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CHINESE CONSTITUTIONALISM IN THE NEW ERA: THE EMERGING IDEA AND PRACTICE OF CONSTITUTION IN THE 19TH CPC CONGRESS REPORT LARRY CATÁ BACKER¹

ABSTRACT: During the course of the recently concluded Round Table on the Implications of the 19th Chinese Communist Party Congress (Penn State School of International Affairs 3 Nov. 2017) the speakers raised a very interesting issue that might merit some further initial discussion. We wondered, collectively, about the extent and character of the evolution of CPC thinking, and the CPC Basic Line, with respect to Socialist Rule of Law and Socialist Constitutionalism. The question arose in the context of a discussion around the question of the extent to which – the Work Report delivered by Xi Jinping and the resulting final Resolution of the 19th Congress reflected a downshifting of the importance of the state constitution and constitutionalism in general from the Basic Line of the CPC itself. As interesting was a follow up question around the effects of any such downshift on the relation between the state and the political constitutions of China. To that end, it is worth considering whether principles of constitutionalism for the “New Era” may be extracted from the sum of Xi Jinping’s Report to the 19th Congress. What follows, then is a preliminary report and assessment of Constitutionalism with Chinese Characteristics in the New Era from Out of the 19th CPC Report.



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¹ W. Richard and Mary Eshelman Faculty Scholar & Professor of Law & International Affairs, Pennsylvania State University. Special thanks to Miaoqiang Dai for his excellent research assistance and to the participants in the Roundtable for lively discussion and debate on these issues.

I.

There is a rich literature on Chinese constitutionalism (on my view of constitutionalism [here](#); on my view of Chinese constitutionalism, e.g., [here](#) and [here](#)). And there are a number of schools that have evolved around the issue of constitutionalism within Marxist Leninist states (in general) and Marxism Leninism with Chinese characteristics (in particular). Dismissing as entirely unhelpful the wealth of Western engagements with Chinese Marxist Leninist constitutionalism—precisely because at their base this literature starts from the presumption of illegitimacy and the premise that constitutionalism and Marxism Leninism is an oxymoron (and thus tell us more about the state of Western self-conceptions than of the object studied)—most commentators on the rich and quite dynamic evolution of constitutionalism in China break down into *roughly* three groups. For ease of reference these may be identified as a political constitutionalism, a legalist constitutionalism, and an evolutionary constitutionalism (others sometimes tend to use the more contextually political descriptors—left, right and center constitutionalism).

Political constitutionalism refers *roughly* to a very broad spectrum of schools that center politics within normative (sometimes binding but not necessarily legal) parameters. These range from variations of classical European Marxist approach that eschews any role for rules and norms and equates constitutionalism with the political program of the vanguard party, to variations on approaches that center politics within constitutions, especially a dual constitutionalism with a political constitution centered on the normative constraints on vanguard party leadership and an administrative constitution through which policy is implemented.

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

Evolutionary constitutionalism refers *roughly* to a spectrum of approaches that inevitably centers people over vanguard. These schools tend to see Chinese constitutionalism as a process that will or should toward structures in which the role of the vanguard party is diminished and a direct relationship between the masses and the organs of government are solidified, sometimes through law and sometimes through institutionalized politics.

Beyond the fairly obvious differences among these vibrant schools of constitutionalism one might point to some points of commonality. All of these schools start from or argue against a set of central documents—constitutions—even as each of them approach those documents differently, as law, politics or transitional devices. Each of them focus on the relationship among constitutional documents, law and politics. Among the most interesting developments of Chinese constitutionalism have been the mutability of these terms within a constellation of regulatory techniques that are themselves fluid. What had been a central element of constitutionalism, however, was a fidelity—within this fluid universe of meaning and uncertainty of normative orthodoxy—the idea of law and rule of law as a mechanics (process and protection against arbitrary activity and personal or institutional abuse), the binding element of law and the cage of regulation to bind officials, and of rule systems to constrain the institutional operationalization of politics. There was a measure of quite conscious ambiguity respecting the supremacy of law—within its jurisdiction. But the scope of that jurisdiction remained unclear with respect to the vanguard party. And in any case, it was also clear that two regulatory systems might coexist—an administrative system lodged in state institutions and the overarching institutional rule system of the vanguard party. But was the political constitution of the CPC itself law? And what was the relationship between the political constitution of the CPC and the state constitution? These were the issues that tended to separate the various schools of constitutionalism in China. But

what united them a recognition that constitutions were central to the administration of the state and the CPC apparatus, and both appeared to be at the center of both the CPC Basic Line and the heart of the administrative constitutional order.

II.

How were these ambiguities and idea navigated and developed in the Report to the 19th Party Congress? Drawing on the official bilingual publication of the 19th CPC Congress Report, “Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era,” Delivered at the 19th National Congress of the Communist Party of China, Oct. 18, 2017, by Xi Jinping [决胜全面建成小康社会 夺取新时代中国特色社会主义伟大胜利—在中国共产党第十九次全国代表大会上的报告— 2017 年 10 月 18 日, 习近平], the word *constitution* appears in the *English version* of the 19th CPC Congress Report **13 times in 9 different sections** (appearing in the Chinese original as 宪法 or its variation 章程 and 党章). At the same time, translation issues produced some anomaly. The English word *constitution* in the official translation appeared in spots that did not correspond to the use of the same term in the original Chinese with precise correspondence. Yet It is plausible to assume that the English translation and its use of the English word “constitution” were faithful to the general meaning of the 19th Congress Report even where a mechanical translation might have suggested otherwise. In any case, the English references to the constitution in the 19th COCP Congress Report consisted of the following:

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

We have fully and faithfully implemented the principle of “one country, two systems,” and ensured that the central government exercises its overall jurisdiction over Hong Kong and Macao as mandated by China’s Constitution and the basic laws of the two special administrative regions. 港澳台工作取得新进展。全面准确贯彻“一国两制”方针，牢牢掌握宪法和基本法赋予的中央对香港、澳门全面管治权，深化内地和港澳地区交流合作，保持香港、澳门繁荣稳定

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

We encourage all Party members to hold the Party Constitution in great esteem. 推动全党尊崇党章，增强政治意识、大局意识、核心意识、看齐意识，坚决维护党中央权威和集中统一领导，严明党的政治纪律和政治规矩，层层落实管党治党政治责任。

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

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

We must improve the Chinese socialist system of laws, at the heart of which is the Constitution; establish a Chinese system of socialist rule of law; build a socialist country based on the rule of law; and develop Chinese socialist rule of law theory. 必须把党的领导贯彻落实到依法治国全过程和各方面，坚定不移走中国特色社会主义法治道路，完善以宪法为核心的中国特色社会主义法律体系，建设中国特色社会主义法治体系，建设社会主义法治国家，发展中国特色社会主义法治理论，坚持依法治国、依法执政、

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

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

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

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

Pg 39 BL (Advancing Law based governance)

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

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

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

（四）深化依法治国实践。全面依法治国是国家治理的一场深刻革命，必须坚持厉行法治，推进科学立法、严格执法、公正司法、全民守法。成立中央全面依法治国领导小组，加强对法治中国建设的统一领导。加强宪法实施和监督，推进合宪性审查工作，维护宪法权威。推进科学立法、民主立法、依法立法，以良法促进发展、保障善治。建设法治政府，推进依法行政，严格规范公正文明执法。深化司法体制综合配套改革，全面落实司法责任制，努力让人民群众在每一个司法案件中感受到公平正义。加大全民普法力度，建设社会主义法治文化，树立宪法法律至上、法律面前人人平等的法治理念。各级党组织和全体党员要带头尊法学法守法用法，任何组织和个人都不得有超越宪法法律的特权，绝不允许以言代法、以权压法、逐利违法、徇私枉法。

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

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

We will continue to support the governments and chief executives of both regions in pursuing the following endeavors: exercising law-based governance,. . . and fulfilling the constitutional responsibility of safeguarding China's sovereignty, security, and development interests. 保持香港、澳门长期繁荣稳

定，必须全面准确贯彻“一国两制”、“港人治港”、“澳人治澳”、高度自治的方针，严格依照宪法和基本法办事，完善与基本法实施相关的制度和机制。要支持特别行政区政府和行政长官依法施政、积极作为，团结带领香港、澳门各界人士齐心协力谋发展、促和谐，保障和改善民生，有序推进民主，维护社会稳定，履行维护国家主权、安全、发展利益的宪制责任。

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

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

Pg. 64 BL (Arming the whole Party with the Thought on Socialism with Chinese Characteristics for a New Era)

We will foster a Marxist style of learning, and make it regular practice and an institutionalized requirement for all Party members to gain a good command of the Party Constitution, Party regulations, and related major policy addresses and to meet Party standards. 弘扬马克思主义学风，推进“两学一做”学习教育常态化制度化，以县处级以上领导干部为重点，在全党开展“不忘初心、牢记使命”主题教育，用党的创新理论武装头脑，

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

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

III.

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

To that end, it might be useful to divide these references into three distinct types. For convenience, I will call the first, references to the CPC Constitution. I will call the second type references to the state constitution. And I will call the third CPC leadership references (mixed or hybrid references). To put the following considerations in sharper focus, of the 13 references to constitution in the English version of the 19th CPC Congress Report, (1) *four (4) make reference to the CPC Constitution* in four (4) different sections, (2) *only two (2) make reference to the state constitution*, in different sections, and (3) *the majority of the references, six (6) references in four (4) sections speak to mixed references, of state constitution under CPC leadership*.

References to the CPC Constitution. It might come as no surprise that the greatest number of references to constitutions are to the constitution of the Chinese Communist Party. But it is the character of those references that open a clear window onto the emerging understanding of the construction of Chinese constitutionalism in the “New Era.” CPC cadres are “encouraged to hold the CPC Constitution in great esteem.” (BL p. 8). They are required to cultivate a “solid understanding of the CPC Constitution.” (Ibid). These encouragements and responsibilities are developed in connection with efforts to ensure full and strict compliance over the CPC itself. The CPC Constitution appears to assume an even greater role in the context of exercising full and rigorous governance over the CPC, the paramount political force in the state. In that context, the 19th CPC Congress Report speaks to the requirement to uphold the CPC Constitution “as our fundamental rules.” (BL p. 25). This requirement is not exercised in isolation, but rather as an element of centering the political work of the CPC in the context of ideological an institution building (Ibid). To that end, there is an emphasis on treating the CPC constitution (but not the state constitution) “in great reverence.” (BL p. 63). That reverence must be translated into strict compliance with its rules (presumably including the premises and ideological lines of its General Program). And it translates into a Marxist style of learning necessary to master the CPC’s political constitution, its regulations and Basic Line (BL p. 64). Taken together, the references suggest both the constitutional character of the CPC Constitution, and their role in organizing and constraining the discretion of the CPC in its own political work. The language is not one that appears to advance the notion that the CPC is a purely political body without constraint. But rather the CPC itself produces the document through which it constitutes and administers its *kompetenz-kompetenz* (its power to manage its own power). It is not so much about the devolution of power as its manifestation through rules that itself better permits the expression of collective and process based rather than personal and discretionary decision making.

Where do these references appear? Not surprisingly, these references are set out in those portions of the 19th CPC Congress Report that focus on the institutionalization of the CPC itself. The first with reference to the

past (Pg 8 BL (“We have achieved remarkable outcomes in ensuring full and strict governance over the Party”). The second with reference with respect to CPC internal governance—its cage of regulation (Pg 25 BL (“Exercising full and rigorous governance over the Party”). The third reference is contained in a section focusing on the centrality of CPC political building and the constraints under which that goal is undertaken (Pg 63 BL (“Putting the Party’s political building first”). The last reference focuses on the discipline of ideology and its dissemination within the CPC itself (Pg. 64 BL (“Arming the whole Party with the Thought on Socialism with Chinese Characteristics for a New Era”). Taking this as a whole, these references to the constitution as the organizing instrument of the CPC and its guide to action suggests a further development of a move toward the constitutionalization of the CPC itself. Its character as the body corporate vested with the authority to lead the state and manage its affairs echoes Western notions not of liberal democratic governmental organs but rather the board of directors of a large complex enterprise. And it suggests a remarkable convergence, not between Chinese and Western liberal democratic theory, but between Marxism and Western liberal enterprise constitutionalism (e.g., [here](#), [here](#), [here](#), and [here](#)). This is an area ripe for further study and may represent the most dynamic element of constitutional evolution in the West and China for this century.

References to the State Constitution. Only two (2) of the references to constitutions are solely centered on the state constitution in its own right. Standing alone, this would certainly add weight to the intuition that the 19th CPC Congress Report points to a substantial downshifting of conventional constitutionalism. And that intuition seems confirmed in this respect. Yet that downshifting of the state constitution does not necessarily mean a drifting away from constitutionalism. Rather it may appear to suggest a re centering, from administrative to political constitution, and an affirmation of the hierarchy of authority that places the state constitution below and crafted to serve the political constitution of the state. Those hints are underlined by the form of reference to the state constitution standing alone. The first reference suggests the value of the state constitution as a tool—the manifestation of a rule that must be strictly applied. That is certainly useful in the context in which it is made—referencing the rules institutionalizing the one country two system policy (BL p. 7). And so does the second. Again, deployed in the context of the adherence to the one country two systems policy, the reference is again to acting in “strict compliance with China’s constitution.” (BL p. 55). So, where has state constitutionalism gone? It appears that the 19th CPC Congress Report underscores the dependent nature rather than the autonomous position of the state constitution within Chinese constitutional universe. That is, the 19th Congress Report makes clear that the state constitution cannot be understood or applied except in the context of the leadership of the CPC and under its direction. As such the state constitution loses its autonomy and derives its power not from itself but from its exercise in accordance with leadership obligations of the CPC.

Where do these references appear? The traditional references of the state constitution as an autonomous instrument legitimating and constraining power appear in two places in the 19th CPC Congress Report. But both focus on the same issue—the outward projection of constitutional premises to define the limits and character of the state system. The first reference was embedded in reports on progress in the integration of China’s autonomous regions, and specially Hong Kong, Macao and Taiwan (Pg 7 BL (“We have made fresh progress in work related to Hong Kong, Macao, and Taiwan”). In the second reference was embedded in the objectives of managing the one country two systems policy (Pg. 55 BL (“Upholding “One Country, Two Systems” and Moving Toward National Reunification”). In both cases, the references are made in passing in the sense that the constitution was brought to bear as a legitimating force rather than as the central element of the discussion. In both cases, the constitution serves its role as a cage of regulation, but one that serves China’s interests in the ordering of its peripheral affairs—the management of its territories. To that extent, the law—and the fundamental legitimating force of the constitution—provide the basis for action, and its justification in ways that appeal both internally and to China’s foreign audience.

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

Thus, the obligation to improve the Chinese Socialist system of laws, “at the heart of which is the Constitution” falls on the CPC (and exercised through its own rules and governance institutions). (BL., p. 22). Indeed, the constitution lies at the heart of a socialist rule of law system, whose principles derive from the political constitution of the nation. More importantly, the state constitution appears to be active only under the leadership of the CPC. Thus the 19th CPC Congress Report declares that “*we* [the CPC] must improve the Chinese socialist system of rules, at the heart of which is the Constitution” (BL p. 22); it further declares that “*we* [the CPC] should give better play to the people’s congresses, and enable [them] to fully perform their functions as stipulated in the Constitution and the law” (BL 37). More importantly, it is the political organs of the state, the CPC, to which falls the responsibility “over the initiative to build rule of law in China” (BL p. 39. In that context, the 19th CPC Congress Report explains that “*we* [the CPC] will strengthen oversight to ensure compliance with the Constitution, advance constitutionality review, and safeguard the authority of the Constitution.” (BL p.- 39. Where has constitutionalism migrated—the answer is plain, in and through the organs of the CPC and constituted within the principles and objectives of the political constitution whose articulation is manifested in the state constitution. It follows that it is to the CPC that the responsibility falls to “develop a socialist culture of rule of law, and increase public awareness of the principle underlying rule of law that the Constitution and the law are above everything else and everyone else.” (BL 39). That responsibility follows and clarifies the hierarchy of constituting power. The Constitution can be above all precisely because it was so created by those with the authority to make that so, consistent with its own binding fundamental rules. It is in this light that the CPC mandatory requirement (reflected as well in the state constitution) that no one and no individual “has the power to overstep the Constitution or the law” (BL p. 39) can be enforced precisely because such principle serves to underscore the leadership authority of the CPC and its political constitution. To that end, it is to the CPC that the state must look “to continue to support the governments and chief executives” of Hong Kong and Macao (BL p. 55) as a necessary aspect of “fulfilling the constitutional responsibility of safeguarding China’s sovereignty, security and development interest” (Ibid).

Where do these references to what has been characterized here as “mixed references” appear? That is indeed the most curious part of the 19th CPC Congress Report. These references are all embedded in the core sections that focus on the project of the construction of socialist rule of law and socialist democracy. One would have expected that these would be the sections in which the state constitution’s autonomy would be reflected as well as its supremacy—to the extent that one gauges constitutionalism in Western terms. Yet these expressions of fidelity to the state constitution are embedded in curious form. They appear not complete in themselves but instead as a passive principle whose activation and management are dependent on the exercise of positive authority by the CPC itself constrained by its own fundamental rules. The first reference was made in the context of the CPC’s duty to ensure the implement of rule of law governance (Pg 22 BL (“Ensuring every dimension of governance is law-based”)). The statement that the Constitution is at the heart of the Chinese socialist system of laws is modified by the obligation of the CPC to improve that system. The second reference is embedded in discussion about popular

government (Pg 37 BL (“Strengthening institutional guarantees to ensure the people run the country”)). But here the reference is technical—with a focus on the operation of the NCP system and of the obligation of the CPC to ensure that state officials are able to perform their duties. The third set of three references is found in the section of the Report describing the objectives of developing the constitutional system itself (Pg 39 BL (“Advancing Law based governance”)). This is in a sense the heart of the state constitutionalism section of the Report—with its affirmation both of the role of the state constitution and its scope. But at the same time, it reaffirms that state constitutional supremacy is itself dependent on two factors—the exercise of CPC leadership in the implementation of the key elements of state constitutionalism and the power of the political constitution to frame that leadership. The last reference is tied to the exercise of legitimate authority in Hong Kong, Macao and Taiwan (Pg. 55 BL (“Upholding “One Country, Two Systems” and Moving Toward National Reunification”)). The most interesting aspect of that reference is the way in which the relationship between the CPC and the regional administrative leaders are framed. The CPC serves to support these officials in fulfilling their constitutional responsibilities, with the implication that this support has constitutional teeth exercised through the state constitution itself and overseen by the CCP (see, e.g., [here](#)).

IV.

So, what is the state of Chinese constitutionalism in the wake of the 19th CPC Congress? It is clear that the issue of socialist rule of law, and socialist democracy remain substantial priorities for the CPC itself and a core policy of governance. It is also clear that the state constitution remains a central instrument of governance. But it also becoming clearer that the fundamental constituting document of the political order is not the state constitution but the political constitution of the CPC. The 19th CPC Congress did not make this declaration explicit, but it made that conclusion inevitable in its discussion of constitutionalism and its practice. The state constitution manifests the exercise of political will in operationalizing first principles. But those first principles—those that bind the organization charged with the leadership role in exercising political authority—are constituted elsewhere, in the political constitution of the nation. And thus, it follows that the primary responsibility for the protection of the constitution and constitutional order falls to the CPC on behalf of the people. Constitutionalism for the New Era thus appears not to represent a break with the past as much as a self-conscious effort to evolve beyond it. There appears to be less need to nod in the direction of Western constitutional sensibilities (neither the word judge nor judiciary appear in the 19th CPC Congress Report).

That shift is most noticeable in the concentration on the building of socialist consultative democracy—a self-consciously political institution (BL p. 38), rather than on the construction of legalized institutions through constitutional meta-rules. So, what is Chinese constitutionalism in the New Era? Perhaps the best answer is provided in the 19th CPC Congress Report itself—an “institutionalized development of consultative democracy” (Ibid). That alone will provide the CPC one of its greatest operational challenges for the New Era. To that end, the idea of a constitution becomes a more nuanced and multi-purpose instrument. The 19th CPC Congress Report uses the term in a number of ways, or better put, it identifies multiple functions and identifies of constitution that together make up Chinese Constitutionalism. One form of constitution serves as the fundamental rules of the constitution of the political order. This form of constitution represents the embodiment of the highest forms of constitutional principles and the organization of political power in China. It demands great esteem, solid understanding, and great reverence. It demands the fostering of a Marxist style of learning and the obligation and gives institutional expression to ideological work and institution building. It is the core of socialist democracy.

Another form of constitution serves as the heart of the socialist system of laws and the foundation of socialist rule of law theory; but not as the foundation of socialist democracy. It provides the structures for the institution of government, but not its ideology. It serves as the guide for people to better perform their societal roles

in government and in society. It serves as the institutional expression of the ideological principle of equality and the subordination of discretion to rule. It serves as the public expression of the core Leninist notion of collectivity and the centering of societal interests over those of individuals. And it provides the rules respecting the operation of the government within a complex institutional structure of two systems in one nation. Over and within both, the CPC itself represents the autonomous political force. It both constitutes and is constituted by its institutionalized system of rules. It is bound by the State Constitution but also ensures that it is obeyed, and must exercise an authority to interpret and modify the state constitution in accordance with its paramount political duty, a duty informed by its own higher law of the political constitution of the CPC itself.

Much of this emerging discourse, of course, must be read within the context of the growing prominence of democratic structures not fashioned in the Western manner but now denominated socialist consultative democracy (BL. P. 4). But here there emerges another curiosity—the disconnect between the content of the state constitution and the construction of core principles of socialist consultative democracy. That connection appears to be strongest not within the principles of the state constitution (the expectation within Western liberal constitutionalism) but instead around the principles that constitute the political constitution of the state and the objectives (and basis for legitimacy) of the CPC as its leading force.

Indeed, one of the most interesting aspects of the invocation of constitution is the 19th CPC Congress Report is the potential relationship between constitution and its normative principles and the conceptualization of socialist democracy as something contextually appropriate to the Chinese political order. This socialist consultative democracy is not built around popular elections and the rise of political parties, but around engagement in governance exercised through the organs that bring together the CPC and the United Front parties. It is in those institutions that socialist democracy will be developed—an exercise in endogenous democracy in contradistinction to the West’s emphasis on exogenous democratic exercise (see my discussion in [“Crafting a Theory of Socialist Democracy For China in the 21st Century,”](#) *Asia Pacific L. & Pol’y J.* 16:1 (2014)). It is in this context that democracy is to practiced and the meaning of the socialist democratic path is revealed:

We must keep to the path of socialist political advancement with Chinese characteristics; uphold and improve the system of people’s congresses, the system of Party-led multiparty cooperation and political consultation, the system of regional ethnic autonomy, and the system of community-level self-governance; and consolidate and develop the broadest possible patriotic united front. We should develop socialist consultative democracy, improve our democratic institutions, diversify our forms of democracy, and establish more democratic channels. (Ibid., p. 22).

What is then centered is socialist democratic democracy built around the Chinese People’s Political Consultative Conference (BL p. 38). The 19th CPC Congress Report stresses: “. Consultative democracy is an important way of effecting Party leadership and a model and strength unique to China’s socialist democracy. . . . The CPPCC, as a distinctively Chinese political institution, is a major channel for socialist consultative democracy, and its committees are specialist consultative bodies.” (BL p. 38). The nexus between state, CPC and United Front through the CPPCC, then, serves as the connective tissue between CPC and State constitutions, and between the political authority of the CPC and its exercise through the rule system it itself has mandated as its own political line.

V.

For those who looked for an expansion of the authority and autonomy of the state constitution within Chinese constitutionalism, the 19th CPC Congress Report confirms a downshifting from that objective. But that downshifting does not produce a diminution of constitutionalism. The opposite appears to be true. It is just that

constituent power continues to be driven by and institutionalized within the political constitution of the CPC rather than the administrative constitution of the state. Within that complex, the greatest challenge for the New Era will lie in the further development of the relationship between the CPC and its Basic Line. These, at any rate, are what may be suggested by the references to the constitution in the 19th CPC Congress Report. The conclusions are tentative. They are meant to suggest possible trajectories. The next five years may better reveal the contours of the development of Chinese constitutionalism. If this 19th CPC Congress Report is any guide, then that development points to greater deviation rather than closer convergence with Western constitutional traditions. Yet at the same time, it appears to suggest a convergence between the democratic ideals and practices of global enterprises in the West—complex overlapping systems lead by a collective (the board of directors) and subject to a charter that vests substantial discretion bounded only by clear but broad constraints (fiduciary duty). It is to the divergences between Chinese and Western public law theories and the growing convergence between Chinese and Western private law constitutionalism that one should turn one's attention.