also states that the constitution is “the fundamental law of the state and has supreme legal authority.” In Backer’s view, it is inappropriate to apply the Western constitutional perspective to understanding the Chinese constitutionalist state, as doing so ignores the CCP’s central role in the Chinese constitutional framework. As the Chinese constitutional order is grounded on the relationship between the CCP and the state, Backer argues that Chinese constitutionalism must be understood through both the 1982 Constitution and the constitution of the CCP. Although Backer, unlike me (Jiang Shigong, 2010a), has not approached Chinese constitutionalism from the viewpoint of an unwritten constitution, he nonetheless has looked beyond the written Chinese constitution and emphasized the constitutional significance of the party constitution. It is important to note that in Chinese, *xianfa* 宪法 (national constitution) and *dangzhang* 党章 (party constitution) are two completely different concepts—they have disparate connotations and are expressed by different sets of Chinese characters. In English, however, both “national constitution” and “party constitution” contain the word “constitution” and the two terms can be easily linked together by their shared common denominator. In Backer’s analysis of Chinese constitutionalism, he consolidates *xianfa* and *dangzhang* as mutually complementary constitutional documents that together signify China’s constitution. As Backer puts it:

Thus the principle of constitutionalization in China might best be understood as bifurcated, and in that bifurcation reflecting the political organization of society. In that context it is important to understand the constitution as consisting of two—the Chinese Constitution of 1982 and the constitution of the party in power, that of the Chinese Communist Party. The former lays out the organization of the state and the relationship between the state apparatus to the party in power as the holder of supreme collective political authority. The constitution is meant to provide both a framework for the devolution of inferior governmental power to an apparatus of state organizations and for the constitution of the superior political authority in the apparatus of the Communist Party. The [latter] organizes and institutionalizes the manifestation of political authority within the nation—the power is collective, corporate and is expressly bound by rules and norms that give character to that polity. What distinguishes both from the vanguard party governance prior to 1979 was the use of law as a mechanics of institutionalization and bureaucratization of political power. But this difference is crucial from a constitutionalist perspective; the move from politics unbounded to a law bounded framework for governance represents a crucial step toward the adoption of a rule of law foundational framework for the organization of political power. This, of course, is the critical presumption of constitutionalist states. (Backer, 2009a: 130–31)

In Backer's narrative, the party-state relationship has been institutionalized under a bifurcated constitutional framework, where the PRC constitution and the CCP constitution would together consolidate the formal institutions of the state under the oversight of values/governance role of the CCP: "The constitutional role of the Communist Party as the source of political values and the guardian of those values as applied by the state apparatus is embedded in the Constitution" (Backer, 2009a: 131). With regard to the CCP's relationship with the state, the constitution of the CCP specifically lists building "a socialist country under the rule of law" as one of the CCP's primary objectives, and clearly states that "the party must conduct its activities within the framework of the constitution and laws of the country." This implies that the relationship between the CCP and the state apparatus has been effectively institutionalized under a unified constitutional framework through the text of the Chinese constitution and the CCP constitution.

### *Rule of Law: Interactions between Formal and Substantive Rule of Law Elements*

Constitutionalism relies on the establishment of the rule of law, as supremacy of the constitution can only be established through the predominance of the law. Therefore, in order to understand the Chinese constitutionalism, it is indispensable to discuss the rule of law in China.

"Rule of law" encompasses two aspects: the first is procedural rule of law, which signifies the distinction between "legal" and "illegal" and forms the formal institutional constraints on the exercise of power. For instance, procedural rule of law often incorporates concepts such as "separation of powers (tripartite)," "limited government," "judicial independence," and "procedural justice." The second is substantive rule of law, which corresponds to the ideological framework within which legal procedures operate, and the belief that law must adhere to the fundamental values, norms, and beliefs of a state and its people. Substantive rule of law is manifested differently depending on the historical background and cultural traditions of each individual state. For instance, "all men are created equal" expresses the fundamental substantive value for American rule of law, whereas "*die Würde des Menschen ist unantastbar*" (human dignity is inviolable) can be seen as the highest value expression for German rule of law. The rule of law in the Islamic world, likewise, would embody substantive values that are associated with Islam (Backer, 2006).

Therefore, when looking at the development of Chinese rule of law, it is important to consider the development of both procedural and substantive

rule of law in China. Since the economic reforms, the development of rule of law in China has been geared toward procedural reforms. In fact the well-publicized judicial reforms in recent years have mostly focused on improving legal procedures. However, those judicial reforms have been controversial because they did not reflect the fundamental substantive values of the Chinese socialist system. Socialist construction in China during the past few decades has been based on the fundamental values of achieving substantive equality and assisting the weak. The procedural rule-of-law reforms, on the other hand, have been conducted in direct contradiction with the fundamental substantive values advocated by the Chinese socialist system. Not only have the procedural legal reforms mostly benefited the rich and the powerful, but those benefits have often come at the expense of the common people. The disjuncture between procedural and substantive rule-of-law development in China has intensified the tension between the elite and the masses, which ultimately will lead to social instability.

As the CCP is the repository for the substantive political values and norms of the state, it bears the duty to develop substantive rule of law. The party must play an active and dynamic role in the development of the Chinese rule-of-law system by continuously adjusting the direction of rule-of-law reforms in accordance with practical needs on the ground. The transition from the “Xiao Yang Supreme Court” to the “Wang Shengjun Supreme Court” reflected the growing demand for the CCP to become actively involved in the development of rule of law. The expression of the “three supremacies” (supremacy of the party enterprise, supremacy of the interests of the people, and supremacy of the constitution and the law) by the Supreme Court under Chief Justice Wang Shengjun precisely expresses the urgent need to harmonize the contradiction between the procedural and substantive aspects of the rule of law in China.

However, many critics of the rule of law in China see the CCP’s involvement in judicial reforms as unacceptable, the CCP being the biggest obstacle preventing China from developing the rule of law. Those critics often cite the CCP’s unwillingness to promote judicial independence and a tripartite separation of powers, and the fact that the CCP is above the PRC constitution, to substantiate their claims against the CCP’s role in the development of rule of law in China.<sup>11</sup> In Backer’s view, however, those criticisms are grounded in Western perceptions of the rule of law:

While grounded in neutral language, these arguments are, in reality, applied expressions of a particular ideology that has assumed universal acceptance outside of China in the period after the end of the Second World War. Specifically, this popular strain of rule-of-law analysis is grounded in a very specific ideal of



constitutionalism that has become well developed and accepted outside of China. Yet this peculiar ideal is somewhat removed from governance ideals developed within the People's Republic. The international norm of deep constitutionalism that has developed since 1945 serves as the ideal against which the Chinese system is evaluated. . . . These approaches to analyzing China and its constitutional developments tend to say more about the cultural perspectives of the critics than about China itself. (Backer, 2006: 50–51)

Chinese law expert Donald Clarke has referred to the standard critiques of Chinese rule of law as “imperfect realization of an ideal.” That is, in terms of the rule of law, the “ideal” tends to reflect the Western approach, and looking at the rule of law from the Western perspective will not help in understanding the development of the rule of law in China (Clarke, 1999). Backer shares Clarke's view and has further criticized the limitations of Western-centric analysis of China's rule-of-law framework.

First and foremost, Backer maintains that the standard Western rule-of-law analysis ignores the substantive elements of Chinese constitutionalism and dismisses the CCP's political thought as “empty ideology.” As Backer points out,

the Western approach dismisses ideological developments in Chinese constitutionalism that Western states might characterize as substantive or deep constitutionalism. Ironically, the American President treats his ideological campaign for democracy, accountability, and social responsibility as part of the important discourse of constitutional values in the United States, yet the important conversations within China about the role of citizen, state and party are marginalized as “mere” ideology. (Backer, 2006: 53)

Backer claims that political expressions of the CCP—from Marxism and Maoism in its incipient years to Deng Xiaoping Theory, Three Represents, and the important concept of Scientific Development—have all provided a normative basis for the development of rule of law in China, and should be considered important elements in China's substantive rule of law. Just as American constitutionalism was developed under the influence of Jeffersonian and Madisonian political philosophy, the Chinese constitutional order was constructed under the guidance the CCP's political thought. And just as the U.S. Supreme Court, through its reinterpretations of the Founding Fathers' thoughts, has played an important role in developing the rule of law in America, the CCP, through its ideological movements and its involvement in judicial reforms, can also serve to advance the rule of law in China.

Second, Backer argues that the conventional approach to the rule of law not only misconstrues the theoretical claims of the CCP but also overlooks

the party's institutional functions. Understanding constitutionalism and the rule of law in China requires serious treatment of the CCP's party line. This means that the theoretical expressions of the CCP should not be automatically labeled ideological "propaganda"; rather, they should be treated as substantive values of the state.

No analysis of the rule of law in China is possible without taking into account the institutional role of the Chinese Communist Party both within and outside the apparatus of the State. This requires taking seriously the place of the CCP as the "party in power" for constitutional purposes. It also requires looking at the CCP not as a Western-style party—like the factions of Madison's theorizing—but as an essential element of the construction of State power. (Backer, 2006: 57–58)

And in terms of the operation of state power, the CCP functions as the "institutional representative of the people and thus serves the important State purpose of infusing the formal institutions of State power with a normative basis for the exercise of political power" (Backer, 2006: 58).

To understand the rule of law in China, one must understand the important role of the party in the rule of law. This leads to a "hybrid rule-of-law concept" that synthesizes the roles of the CCP and the state in developing the rule of law:

Ruling the country by law means that the broad masses of the people, under the leadership of the party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, economic and cultural undertakings and social affairs, and see to it that all work by the state proceeds in keeping with law, and that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader. (Jiang Zemin, 1997)

This hybrid concept on one hand adheres to the basic Western principles for the rule of law by seeking to incorporate all social affairs under legal management, so that the will of the law will replace the will of individuals. However, this concept also encompasses the leadership role of the CCP, allowing the rule-of-law framework to advance and develop under the guidance of the party. By fully acknowledging the legal capacity of the CCP, this is no doubt a rule-of-law concept with Chinese characteristics. More importantly, this concept is also problematic in that it encompasses the tension between procedural and substantive rule-of-law elements. It follows that the CCP, through its active participation in the rule-of-law construction, will permeate itself into the operations of the state judicial apparatus. This implies that the CCP,

in addition to offering the basic substantive rule-of-law values, can also become an obstructive force that hampers or even dismantles the rule of law in China.

Therefore, when incorporating the party into the rule-of-law structure, the party leadership must also adhere to the basic principles of the rule of law. In terms of restraining the party by the rule of law, Backer compares two possible solutions. The first is “less Party, more state,” which would require the CCP to continue to separate itself from the state and become more like a conventional political party. This approach utilizes Western perspectives on political and social organization to reform the Chinese constitutional system. The second approach is “more Party, less state,” which emphasizes the need to strengthen the party’s role in the state apparatus and further party-state integration. Backer advocates the latter approach, and highlights the “Three Represents” concept as central to the self-discipline of the party.

It is clear that the Three Represents can be read as providing a basis for creating and imposing a great principal [*sic*] of fiduciary duty on Party and State officials; an obligation to act solely in the best interests of the people. (Backer, 2006: 68)

As building a socialist country under the rule of law is one of the primary duties of the CCP, it is imperative for the party to govern the country through the law and subject itself to the constitution and the law. Thus, in Backer’s view, the concept of “Three Represents” incorporates basic democratic principles and rule-of-law elements in terms of imposing limitations on the party.

In order to tame the party and ensure that it fulfills its fiduciary duty to govern through the law, we must first cultivate an ethical culture of the rule of law within the party. The CCP is no longer a revolutionary party but a constitutional ruling party; and for the party to become a vanguard force in the development of the rule of law it must replace its revolutionary party spirit with the spirit of the rule of law. Thus, it is imperative to develop a code of ethics and a sense of responsibility among party members. Backer has cited *Liangge wubi* (The Two Musts) and *Barong bachi* (Eight Honors and Eight Shames) as examples of intra-party moral campaigns to install rule-of-law principles as the party’s core value system: “The insertion of the CCP into the formal state apparatus, and the insertion of state power rule-of-law elements into the CCP itself can be furthered in a variety of ways” (Backer, 2006: 93). To strengthen party discipline means that the party must govern itself through the law. This implies that the party must abide by the constitution and the law and that party members must first comply with the norms, values, and the code of conduct within the party. In adhering to the path of the rule of law, it is important to expand intra-party democracy and constrain

individualistic tendencies within the party; at the same time, it is also imperative for the party to expand its mass base by allowing all sectors of society to join the CCP. In this sense, the “Three Represents” concept offers important guidance for governing the party under the spirit of the rule of law.

### *Judicial Review: A Chinese-Style Constitutional Court*

Constitutionalism implies that the constitution has supreme legal authority. Thus, in order to protect the integrity of the constitutional system, it is necessary to make institutional arrangements for constitutional review. At present, there are four general approaches to constitutional review: the Anglo-American tradition of judicial review, the French tradition of review by the Constitutional Council, the hybrid mode of constitutional court that combines elements of the Anglo-American and French traditions, and China’s constitutional review by the NPC.

Of the four models of constitutional review listed above, China’s NPC review model stands out as the most controversial. According to the Chinese constitution, the NPC is the highest organ of state power and the principal state legislative body. At the same time, the constitution stipulates that the NPC is responsible for “interpretation of the constitution and supervision of its enforcement.” This arrangement creates a contradictory condition that defies the logic of jurisprudence—that the NPC is responsible for reviewing the constitutionality of its own legislation. There are considerable debates among Chinese scholars with regard to China’s constitutional review system. Some Chinese legal scholars single out the Anglo-American judicial review system and call for the “judicialization” of the constitutional review process; others prefer adhering to the existing constitutional provisions and advocate the establishment of a “constitutional committee” under the NPC structure.

It is important to note, however, that both the “judicial review” and the “constitutional committee” camps have confined their analysis within the framework of the state apparatus and the written constitution. In Backer’s view, the conventional analyses of constitutional review tend to overlook the role of political power in China’s constitutional order. Constitutional review in China, according to Backer, is a political function, not an administrative one. This implies that neither the NPC nor the Supreme People’s Court should be responsible for constitutional review, since both entities are administrative state organs. Therefore,

constitutional review is possible within China, and on Chinese terms, but only 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. (Backer, 2010: 596–97)

Under this framework, “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” (Backer, 2010: 613).

Specifically, Backer calls for the establishment of a special committee within the CCP as the highest interpretative body for the constitution. This special committee in many aspects would function as a constitutional court, but rather than resolving judicial disputes, this constitutional court might be most useful in “maintaining the arrangement between state power and political power—that is between the NPC architecture and the CCP” (Backer, 2010: 615). Therefore, this special committee would not review cases submitted by individuals, but only review the actions of the state organs (including state judicial organs) upon a request from a majority of the members of the NPC Standing Committee. Unlike the Anglo-American judicial review system that amalgamates political and judicial functions, this proposal for a constitutional court within the CCP architecture bears more similarity to the French model by separating the political interpretative functions from the state judicial process. That being said, perhaps Backer has overlooked the possibility that under his Chinese “constitutional court” proposal, there may never be any constitutional issues to review at all—just like the fact that no case of unconstitutionality has ever been found since the inception of the PRC.

## Conclusion

Backer’s work is based on the fundamental problem of disjuncture between ideology and reality in contemporary politics. From this premise, he has discussed various issues relating to global constitutionalism from a comparative perspective. By comparing the American-led Western secular transnational constitutionalist paradigm with Islamic theocratic constitutionalism and Chinese party-state constitutionalism, Backer has delineated different sets of substantive values associated with these constitutionalist models, and pointed out the intrinsic tension between substantive constitutional values and routine state operations. Although Backer’s claims often seem simplistic, he nonetheless has raised many critical issues that demand careful and unbiased treatment from serious scholars.

From Backer’s “value neutral” social science research approach, we can see that the universal values embodied by post–World War II Western constitutionalism have originated through “historical” and “political” means. Universal norms are not created by theoretical propositions; rather, they are products of political struggles throughout history. Many proponents of universal value systems like to preach about the “end of history,” hoping to

legitimize their claims of universality once and for all. But those “universalists” are merely interested in “the end” as a consequence—they never intend to seriously confront the term “history” nor are they willing to examine the “end of history” through a historical lens. Thinkers such as Hegel, Marx, Kojève, and even Fukuyama have all demonstrated the importance of historicism in understanding the political significance of “universal norms” and constitutions. Legal procedures, in this sense, have been appropriated by legal formalists as a technical device that filters out the historical and political “impurities” of universal norms. The emperor has no clothes! Such an act of “cleansing” is analogous to obtaining a forged “legal” birth certificate for an illegitimate child, as both efforts share the goal of covering up a “problematic” or “illegal” beginning. The schism between formalist and political constitutional scholars is not simply a methodological difference. Their disparate attitude toward *history* and *politics* ultimately defines the scope of their perspectives. Some prefer to bury their heads in the sand in order to avoid their responsibility to history and to deflect their fear of the outside world. Others would embrace historicism and adopt a broad view that transcends temporal and ideological boundaries. That being said, narratives with broad perspectives sometimes do come at the expense of great attention to detail. In this sense, the apparent simplicity found in Backer’s works is the kind one would expect from a bird’s-eye view. It is from this bird’s-eye view that Backer has criticized constitutional formalists for their unwillingness to face other, “alien” traditions such as Islamic and Chinese civilizations.

If we can see the world the way Backer sees it, by looking at American, Iranian, and Chinese constitutionalist systems with the “normal mind” of a Zen Buddhist monk, the illusion of an immutable and universally perfect system of governance would fade away. It is absurd to assume any single type of governing framework can be the panacea for all social ills. Each society comes with its own unique challenges and difficulties, both from the past and present, and societies must organize themselves in ways that reflect their own special circumstances. Therefore, it is imprudent to evaluate the quality and effectiveness of a political system without first contextualizing the political system within its corresponding historical and social background. A “perfect” political system is impossible even within a specific historical-social context. After all, humans are imperfect, and there is a skeleton in every closet. On one hand, theocratic and party-state constitutionalist systems are often caught up in certain extra-constitutional norms that amount to excessive government oppression, which in turn may exacerbate social instability. On the other hand, the American constitutionalist system is also haunted by various problems that are not commonly found in theocratic and party-state constitutionalist systems, such as the counter-majoritarian difficulty and increasing Supreme Court partisanship. Depending on the circumstances, each system has its own benefits and shortcomings.

When putting different constitutionalist models in perspective, we will see that the apparently “stable” American constitutionalism suffers from its own democratic pangs, whereas ostensibly “authoritarian” theocratic and party-state systems are superior in facilitating socio-political integration.

As humans remain imperfect beings, history will not simply end and “Utopia” will remain an elusive goal. Since World War II, the history of mankind has been facing an unprecedented period of transformation. The rapid globalization process and the reshaping of the global political and economic order have brought many new challenges for humanity. The meteoric rise of China can be seen as an important force driving global change and providing solutions for our future challenges. Therefore, it is especially important to treat China with a balanced and unbiased mind. Given the complex historical background of its people and civilization, China is a country that is well known but seldom adequately understood. Chinese scholars frequently have to rely on foreign research materials when examining domestic issues. In fact, it is not unusual for Chinese scholars to come to terms with their ignorance of their own country and civilization through the works of Western academics. Therefore, I am confident that Backer’s seminal work on the Chinese party-state system will provide valuable inspiration for China’s domestic scholarly discourse.

China’s party-state system has an extensive historical background. Such a system not only carries a certain degree of continuity from the Republic of China era government and the classical notion of *tianxia*, but also marks a uniquely Chinese approach in response to modern political life. Ironically, at present, research on the Chinese party-state system can only be found outside of China. Therefore, it is imperative for those who are concerned with China’s constitutional and rule-of-law development to be acquainted with and carefully study the party-state system. The goal is to find ways to improve and reform this party-state system. Perhaps like the discussion of the counter-majoritarian dilemma in the United States, the difficulty in dividing CCP and state powers will continue to bedevil Chinese scholars in years to come.

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## Notes

1. See Hannah Arendt, *The Origins of Totalitarianism* (1967), where she categorized the Soviet-style system of government as a form of totalitarianism. This line of thinking resulted in the tendency among academic circles to associate “totalitarianism” with the PRC. Even before the emergence of the Soviet Union, criticism of the classical Chinese authoritarian system of governance had been a component of the post-Enlightenment Western identity. Works such as Karl Wittfogel’s *Oriental Despotism* (1967) colored the understanding of classical Chinese political traditions among Western scholars, which in turn led to the common Western assumption that there was a link between “classical Chinese despotism” and “contemporary Chinese authoritarianism.”
2. The concept of the “end of history” was originally proposed by Hegel, who suggested that human progression toward universal history involves a constant dialectical struggle of ideas—a process of ideological conflicts between different civilizations and values. For Hegel, the “end of history” implies the realization of absolute knowledge and universal values. This idealistic perspective was appropriated by Karl Marx and many other Western thinkers alike. For instance, Alexandre Kojève contended that the end of history will be marked by the realization of a universal homogenous state. Francis Fukuyama likewise suggested that the end of the Cold War universalized liberal democratic ideals, thus marking the end of history as well as the end of the ideological evolution for mankind. For further discussion of the “end of history,” see Liu Xiaofeng 刘小枫, “历史的终结: 在四川大学哲学系的演讲” (The End of History: Lectures at the Department of Philosophy, Sichuan University), <http://wenku.baidu.com/view/84f048244b35eefdc8d33326.html>.
3. Australian political theorist John Keane has written extensively on the topic of civil society and democratization. Some of his relevant works include *Democracy and Civil Society: On the Predicaments of European Socialism, the Prospects for Democracy, and the Problem of Controlling Social and Political Power* (Verso, 1988); *Civil Society and the State: New European Perspectives* (Verso, 1988); *Civil Society: Old Images, New Visions* (Polity Press, 1998); and *Global Civil Society?* (Cambridge Univ. Press, 2003). Keane’s approach to social science research, known in China as the “state-and-society theoretical paradigm,” became the dominant theoretical paradigm among Chinese social scientists



- during the 1990s. See Deng Zhenglai 邓正来 and Jeffery Alexander, *国家与市民社会: 一种社会理论的研究路径* (State and Civil Society: A Theoretical Perspective for Social Science Research) (Shanghai shiji chubanshe, 2006). Deng Zhenglai is widely considered the most prominent Chinese scholar on the state-and-society paradigm. Some of his most influential books are: *国家与社会: 中国市民社会研究* (State and Society: China's Civil Society) (Sichuan renmin chubanshe, 1997); *研究与反思: 中国社会科学自主性的思考* (Research and Reflections: Autonomy of China's Social Sciences) (Liaoning daxue chubanshe, 1998); and *谁之全球化? 何种法哲学?: 开放性的全球化观与中国法律哲学建构论纲* (Whose Globalization? What Kind of Legal Philosophy? Outlook of Open Globalization and Outlines for Construction of China's Legal Philosophy) (Shangwu yinshuguan, 2009).
4. For instance, Leo Strauss not only heavily influenced American conservative political thought, but also revitalized classical political philosophy in his challenge to modern ideologies. See Gan Yang 甘阳, *政治哲人斯特劳* (Leo Strauss, the Political Philosopher) (Hong Kong: Oxford Univ. Press, 2002). More recently, with the launching of the "war against terror," American political discourse once again has turned toward "friends-and-foes" type of discussions, which has led to the resurgence of Carl Schmitt's political thought (such as political theology) in the United States. On Schmitt's theories and American constitutionalism, see Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia Univ. Press, 2011). Outside of the United States, "Cambridge School" scholars have offered seminal and yet subversive texts that deconstruct many liberalist myths, where Hobbes is reframed as an ally of the liberalist republic and Locke is portrayed as a "radical revolutionary" in disguise. See Quentin Skinner, *Hobbes and Republic Liberty*, trans. Guan Kenong (Shanghai sanlian shudian, 2011); Peter Laslett, "Introduction," in John Locke, *Two Treatises of Government*, trans. Feng Keli (Shanghai sanlian shudian, 2007).
  5. See *谁的终结?——福山与张维为对话“中国模式”* (Whose End?—A Dialogue between Francis Fukuyama and Zhang Wei on the "China Model"), [www.21ccom.net/articles/zgyj/hwkzg/2011/0809/42809.html](http://www.21ccom.net/articles/zgyj/hwkzg/2011/0809/42809.html).
  6. See Larry Backer, "About Me," [www.personal.psu.edu/lcb11/about\\_me.htm](http://www.personal.psu.edu/lcb11/about_me.htm).
  7. In his articles, Backer uses the terms "Party-state" and "state-party" interchangeably. Although the term "state-party" appears frequently in his articles, I prefer to use the term "party-state."
  8. See Weber's historical analysis of political operations, especially his articulation of how politics has transformed from the traditional patriarchal and patrimonial mode to modern "party politics." Max Weber, "The Profession and Vocation of Politics," in his *Political Writing*, ed. Peter Lassman and Ronald Speirs (Cambridge Univ. Press, 1994).
  9. In his speeches, Deng Xiaoping explicitly warned against the over-centralization of power, as well as the need to reflect decentralization principles through the constitution. See Deng, 1994: 336. With regard to the shortcomings engendered by the 1982 "decentralization" Constitution, see Jiang Shigong, 2010a.

10. With regard to the manifestation of the “indirect and dynamic governance of the party” strategy within the context of the rule of law, see Jiang Shigong, 2010b.
11. Backer is unfamiliar with the relevant Chinese literature; he mostly cites from secondary English texts written by experts on Chinese law.

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