
THE CHINESE MODEL OF DEMOCRACY AS LIBERAL DEMOCRACY'S MAJOR COMPETITOR

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ABSTRACT

The People's Republic of China officially refers to its current system of governance as democracy with Chinese characteristics. This Article seeks to understand that claim and foster trans-Pacific discussion by focusing first on the differences and then on the similarities between the Chinese model and the model of liberal democracy embraced in much of the rest of the world. The first part of this Article examines the ways in which the Chinese model concentrates power in a rejection of what I argue to be the key features of liberal democracy.

The first part of this Article also seeks to explain the development of the different view of democracy in China through a brief and tentative comparison of the different historical and intellectual developments in China and in the West, where liberal democracy first developed. This Article argues that the differences in attitudes regarding the power of political and moral education to overcome the individual's self-seeking behavior are especially important. The strong Confucian belief in the power of education appears to have played an important role in rationalizing great concentrations of power in China. In the West, Lord Acton's maxim epitomizes the thinking that education is never enough; structural limitations provided by such institutions as regular, open, and competitive elections are necessary to protect against tyranny and corruption.

The Chinese model is thus the major competitor for liberal democracy, at least for the fifth of the world's population that lives in China. Nevertheless, the second part of this Article seeks to show that the Chinese are not so different because we share concerns about such important issues as the dangers of unguided populism, the politicization of the judiciary through constitutional review, and the problem of the role of money in politics. We therefore can and should learn from each other by discussing our respective conceptions of good governance.

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I. INTRODUCTION

The purpose of this Article is to introduce the Chinese model of democracy and show how robustly it differs from the liberal democratic version of democracy that is widely adopted throughout the world. I do not do this in order to advocate for the Chinese model or to criticize it. Like many people in liberal democracies, I prize the fundamental tenets of liberal democracy and find it difficult to imagine that there are people who do not find them as attractive as I do. So this Article is, in part, an attempt to understand that different world. It is important to do this because I argue the Chinese model is a strong—if not the strongest—competitor to the liberal democratic version. My second goal is to show how we in fact share some of the same concerns that advocates of the Chinese model have, so the Chinese model is perhaps not so different from liberal democracy after all. We can learn a lot about our own form of democracy by looking at the Chinese model. In order to pursue these goals, Part II of this Article compares the liberal democratic and Chinese models of democracy and seeks to make sense of the values underlying both models; I argue, in effect, that China appears to be really different from the West. Part III of this

Article, by contrast, argues that the Chinese may actually be quite a bit like us in the West. The Article ends by noting the striking opening of China and the West to each other. This opening has at long last made a deeper and more productive dialogue regarding governance possible. This Article seeks to stimulate that dialogue.

II. CHINA IS DIFFERENT: HOW THE CHINESE MODEL DIFFERS FROM THE LIBERAL DEMOCRATIC MODEL

First, a word about terminology: Liberal democrats tend to equate democracy with regular, competitive elections in a multiparty system.¹ Liberal democrats also tend to equate democracy with the West—where the forms of liberal constitutionalism were first developed. But democratic ideals have spread throughout the world.² No one culture or country owns the word *democracy*, and it is important to acknowledge that quite a spectrum of ideas exist regarding what systems of governance are comprehended within that term. During the Cold War, quite a few East Bloc countries used the adjective *democratic* in their official names; even though, like China today, they were governed by the firm, authoritarian leadership of the Communist Party leaders, whom Westerners tended to regard as strong-armed dictators.³ The ancient Greek word *demokratia* is probably best translated as a system of rule by the people; but as Reisinger notes, “Both the idea of ‘ruling’ and that of ‘the people’ are ambiguous.”⁴ Many systems could arguably fit under that definition.

Chinese leaders regularly speak of the Chinese model as a form of democracy—even though it lacks regular, competitive elections—because it has other features that, in their view, are designed to ensure that government

1. See Matt Singer, *Young People Are Coming to Save Our Democracy*, FORBES (Sept. 25, 2018), <https://www.forbes.com/sites/civictionation/2018/09/25/young-people-are-coming-to-save-our-democracy/#43cf43ba597e>.

2. See Drew DeSilver, *Despite Concerns About Global Democracy, Nearly Six-in-Ten Countries Are Now Democratic*, PEW RES. (Dec. 6, 2017), <http://www.pewresearch.org/fact-tank/2017/12/06/despite-concerns-about-global-democracy-nearly-six-in-ten-countries-are-now-democratic/>.

3. See Vladimir Dubinsky, *How Communism Took Over East Europe After World War II*, ATLANTIC (Oct. 22, 2012), <https://www.theatlantic.com/international/archive/2012/10/how-communism-took-over-eastern-europe-after-world-war-ii/263938/>.

4. William M. Reisinger, *Choices Facing the Builders of a Liberal Democracy*, in DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE 24, 25 (Robert D. Grey ed., 1997).

is responsive to the wishes of the people.⁵ Chief among these features is the principle of “democratic centralism,” originally a design principle for Marxist–Leninist cells allowing debate and discussion of policy among Communist Party members but requiring unquestioning obedience to and support for the policy once a decision is made.⁶ Some people speak of China as a “consultative democracy” because its government requires consultations among legislative bodies at all levels.⁷ That consultation extends to corresponding bodies within the Chinese Communist Party (CCP) and, more recently, to the public through experiments with requirements for public comment on the formulation of policy and law.⁸ For purposes of this discussion, I am going to grant that the Chinese model may be considered a form of democracy, but I will call it the “Chinese model of democracy” or the “Chinese model” for short. I will refer to the forms of democracy that started in and spread from the West as “liberal democracy” since the electoral competition that lies at the heart of the Western model is designed to be a force that undercuts state and elite control of the democratic processes and is therefore liberal in the original meaning of the term. The terminology is not so important. The important point for this Article concerns the significant ways in which the two models differ.

A. *Fundamental Aspects of Liberal Democracy*

In order to understand how thoroughly the Chinese model rejects fundamental aspects of the liberal democratic model, we first need to review those aspects. In my view, the essential elements of liberal democracy include, as already mentioned, regular, competitive elections in a multiparty system with broad-based suffrage; however, there are dissenting views.⁹ In

5. RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS* 20 (2010) (citing statements by Mao and Premier Wen Jiabao as well as a Chinese Communist Party (CCP) white paper in 2005 that claimed “[d]emocratic government is the Chinese Communist Party governing on behalf of the people”).

6. KERRY DUMBAUGH & MICHAEL F. MARTIN, *CONG. RESEARCH SERV., R41007, UNDERSTANDING CHINA'S POLITICAL SYSTEM* 3 (2009).

7. YU KEPING, *DEMOCRACY IN CHINA: CHALLENGE AND OPPORTUNITY* 98–99 (2016).

8. *Id.*

9. For a good discussion, see Reisinger, *supra* note 4, at 30–31. Even if some theorists would like to downplay the importance of competitive elections, they do not deny the centrality of political competition for liberal democracy. *See id.* at 31. It is commonly said that suffrage in a democracy should be universal, but exceptions always

order to produce vigorous electoral competition, a multiparty system needs the guarantee of freedom of association.¹⁰ Potential voters need to be able to associate with like-minded voters in order to promote their political agendas.¹¹ Any significant restriction on the freedom of association, even if just to restrict political action to two or three state-sanctioned parties, would threaten to limit the effectiveness with which dissenters could challenge the policies adopted by the state.¹²

Protecting the right to organize for political purposes requires protecting the freedom of association rather broadly because it is difficult to draw a clear line around political causes.¹³ Dog owners may band together due to their dog-related interest, but sooner or later some of those interests—such as the interest in establishing off-leash parks or rules for dog walking in public spaces—may become political issues. Moreover, the organization, skills, and habits that promote effective electoral competition are, to a great extent, the same skills needed generally to create private organizations and work with other people within such structures for a common cause, whether political or not.¹⁴ So protecting the right to have a multiparty system capable of producing vigorous competition in elections arguably requires protecting civil society in general, and a vigorous civil society provides valuable support for a vigorous system of electoral competition.¹⁵

exist—such as the common exception for the mentally incompetent. In earlier ages, suffrage was highly restricted. Universal suffrage is used here to mean that voting is not restricted by racial or gender restrictions or by property ownership, for example, but it can be restricted to adults, and although controversial, temporary or permanent restrictions on voting rights of those convicted of a serious crime may be allowed.

10. See Su Xinqi, *China Hits Out at Foreign Attacks on Hong Kong National Party Ban, but Spokeswoman for US Secretary of State Mike Pompeo Renews Criticism Just Hours Later*, YAHOO! NEWS (Sept. 24, 2018), <https://sg.news.yahoo.com/china-warns-other-countries-respect-035123652.html> (discussing a recent ban of a political party, an action the U.S. condemned as attacking freedom of association).

11. See Moisés Naím, Opinion, *Why We Need Political Parties*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/opinion/need-political-parties.html>.

12. See *id.*

13. See *id.*

14. See Joe Garecht, *Why You Need to Run Your Election Campaign Like a Business*, LOCAL VICTORY, <https://www.localvictory.com/organization/political-campaign-business.html> (last visited October 11, 2018).

15. See Reisinger, *supra* note 4, at 31–32.

In a like manner, protecting the right to vigorous electoral competition requires protecting the rights of freedom of speech and the media's rights to freedom of expression. Candidates and others seeking to influence the debate about political issues cannot do so if they do not have freedom to express their opinions, and the debate cannot be vigorous and free unless all forms of public expression by public media are protected.¹⁶ Just as with freedom of association, even though political debate is what needs to be protected for the functioning of democracy, the types of speech and media expression protected by this freedom cannot be drawn too tightly—or perhaps limited at all—because, just as it is difficult, if not impossible, to distinguish political from nonpolitical reasons to form associations, there is arguably no clear distinction between political and nonpolitical forms of speech. Liberal democracies may differ in the degree to which they protect these speech freedoms, but they all recognize the need to provide substantial protection to political speech.¹⁷

Another important feature of liberal democracy is the separation of powers. Among those countries that most strongly embrace the ideals of liberal democracy, the forms that separation of powers may take differ greatly;¹⁸ however, all of these countries agree that the Judiciary has to have substantial independence from the other two branches of government—the Legislature and the Executive.¹⁹ Thus, judicial independence is at the heart of common Western ideas about separation of powers. Judicial independence is also a part of the complex of ideas known as separation of powers that overlaps with the rule of law ideal.²⁰ While the concept of the

16. *See id.* at 38–39.

17. Perhaps the most interesting examples come from Britain and other Commonwealth countries in the 1990s; at that time, there was no express constitutional protection for free speech, either because the country had not yet adopted a form of judicial review (Great Britain and New Zealand) or because the Constitution did not expressly protect speech (Australia). While hesitant to declare a new constitutional right in those circumstances, the courts nevertheless interpreted statutes and the common law to provide some protection for political speech because of its importance to democracy. *See, e.g., Lange v. Australian Broad. Corp.* (1997) 189 CLR 520 (Austl.); *Lange v. Atkinson*, [2000] NZCA 95, [2000] 3 NZLR 385 (N.Z.); Ronald J. Krotoszynski, Jr., *Brind & Rust v. Sullivan: Free Speech and the Limits of a Written Constitution*, 22 FLA. ST. U. L. REV. 1 (1994).

18. For example, think of the difference between presidential systems of government and parliamentary systems. *See generally* John C. Reitz, *Political Economy and Separation of Powers*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 579 (2006).

19. *See id.* at 611–14.

20. John C. Reitz, *Politics, Executive Dominance, and Transformative Law in the*

rule of law is quite broad and covers much more than judicial independence, the independence of the judges is also at the heart of the rule of law ideal.²¹

But judicial independence is a tricky concept. It is easy enough to see that we have to outlaw bribing judges and ex parte contacts with judges, but the question of other kinds of influence by political leaders and the public is a bit trickier. No nation wants or tolerates judges who are completely independent of all political influences.²² Judging is too important—too likely to involve important political issues—to leave it to a system that is completely outside of all political control. Rather, a balance between judicial independence and political accountability is wanted.²³

All liberal democracies seem to agree to try to protect judges from direct political influence on their decisions in specific pending cases—in part by criminalizing actual and attempted bribery and imposing a strict ban on ex parte communications—while leaving the judges subject to more indirect political influences, typically through selection and promotion processes.²⁴ The U.S. federal system tilts the balance to the side of protecting judicial independence at the expense of accountability by granting federal judges lifetime tenure once they have been appointed.²⁵ State systems vary quite a bit, but many of them tilt the balance to the side of promoting judicial responsibility through periodic confirmation votes by the electorate for limited terms, if not (as in some states) by periodically forcing the judges to run the gauntlet of competitive elections.²⁶

Culture of Judicial Independence, 5 U. ST. THOMAS L.J. 743, 800 (2008) [hereinafter Reitz, *Politics, Executive Dominance, and Transformative Law*].

21. *Id.* at 799. For a more extensive definition of the rule of law that seeks to understand that concept both as a culture and as a set of institutions, see John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429, 435–41 (2003) [hereinafter Reitz, *Export of the Rule of Law*].

22. See Reitz, *Export of the Rule of Law*, *supra* note 21, at 437.

23. For a history of the development of protections for the judges in the face of political controls in the United States, France, and England, see Reitz, *Politics, Executive Dominance, and Transformative Law*, *supra* note 20, at 780–93.

24. See *id.*

25. *Id.* at 782.

26. See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1264, 1270–72, 1280 (2008) (discussing competitive judicial elections and defeat of some judges' bid for reappointment because of decisions that were unpopular with the electorate).

Judicial independence is especially important because of the institution of judicial review of governmental action.²⁷ Judicial review is at the heart of liberal democracy and the rule of law because it is the process by which the courts are asked to decide whether the government is operating according to the rules.²⁸ If we are to have fair elections—fairly contested—in which the electorate can have confidence, a neutral forum must exist to determine whether everyone is playing by the election rules and to keep those vested with governmental power, whether legislative or executive, from exceeding or otherwise abusing their power.²⁹ It should be noted, however, that judicial review of legislation is especially controversial. When a court invalidates a statute that was passed by a duly constituted legislative majority, the institutions and ideals of the rule of law are brought into sharp conflict with the majoritarian principle—another important principle at the heart of democracy.³⁰ As a result, judicial review has a tendency to politicize the judiciary that exercises such power.³¹ Nevertheless, judicial review and the judicial independence it requires are basic components of the liberal-democratic model.

B. The Chinese Model Rejects Fundamental Aspects of Liberal Democracy

As Table 1 shows, the Chinese model rejects all the fundamental aspects of the liberal democracy. Consideration of the main points in Table 1 will help make that contrast clear.

27. Reitz, *Politics, Executive Dominance, and Transformative Law*, *supra* note 20, at 795.

28. See Jeffrey Rosen, *The Court and Democracy*, THIRTEEN MEDIA, <https://www.thirteen.org/wnet/supremecourt/democracy/history.html> (last visited Sept. 6, 2018) (arguing that judicial review is the Supreme Court's greatest power).

29. See Reitz, *Politics, Executive Dominance, and Transformative Law*, *supra* note 20, at 773.

30. See generally Paul Gowder, *The Countermajoritarian Complaint*, 23 *TRANSNAT'L L. & CONTEMP. PROBS.* 7 (2014) (recognizing majoritarianism as an important democratic principle but arguing for an understanding of democracy and the rule of law that would overcome the majoritarian complaint).

31. Reitz, *Politics, Executive Dominance, and Transformative Law*, *supra* note 20, at 758.

TABLE 1: U.S. LIBERAL DEMOCRACY AND CHINESE MODEL COMPARED

Elements in Model	U.S. Liberal Democracy	Chinese Model
Separation of Powers	Separation of powers built into Constitution; creates system of ambition checking ambition to prevent tyranny by any one branch of government.	Rejects separation of powers in favor of doctrine of unity of powers; leadership of CCP recognized by Constitution.
Political Parties and Elections	Multiparty, competitive elections with broad electorate.	Single-party leadership; multiparty cooperative elections with limited competition.
Freedom of Association, Including Freedom for All Kinds of Political and Nonpolitical Groups	Strong constitutional and statutory protections for freedom of association; vigorous civil society with robust independence from the state in many cases.	Freedom of association only weakly protected; civil society developed substantially in last 30 to 40 years, to some extent supported by state, but government also seeks to control and suppress to some extent; result is “cat and mouse” game in which CCP can tolerate many unregistered and hence illegal NGOs but can crack down on any that it deems to be a threat to CCP power or policies.
Freedom of Speech and Media	Most media privately owned and operated; strong constitutional and statutory protections for freedom of speech and media; strong legal and social barriers to state censorship.	Media gaining independence from state because of advertising revenues, but constitutional and statutory guarantees are weak and state regularly suppresses speech and censors media and the Internet.
Independence of the Courts (Separation of Powers and the Rule of Law)	Judges have substantial structural guarantees of independence.	CCP has to approve selection of judges, and they can be dismissed for violating CCP policies; judges are generally CCP members and are “partyized” (their views are aligned with the CCP).

1. Political Parties and Elections

Multiple political parties exist in China, but the parties that have been permitted have relatively small memberships and do not challenge CCP control.³² Rather, these political parties have been coordinated by the CCP and even funded by the CCP.³³ They have agreed to work with and consult with the CCP, and no possibility exists for starting a new political party which is not in this relationship with the CCP.³⁴ Thus, we can call the Chinese political system a multiparty system of party cooperation. It is very different from the openly competitive relationship among parties in liberal democracies.

China does have elections, but they are not popular elections with anything approaching universal suffrage.³⁵ The elections for members of China's highest legislative body, the National People's Congress (NPC), are "for five-year terms by the next lower tier of 'people's congresses'—deputies at the provincial and municipal level, as well as by members of the armed forces."³⁶ As a general matter, only deputies at the lowest level of People's Congresses—essentially this means in the villages—are directly elected, and those candidates must be approved by Party officials.³⁷ Despite limited experiments in the late 1990s with expanding direct elections to the township level, direct democracy has not been permitted to expand to the township level.³⁸ Elections also occur within the CCP, and the Party has made limited experiments with "intra-Party democracy," a system of allowing the number of candidates running for leadership positions in the Party to exceed the number of open positions.³⁹

32. DUMBAUGH & MARTIN, *supra* note 6, at 1.

33. *Id.*

34. Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 537 (2007) (noting that some leaders of these other parties are also CCP members, and they all accept the political leadership of the CCP).

35. DUMBAUGH & MARTIN, *supra* note 6, at 9.

36. *Id.*

37. *Id.*; see also KERRY BROWN, *BALLOT BOX CHINA 2* (2011) (explaining that since the 1980s village elections have been competitive (more than one candidate per position) and based on one person/one vote and secret ballots and noting that candidates have not needed to be members of the Party); GUNTER SCHUBERT & ANNA L. AHLERS, *PARTICIPATION AND EMPOWERMENT AT THE GRASSROOTS 1* (2012) (noting that as a result of the 1998 national statute, direct village elections are now held throughout China every three years).

38. SCHUBERT & AHLERS, *supra* note 37, at 163.

39. DUMBAUGH & MARTIN, *supra* note 6, at 17. There have been contested

The top leaders are also elected but not in competitive, popular elections. In March 2018, Xi Jinping was re-elected by the NPC to his second five-year term as President of the country.⁴⁰ His candidacy, and those of the other leaders elected with him at that time, was worked out among the top CCP leaders long before the NPC meeting began.⁴¹ There were no competing candidates.⁴² Once Xi was announced as a candidate for reappointment, the result was never in doubt.⁴³ But the process of picking the very top CCP leaders is not transparent.⁴⁴ It “is still characterized by uncertainty. Decisions often are made through a combination of internal campaigning, behind-the-scenes manipulation, negotiation, and compromise among approximately 30 top senior leaders.”⁴⁵

The lack of popular contested elections above the level of village or town does not mean there is a complete lack of discussion between government officials and various parts of the public about important political issues.⁴⁶ The CCP mechanisms of democratic centralism exist, which are intended to foster discussion within all levels of the Party until a decision is reached by the top levels.⁴⁷ More significantly, perhaps, the Party has encouraged the use of many different techniques for soliciting public

elections for delegates to some provincial Congresses, but the electorate is limited to representatives in the next lower level of People’s Congresses. In fact, competitive elections for Deputies to the Hunan People’s Congress involved a serious vote-buying scandal in 2012 and 2013. Shen Chuanliang, *Zero Tolerance for Corruption: Catching Both ‘Flies’ and ‘Tigers’, in FIGHTING CORRUPTION: HOW THE CPC WORKS* 97, 114–17 (Xie Chuntao ed., Wang Jun trans., 2016); see also MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* 280 (2d ed. 2012) (discussing the spread of competitive elections to government positions in some towns).

40. Goh Sui Noi, *NPC 2018: China’s Parliament Unanimously Re-Elects Xi Jinping as President*, STRAITS TIMES (Mar. 17, 2018), <https://www.straitstimes.com/asia/east-asia/chinas-parliament-unanimously-re-elects-xi-jinping-as-president>.

41. See DUMBAUGH & MARTIN, *supra* note 6, at 9.

42. See Chris Buckley & Keith Bradsher, *China Moves to Let Xi Stay in Power by Abolishing Term Limit*, N.Y. TIMES (Feb. 25, 2018), <https://www.nytimes.com/2018/02/25/world/asia/china-xi-jinping.html>.

43. See *id.*

44. *Communist Party Congress: How China Picks Its Leaders*, BBC NEWS (Oct. 7, 2017), <https://www.bbc.com/news/world-asia-china-41250273>.

45. DUMBAUGH & MARTIN, *supra* note 6, at 17.

46. Wang Chuanzhi, *Democratic Centralism: The Core Mechanism in China’s Political System*, QIUSHI J. (Oct. 1, 2013), http://english.qstheory.cn/politics/201311/t20131113_290377.htm.

47. See *id.*

comments and ideas regarding the issues facing various levels of government, including public hearings with oral statements as well as notice-and-comment procedures conducted on paper or the Internet.⁴⁸ For this reason, some scholars argue that China can be called a “consultative democracy.”⁴⁹ This kind of consultation, along with the concept of democratic centralism, is the primary basis for the claim that the Chinese model can be considered a type of democracy.⁵⁰

In sum, the only open or public, contested elections in China are at the lowest levels. The only significant competitive elections to date are within the Party or for legislative offices no higher than the provincial level, and the electorate for those elections is restricted to the legislature at the next lower level.⁵¹ Popular, competitive elections are not an important part of the Chinese model.⁵² In fact, some analysts argue China’s experimentation with more open and competitive forms of election should not be understood as a small step toward a general system of contested, popular elections.⁵³ Rather, the village elections have been justified as ways of “fostering greater support for local leaders . . . creating incentives for more effective local governance; and providing a disincentive for local government corruption.”⁵⁴ Intraparty democracy, fielding more candidates than there are open positions for certain ranks of senior CCP officials, is justified on the same sorts of grounds—not as a step toward a general system of democracy.⁵⁵ It seems reasonable to conclude, at least for now, that “democracy [with popular, contested elections] is not necessarily the most important factor in a state’s legitimacy and may, as in the case of China, be relatively unimportant.”⁵⁶

2. *Freedom of Association and Free Speech, Civil Society, and the Media*

Given the general absence of truly competitive elections and the way in which the CCP controls all other political parties in China, it is perhaps no

48. YU, *supra* note 7, at 98–99.

49. *Id.* (rejecting the label of “deliberative democracy”).

50. *Id.* at 99.

51. *See supra* Part II.B.1.

52. DUMBAUGH & MARTIN, *supra* note 6, at 16.

53. *Id.*

54. *Id.* at 16–17. Schubert and Ahlers conclude in their study that “village elections do much more (for the time being) to reinforce one-party rule than to democratize the Chinese political system.” SCHUBERT & AHLERS, *supra* note 37, at 161.

55. DUMBAUGH & MARTIN, *supra* note 6, at 17.

56. JACQUES, *supra* note 39, at 266.

surprise that freedom of speech and freedom of association do not receive very robust legal protection. The problem is not a lack of applicable law. Article 35 of the Constitution, for example, promises “freedom of speech, of the press, of assembly, of association, of procession and of demonstration;”⁵⁷ however, the courts are not empowered to enforce the Chinese Constitution,⁵⁸ and the government has a long record of violating these rights.⁵⁹

Most of the media is public, but the government attempts to control both public and private media; this includes much outright censorship.⁶⁰ The distinction between public and private ownership is also diminishing because publicly owned media is becoming increasingly self-supporting due to advertising revenues.⁶¹ As a result, much of the media has become more independent in recent years and plays a careful game of balancing independence with wary compliance with government controls. China

57. XIANFA art. 35 (2004) (China).

58. See generally Surya Deva, *The Constitution of China: What Purpose Does It (Not) Serve?*, 2 JINDAL GLOBAL L. REV. 55, 67 (2011); *Freedom of the Press 2017: China Profile*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2017/china> (last visited Nov. 23, 2018) (Legal Environment subhead).

59. See generally *Freedom of the Press 2017: China Profile*, supra note 58; *World Report 2016: China*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2016/country-chapters/china-and-tibet> (last visited Nov. 23, 2018). For a recent and perhaps surprising example of suppression of free speech, see Javier C. Hernández, *Chinese Fight for Mao’s Ideals, to Chagrin of Communist Party*, N.Y. TIMES, Sept. 29, 2018, at A1 (reporting that Chinese police have suppressed a number of recent nonviolent protests based on the teachings of Mao and Marx by students and college graduates; the students have protested against issues such as unfair treatment of workers, and the Chinese police have arrested some of the protestors).

60. See, e.g., Alex W. Palmer, *The Case of the Missing Bookseller*, N.Y. TIMES MAG., Apr. 18, 2018, at 43 (describing PRC Police action that effectively drove Hong Kong publishers and booksellers out of business by arresting and extracting forced confessions for publishing in Hong Kong and selling books China had banned); Sui-Lee Wee & Li Yuan, *Fearing Stall, China Censors Gloomy Topics on Economy*, N.Y. TIMES, Sept. 29, 2018, at B1 (discussing governmental directives sent to journalists ordering them to “manage” the reporting of certain topics in order to avoid endorsing the view that the Chinese economy is slowing down or entering a difficult period; a second directive ordered news outlets to remove comments that “bad-mouth the Chinese economy”).

61. *The Chinese Media: More Autonomous and Diverse—Within Limits*, CIA, https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/the-chinese-media-more-autonomous-and-diverse-within-limits/copy_of_1.htm (last updated June 19, 2013).

famously monitors the Internet and employs firewalls and an army of people to remove offensive postings, but many Chinese are quite tech savvy and are able to work around at least some of the governmental controls.⁶² The result is that the media collectively provides a considerable, but spotty, flow of information to the citizenry about the government and the country; however, it seems reasonable to conclude that this flow is not as robust as in countries that have a stronger commitment to free speech.⁶³

As in the case of political parties, private, nonstate groups exist for many other types of activities. Various forms of civil society have multiplied substantially in China in the last 30 to 40 years as part of the shift toward the market and stronger engagement in the world community, a shift known in China as the Reform and Opening. But all forms of civil society in China remain subject to strong influence by the government.⁶⁴ Under the dynastic government that persisted in China for over 2,000 years and the early years of CCP rule, the government displayed a strong pattern of attempts to control or suppress private organizations.⁶⁵ Under the Reform and Opening, the Chinese government continued that pattern of suppression and control while promoting some kinds of nonprofits by providing them with direct support through subsidies and indirect support through tax deductions and government contracts.⁶⁶ The two-sided governmental policy enables Chinese nonprofits to function to some degree as agents carrying out government policy while still opposing or attempting to influence that policy. Similar to the question of media freedoms, the picture is not one of simple repression

62. See Reuters, *How Some of China's Plush Hotels Are Getting Around the "Great Firewall"*, FORTUNE (Aug. 1, 2017), <http://fortune.com/2017/08/01/china-hotels-great-firewall-vpn/>.

63. Anne S.Y. Cheung, *Public Opinion Supervision: A Case Study of Media Freedom in China*, 20 COLUM. J. ASIAN L. 357, 360 (2007) (describing the "delicate power game of public opinion supervision and the complex relationship between the Party and the Chinese media").

64. YU, *supra* note 7, at 197 ("[C]ivil society in China takes the form of 'government-led civil society' in which the majority of civil society groups lack the degree of independence of similar groups in western countries.").

65. Liu Peifeng, *Expansion of the Civil Right of Association, in EMERGING CIVIL SOCIETY IN CHINA, 1978–2008*, at 59, 61–62, 67–70 (Ming Wang ed., 2011).

66. *Id.* at 90–91; Ketty Loeb, *A Grim Outlook for China's Civil Society in the Wake of the 19th Party Congress*, HUFFPOST (Nov. 1, 2017), https://www.huffingtonpost.com/entry/a-grim-outlook-for-chinas-civil-society-in-the-wake_us_59f22600e4b06ae9067ab727 (providing a more recent, but similar, assessment that the CCP both tries to "control and develop China's civil society sector").

and control but more of a cat-and-mouse game between the government and civil society.⁶⁷

3. Concentration or Unity of Powers

In liberal democracies, the doctrine of separation of powers guarantees at least the independence of the courts and may also substantially impede the great concentrations of power that liberal democrats tend to fear as the chief obstacle to liberal democracy.⁶⁸ China officially rejects the doctrine of separation of powers in favor of the doctrine of unity of powers.⁶⁹ In theory, supreme political power resides in the top legislative body in the country, the NPC,⁷⁰ but that body is actually quite weak, meeting for only a few weeks per year and essentially rubber-stamping measures proposed by the CCP and the administrative bureaucracy.⁷¹ In fact, because of the way the CCP duplicates and is so thoroughly intertwined with all organs of government in China, the real power resides in the seven-person Standing Committee of the CCP's Politburo (or Political Bureau).⁷²

In order to understand the degree of power held by this body of seven persons at the top of the CCP, one must understand the CCP's system of

67. Liu, *supra* note 65, at 92–96 (noting, among other controls, the use of registration requirements which many organizations cannot meet and are therefore deemed illegal). *But see* TARU SALMENKARI, *CIVIL SOCIETY IN CHINA AND TAIWAN* 103–05 (2018) (conceding that a lack of registration makes a nongovernmental organization (NGO) illegal, but arguing that such status does not necessarily limit the organization's effectiveness which depends more on individual contacts with sympathetic bureaucrats; government tolerates many unregistered NGOs for long periods of time). Salmenkari does not dispute that the Chinese state seeks to control civil society; he merely suggests that the control is spotty at best. *Id.* at 102. In the interaction between state and NGOs, there is some room for private citizens to resist governmental policies, which Liu had suggested with the metaphor of a cat-and-mouse game. *Id.* Salmenkari concludes, “Instead of law, Confucian social control and Legalistic model punishments for propagating what is forbidden can explain state strategies toward associational society.” *Id.* at 105.

68. *See supra* Part II.A.

69. Associated Press, *China Condemns Western Democracy*, NBC NEWS (Mar. 9, 2009), www.nbcnews.com/id/29600839/ns/world/_news_asia_pacific/t/china-condemns-western-democracy/#.W5E_f-hKibg.

70. “All power in the People's Republic of China belongs to the people. The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power.” XIANFA art. 2 (2004) (China).

71. DUMBAUGH & MARTIN, *supra* note 6, at 9.

72. *See id.* at 4–5.

backstage governance. The Party controls all levels of government, military, courts, schools, think tanks, and even recognized religions through a system of Party committees within each work unit (*danwei*) and a Party Secretary, who is generally a leader within the organization at or near the same level as the governmental leader of the unit.⁷³ As private enterprises have developed, the Party has been securing these positions inside nominally private companies as well.⁷⁴ The Party thus forms a kind of shadow government with bodies inside virtually every organization in China.⁷⁵ This guiding power of the CCP is now formally recognized in the Party Hegemony Clause, which President Xi successfully had adopted in the March 2018 constitutional amendments.⁷⁶ But the amendments really just codify what has been the reality in China for a long time.

The Party itself is a formidable organization—with its own Constitution and system of Party disciplinary commissions—that is headed by the Central Discipline Inspection Commission and included about 89.95 million members in 2016⁷⁷ or about 6.4 percent of China’s overall population of 1.39 billion.⁷⁸ As the CCP’s top leaders, the Politburo’s Standing

73. *Id.* at 4, 15.

74. *See* MCGREGOR, *supra* note 5, at 32 (discussing the Party’s process of paying huge sums to those “who set up new party committees in private enterprises where none had existed before”).

75. *Id.* at 13; DUMBAUGH & MARTIN, *supra* note 6, at 4. As Dean Zhu explained:

At every administrative level in the [People’s Republic of China], the head of the administrative unit is not only a party member, but the number two leader (for example, the deputy party secretary) of the party organization at that level Party and governmental officials are interchangeable, for example, most governors eventually assume a position as provincial Party secretary, and many provincial Party secretaries have previously served as governors or other officials.

Zhu, *supra* note 34, at 538–39.

76. Changhao Wei, *Translation: 2018 Amendment to the P.R.C. Constitution*, NPC OBSERVER (Mar. 11, 2018), <https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/> (amending Article 1, Paragraph 2, of the Constitution to include the following: “The defining feature of socialism with Chinese characteristics is the leadership of the Communist Party of China.”).

77. *Statistics Within the Party Show that the Communist Party of China Has a Total of 89.447 Million Grassroots Party Organizations and 4.518 Million Party Organizations*, XINHUA NEWS AGENCY, http://www.xinhuanet.com/politics/2017-06/30/c_1121242479.htm (last updated June 30, 2017).

78. *China Population*, WORLDOMETERS, <https://www.worldometers.info/world-population/china-population/> (last visited Sept. 25, 2018) (stating China’s population as

Committee thus leads an organization that is larger than many medium-sized countries.⁷⁹ The Standing Committee previously consisted of nine persons, but in the process of purging it of rivals, Xi succeeded in reducing the number to seven.⁸⁰

The Politburo's Standing Committee is headed by the Secretary General of the CCP, and since the era of Mao Zedong, that person has also tended to serve simultaneously as the President of the country and the Chair of the Party's Central Military Commission, the body exercising command and control over the People's Liberation Army (PLA).⁸¹ Thus, there is a long tradition that the President unites party, military, and civilian government control in one person—in other words, control of all the significant sources of public power within the country. The current President, Xi Jinping, occupies these three positions.⁸²

Xi has further consolidated his control by ensuring the Politburo's Standing Committee, the only body that might be in a position to limit the President's power, is composed entirely of his loyalists.⁸³ On March 11, 2018, just before his reappointment for his second five-year term, Xi also succeeded in getting the NPC to eliminate the two-term limit that had been imposed on the office of President (and on the Vice President and all representatives to the NPC) precisely in order to prevent the President from amassing such power.⁸⁴ Perhaps he will not take advantage of the repeal of

of September 15, 2018, was over 1.4 billion people).

79. DUMBAUGH & MARTIN, *supra* note 6, at 4.

80. Jun Mai & Nectar Gan, *Will Xi Jinping Cut Seats at Politburo Top Table from Seven to Five?*, SOUTH CHINA MORNING POST (Dec. 19, 2016), <https://www.scmp.com/news/china/policies-politics/article/2050049/xi-jinpings-chance-cement-power-politburos-top-table>.

81. DUMBAUGH & MARTIN, *supra* note 6, at 2–3; *see also id.* at 10 (“While systems of power in China appear distinct, many in China’s central leadership wear multiple hats, holding positions concurrently in all three systems—the Party, the Government, and the Military.”).

82. *See* Mai & Gan, *supra* note 80.

83. Janis Mackey Frayer, *Analysis: Xi Jinping Exits Congress with Near-Absolute Authority*, NBC NEWS (Oct. 24, 2017), <https://www.nbcnews.com/new/china/analysis-xi-jinping-exits-congress-mear-absolute-authority-n814096>.

84. James Doubek, *China Removes Presidential Term Limits, Enabling Xi Jinping to Rule Indefinitely*, NPR (Mar. 11, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/11/592694991/china-removes-presidential-term-limits-enabling-xi-jinping-to-rule-indefinitely>; Wei, *supra* note 76 (indicating Article 45 of the March 2018 amendments to the Chinese Constitution amended Paragraph 3 of Article 79 of the Chinese Constitution). *See generally* Chris Buckley & Steven Lee Myers, *China's*

the term limits, but it seems unlikely that he would have gone to the trouble to eliminate them unless he intended to violate what had become a norm meant to prevent the rise of another absolute ruler like Mao Zedong.

President Xi succeeded in securing one other additional lever of power in the constitutional amendments the NPC adopted in March 2018.⁸⁵ A new set of supervisory commissions was established at all levels of government headed by a National Supervisory Commission.⁸⁶ The specific powers of the commissions are to be specified by statute, but it appears the commissions are generally intended to conduct investigations into suspected corruption, bribery, and other forms of abuse of public office.⁸⁷ The CCP has long had a similar office for maintaining discipline within the Party, but the new supervisory commissions apply to every public office in the country. How exactly they will interface with the courts, prosecutors (sometimes referred to as “procuratorial organs” in English), and police is not clear. New Article 127 of the Constitution says only that “[t]he supervision organs, in handling cases of illegal or criminal abuse of public office, shall mutually cooperate with and mutually restrict adjudicatory organs, procuratorial organs, and law enforcement departments.”⁸⁸ Whatever the relationship, it is clear that the new supervisory commissions could be used as a powerful tool to enable a leader in President Xi’s position to ensure that the government bureaucracy at all levels carries out his orders. The commission could also be used—especially if the courts do not become significantly more powerful than they are now—as the Silk Robe Guards of the Ming Dynasty or the Russian and Soviet institution of the *prokuratura* were used, to neutralize or eliminate political opponents.⁸⁹

Legislature Formally Ends Term Limits, Paving Way to Let Xi Rule for Life, N.Y. TIMES, Mar. 12, 2018, at A5 (indicating term limits are part of system of collective leadership and orderly transition of power set in place by Deng Xiaoping before he died in 1997).

85. See *Constitutional Amendment Adopted by NPC*, SHINE (Mar. 12, 2018), <https://www.shine.cn/news/nation/1803111536/>.

86. *Id.*; Wei, *supra* note 76 (indicating Article 52 of the March 2018 amendments to the Chinese Constitution added five new articles to Chapter III of the Chinese Constitution as a new Section 7, titled “The Supervision Commissions”).

87. *Constitutional Amendment Adopted by NPC, supra* note 85.

88. Wei, *supra* note 76.

89. For critical reaction to the proposal floated in 2017 to add these supervisory commissions, see Chris Buckley, *Risky Defense of Rule of Law in China*, N.Y. TIMES, Dec. 5, 2017, at A4; Chris Buckley & Keith Bradsher, *China Unveils Superagencies in Move to Shore Up Party Rule*, N.Y. TIMES, Mar. 14, 2018, at A8 (noting that the National Supervision Commission, just one of a series of superagencies, was created to strengthen central government’s power to take action against major problems and corruption in the

President Xi Jinping has thus inherited a system that concentrates power to an extraordinary degree in a handful of top leaders, especially due to the tradition of combining the offices of President, General Secretary of the CCP, and Chairman of the Central Military Commission in one person.⁹⁰ He has been able to add some additional degrees of concentration of power.⁹¹ In the process, he appears to have weakened or dismantled the main structural protections designed in the post-Mao era to foster a limited form of collective leadership.⁹² In the past, when the Standing Committee of the Politburo included representatives from the main factions of the CCP, contending factions could impose some degree of restraint on the top leader.⁹³ But President Xi has succeeded in purging committee membership of all who are not his loyalists, a process made easier by the reduction in the number of positions on the Standing Committee from nine to seven.⁹⁴ In a similar manner, the two-term limit on the office of President was meant to impose a clear temporal limit on that person's power, a limit which could promote some degree of alternation in power among the contending factions of the CCP.⁹⁵

The commitment to collective leadership was never deeply engraved into the formal structure of the country,⁹⁶ and now under Xi Jinping, China

case of this agency). See also RAY HUANG, 1587, A YEAR OF NO SIGNIFICANCE: THE MING DYNASTY IN DECLINE 24, 114–15 (1981) (mentioning the Silk Robe Guards, *jinyiwei*, which more literally means “Brocade Robe Guards”); John Reitz, *Progress in Building Institutions for the Rule of Law in Russia and Poland*, in DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE, *supra* note 4, at 144, 152–54 (indicating the Russian and Soviet *prokuratura* is basically a prosecutor or procuratorate office with expanded investigatory powers over all governmental affairs). The *prokuratura* was said to be “the eye[s and ears] of the Tsar.” W.E. BUTLER, SOVIET LAW 107 (2d ed. 1988).

90. DUMBAUGH & MARTIN, *supra* note 6, at 10–11.

91. Ashwin Kaja & Timothy P. Stratford, *China's 2017 Party Leadership Transition*, GLOBAL POL'Y WATCH (Apr. 24, 2017), <https://www.globalpolicywatch.com/2017/04/chinas-2017-party-leadership-transition/>.

92. See *id.*

93. See, e.g., DUMBAUGH & MARTIN, *supra* note 6, at 5 (arguing that during Hu Jintao's tenure as President, Xi Jinping and Li Keqiang—both sitting on the Standing Committee of the Politburo—were thought to be representatives of two different groups within the CCP: Xi represented the group favoring continued rapid economic development and Li represented the group favoring a balance between economic growth and improving the lot of the poor and disenfranchised).

94. See generally Kaja & Stratford, *supra* note 91.

95. See Doubek, *supra* note 84.

96. See generally DUMBAUGH & MARTIN, *supra* note 6. It remains to be seen

once again has a leader who may be in a position to wield the kind of unlimited personal power that Mao Zedong exercised.⁹⁷ Regardless of whether he exercises power in that manner, it is clear that the Chinese system does not reject greatly concentrated power.

4. *Law's Lack of Autonomy*

The Chinese Constitution says the People's Republic of China (PRC) is a country under the "rule of law."⁹⁸ It is true that since the end of the Cultural Revolution in 1976, at which time there were virtually no lawyers or courts in China, the country has built an impressive legal infrastructure with an elaborate court system and many law schools, law students, judges, and practicing lawyers.⁹⁹ But the rule of law clearly means something different in China than in liberal democracies because the PRC has never provided any structural protections for judicial independence.¹⁰⁰ Judges can be dismissed for decisions the top political leaders do not like, and they are so completely "party-ized" that dismissal is rarely necessary to ensure their fidelity to CCP policy.¹⁰¹

whether President Xi will honor another rule that was part of the package of Deng-era reforms intended to regularize succession and reduce the danger of succession power struggles and personal rule, namely, the rule of mandatory retirement at age 68 for members of the Politburo. *Id.* at 4.

97. See generally Ryan Manuel, *Commentary: Xi Jinping Unlimited Also Means Xi Jinping Fully Responsible for China's Outcomes*, CHANNEL NEWSASIA (Mar. 24, 2018), <https://www.channelnewsasia.com/news/commentary/china-removal-president-term-limits-xi-jingping-unlimited-10058726>.

98. The English translation of Article 5 of the current Constitution is usually given, in pertinent part, as, "The People's Republic of China practices ruling the country in accordance with the law . . ." This is the translation on the official website of the Supreme People's Court of the People's Republic of China. *Constitution of the People's Republic of China*, SUP. PEOPLE'S CT. CHINA, <http://en.chinacourt.org/public/detail.php?id=4446> (last visited Sept. 30, 2018) (providing the added language in question as the new first section to Article 5 by Amendment Three, approved by the NPC in 1999). The expression, *ruling the country in accordance with law* (*yi fa zhi guo*), is the standard translation for the rule of law.

99. See Jianli Song, *China's Judiciary: Current Issues*, 59 ME. L. REV. 141, 145–46 (2007).

100. See *id.* at 146.

101. Zhu, *supra* note 34, at 536 (defining "partyization," a term used not by the CCP but by its rival the Nationalist Party or Guomindang that eventually established the Republic of China on Taiwan, as meaning that the judiciary are all members of the ruling party and are aligned in all significant matters with the ruling party's policies).

It is no surprise that China has not made any moves to strengthen the independence of the judiciary.¹⁰² The liberal democratic form of the rule of law never flourishes where political power is highly concentrated.¹⁰³ Sooner or later judicial review of governmental action will become inconvenient for those in power. Realizing this point, leaders with highly concentrated power use that power to retain control of the courts as best they can.¹⁰⁴ However, in the absence of truly open elections, there is no compelling need for neutral decisionmakers to resolve disputes about the application of rules of fair play.

C. Differences in the Values Supporting the Two Models

The foregoing discussion highlights a stark contrast between the liberal and Chinese models of democracy. The liberal model of democracy manifests a thoroughgoing preference for competitive processes, starting with regular competitive elections at all levels of government and including all the elements that are designed to protect the openness and meaningfulness of such elections.¹⁰⁵ These elements include freedom of association that allows people to form political parties without state permission, freedom of expression that protects the open campaigning necessary to make a system of elections meaningfully competitive, and autonomy of the courts to provide a neutral forum for adjudication of disputes that makes sure all parties are playing by the rules.¹⁰⁶ By contrast, the Chinese model appears to favor concentration of power.¹⁰⁷

How can we make sense of the stark contrast between these two models? The differences suggest that the two models must be based on very

102. See *Judicial Independence in the PRC*, CONG.–EXECUTIVE COMMISSION ON CHINA, <https://www.cecc.gov/judicial-independence-in-the-prc> (last visited Sept. 10, 2018) (“[Chinese] judges are expected to adhere to the leadership of the Party and submit to the supervision of the people’s congresses and the procuratorate.”).

103. See Anton M, *The Future of Liberal Democracy*, J. POL. SCI. & PUB. AFF. (June 30, 2017), <https://www.omicsonline.org/open-access/the-future-of-liberal-democracy-2332-0761-1000267.php?aid=91263> (“A liberal democracy, by definition, implies that power is not concentrated.”).

104. See Li Hui & Megha Rajagopalan, *China Aims to Revamp Justice System but Communist Party to Retain Control*, REUTERS (June 1, 2014), <https://www.reuters.com/article/us-china-justice-revamp/china-aims-to-revamp-justice-system-but-communist-party-to-retain-control-idUSKBN0ER0RR20140616> (discussing how China is reforming its entire justice system but ensuring the reforms uphold Party leadership).

105. See *supra* Part II.A.

106. See *supra* Part II.A.

107. See *supra* Part II.B.

different values and different views of human nature. The key differences are apparent in how each model addresses the problem of large concentrations of power. I believe Western views about concentration of power are epitomized by Lord Acton's maxim: "Power tends to corrupt and absolute power corrupts absolutely."¹⁰⁸ The model of liberal democracy is built on a belief in the importance of regular, open, and fair competition because a person not facing competition has, in effect, a type of absolute power which will inevitably be abused for personal ends. While many Chinese people may accept that Lord Acton's maxim has a degree of wisdom, the Chinese model does not appear to be consistent with the maxim. Rather than seeking to avoid concentration of power, concentration of power is central to the Chinese model. I would argue that the Chinese concern for order leads them to concentrate power far more than liberal democrats would be comfortable doing, and instead of relying on competition, the Chinese appear to put their confidence in education and the force of character to produce leaders who can be trusted not to abuse the great power they are given. The Western view reveals a deeply pessimistic view of human nature as inevitably corrupt. The Chinese view that education can nurture the better side of human nature to limit self-dealing and prevent the risks Westerners associate with great concentrations of power is a more optimistic view.

Both the Western tradition that leads to liberal democracy and the Chinese tradition that leads to the current Chinese model have grown out of deep historical roots, but there is no time or space here to give a full accounting of the relevant histories. Indeed, I am not even sure how strong the effect today is of the values underlying the Confucian history to which I point on the Chinese side, though many Chinese with whom I speak affirm that they remain very strong. Are they so strong that they lead the Chinese people to think so differently from those of us who support liberal democracy? I don't know. I can only raise the question by sketching out how I see the differences, based upon my reading of Chinese and Western histories.

The dark view of human nature implicit in Lord Acton's maxim might seem to be derived from the Christian view of humans as infected by original

108. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 750 (Emily Morison Beck ed., 14th ed. 1968). The phrase was originally written in a letter from Lord Acton to a colleague, Bishop Mandell Creighton, on April 5, 1887. *Id.*

sin and therefore tending toward self-seeking behavior.¹⁰⁹ But it is not a view limited by religious tradition. In fact, it is also rooted in ancient Greek ideas about politics. The ancient Greek city-states experienced constant conflict between the wealthy few (the aristocrats or oligarchs) and the less wealthy commoners.¹¹⁰ In most city-states, the oligarchs tended to dominate, or power was seized by or voluntarily given at various times to one all-powerful person the Greeks called a *tyranos* or tyrant.¹¹¹ In a manner consistent with Lord Acton's maxim, the ruling oligarchs or tyrants tended to use their power to take advantage of the weaker citizens.¹¹² The Athenians recognized they had to give substantial power to their leaders, but from the mid-fifth century BCE through the fourth century BCE, they fashioned the first democracy to try to overcome the tendency of those with power to misuse it.¹¹³

If we fast forward to the drafting of the U.S. Constitution in the late eighteenth century, we can see the modern flowering of these ideas. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court explained why the separation of powers in the Constitution

109. See Rupert E. Davis, *Man, Sin and Grace*, in AN APPROACH TO CHRISTIAN DOCTRINE 51, 61 (Greville P. Lewis ed., 2017).

110. Robert W. Wallace, *Revolutions and a New Order in Solonian Athens and Archaic Greece*, in ORIGINS OF DEMOCRACY IN ANCIENT GREECE 49, 51–53 (Kurt A. Raaflaub, Josiah Ober & Robert W. Wallace eds., 2007).

111. *Id.*; Kurt A. Raaflaub & Robert W. Wallace, “*People’s Power*” and *Egalitarian Trends in Archaic Greece*, in ORIGINS OF DEMOCRACY IN ANCIENT GREECE, *supra* note 110, at 22, 22.

112. Raaflaub & Wallace, *supra* note 111, at 42 (archaic Greek tyrannies tended not to last long, in part because their sons tended to abuse their powers and suffer overthrow by the people).

113. Kurt A. Raaflaub, *Introduction* to ORIGINS OF DEMOCRACY IN ANCIENT GREECE, *supra* note 110, at 1, 3–6 (describing Athenian democracy and how “the people through assembly, council, and law courts controlled the entire political process”); Kurt A. Raaflaub, *The Breakthrough of Dēmokratia in Mid-Fifth-Century Athens*, in ORIGINS OF DEMOCRACY IN ANCIENT GREECE, *supra* note 110, at 105, 105–07 (arguing the real breakthrough in the development of Athenian democracy occurred in the period that starts with the reforms of Ephialtes of 462 and 461 BCE and culminates with Pericles’ citizenship law of 451 and 450).

is so important.¹¹⁴ Chief Justice John Roberts quoted the *Federalist Papers*,¹¹⁵ saying:

The Framers created a structure in which “[a] dependence on the people” would be the “primary control on the government.” That dependence is maintained, not just by “parchment barriers” [substantive rules], but by letting “[a]mbition . . . counteract ambition,” giving each branch “the necessary constitutional means, and personal motives, to resist encroachments of the others.”¹¹⁶

Self-policing through dependence on substantive rules (“parchment barriers”) arguably will not work without the structural guarantees of enforcement by parties with their own interests, enabling them to limit the interests of the one who wields power (“ambition . . . counteract[ing] ambition”).¹¹⁷ If there is no countervailing, checking power, then the one who wields power has absolute power. Substantive rules and moral admonishment may operate, for a time, to curb self-seeking behavior, but if you believe Lord Acton’s maxim, sooner or later, absolute power will corrupt. In this view, the most dependable restraint comes from competition offered by other persons pursuing their own conflicting interests.¹¹⁸ Education in moral and philosophical principles may be valuable but can never take the place of structural barriers created by competing interests.

We can see the belief in the power of competition to police our actions and force us to act in a way that is consonant with the common good outside of law as well. For example, it underlies our thinking about the market, as when we say the price determined by open competition in a free market is the most fair, best price or the “Invisible Hand” of the free market will produce an economic system in which goods and services are allocated to their highest uses.¹¹⁹

114. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010).

115. These 85 essays were originally published in New York newspapers in 1787 and 1788 to argue for ratification of the Constitution. They were published under the title, *The Federalist*, by the pseudonymous author, Publius. In fact, we know they were drafted principally by Alexander Hamilton and James Madison, although John Jay also contributed five essays. Clinton Rossiter, *Introduction to THE FEDERALIST PAPERS*, at viii–xii (Clinton Rossiter ed., 1961).

116. *Free Enter. Fund*, 561 U.S. at 501 (citations omitted).

117. See THE FEDERALIST NO. 48 (James Madison).

118. See *Free Enter. Fund*, 561 U.S. at 501.

119. See Andrew J. Coulson, *An “Invisible Hand” Up*, CATO INST. (Aug. 6, 2007),

Chinese history appears to teach a very different lesson. China has over 2,000 years of history in which political power has been strongly concentrated at the top levels of the central government in the nation's capital—similar to how power is concentrated in Beijing today.¹²⁰ For over 2,000 years, dynastic rule, from the Han Dynasty (starting about 206 BCE) through the fall of the Qing Dynasty in 1911, was exercised through a rather complex royal household located in the nation's capital.¹²¹ There was a large corps of administrative officers who came early in this history to be chosen primarily on the basis of national exams on the Confucian classics.¹²² One of these administrative officers represented the Emperor as the Governor or Prefect¹²³ of each of the many counties into which the Chinese empire was divided.¹²⁴ But government was concentrated at the imperial capital, and Prefects were sent out from the capital, typically to districts where they had no relatives, as a way of counteracting nepotism.¹²⁵ The most senior administrators at the national capital (the Grand Secretaries) not only advised the Emperor but also educated him or supervised his education in the Confucian classics from his early childhood.¹²⁶ Other groups within the royal household who sometimes wielded great influence included the various royal consorts—the official wife and the many concubines—as well as the eunuchs, who were thought to be indispensable for administering a large harem.¹²⁷ Who among these groups actually ran the country depended, no doubt, on the relative strength of character and ambition of all the

<https://www.cato.org/publications/commentary/invisible-hand>.

120. See generally E. A. Kracke, Jr., *The Chinese and the Art of Government*, in *THE LEGACY OF CHINA* 309, 309–10 (Raymond Dawson ed., 1964).

121. *Timeline of Chinese History and Dynasties*, ASIA FOR EDUCATORS, http://afe.easia.columbia.edu/timelines/china_timeline.htm (last visited Oct. 7, 2018).

122. See WM. THEODORE DE BARY, *THE GREAT CIVILIZED CONVERSATION: EDUCATION FOR A WORLD COMMUNITY* 229 (2013).

123. This officer is sometimes referred to as the *mandarin* in English. *Mandarin*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mandarin> (last visited Oct. 7, 2018).

124. R. Kent Guy, *Immortal Power and the Appointment of Provincial Governors in Ch'ing China, 1700–1900*, in *IMPERIAL RULERSHIP AND CULTURAL CHANGE IN TRADITIONAL CHINESE* 248, 248 (Frederick P. Brandauer & Chun-Chieh Huang eds., 2014).

125. *Id.* at 254.

126. See He Gan, *Chinese Education Tradition—The Imperial Examination System in Feudal China*, *J. MGMT. & SOC. SCI.*, Fall 2008, at 115, 120.

127. Ellen Soulliere, *Women in the Imperial Household at the Close of China's Ming Dynasty: 1573–1644*, *ASIA PAC. PERSP.*, Fall/Winter 2013–2014, at 33, 39.

contending parties, including the Emperor. Whoever was in control exercised that power in the name of the Emperor who nominally made all important decisions for the country, including the appointment and dismissal of all significant officials throughout the empire.¹²⁸ There were extensive reporting systems to inform the Emperor and his chief advisers about all significant events within the Chinese empire, and most important decisions were made or ratified in the nation's capital.¹²⁹ The history of Chinese cultural life also attests to the strong concentration of political power at the nation's capital.¹³⁰

Under the short lived Qin Dynasty, the philosophical school known as the Legalists or *Fa Jia* held sway, but after the overthrow of the Qin by the Han, Confucianism was adopted as the leading approach to governance.¹³¹ The Confucianists taught the primacy of moral and political philosophy.¹³² Instead of relying, as the Legalists had, on legal rules and harsh punishments

128. For a general discussion of the Ming Dynasty, see HUANG, *supra* note 89. For a broader overview of the history of Chinese government under the dynasties, see Kracke, Jr., *supra* note 120, at 309–39 (placing special emphasis on the function of the office of the Censorate, an office established to hear complaints about government, to criticize ministers and even the Emperor, and to whose power and vigilance, Kracke says, “The longevity of China’s political system must be credited in significant degree.”).

129. For the startlingly detailed reports that ceaselessly flowed to the nation’s capital under the Qing Dynasty in the 1720s and 1730s, see, e.g., JONATHAN D. SPENCE, *TREASON BY THE BOOK* 101–03 (2001).

130. Consider the example of the writer who is usually singled out as China’s greatest poet, Du Fu (712–770 CE), who had to leave the capital in the early 750s because of the chaotic political situation. *Du Fu*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Du_Fu (last visited Sept. 11, 2018) (discussing chaotic times in which Du Fu was forced to move by wars, famines, and the commandment of the Emperor). He slowly traveled around the country, making a large rough circle around the capital, which at that time was in the area of today’s Xi’an, constantly writing poetry about his longing to return to the capital. Duoyu Zhong & Tanya Harrison, *The Mid-Autumn Moon in Classic Chinese Poetry (Part 2)*, EPOCH TIMES (Sept. 6, 2014), https://www.theepochtimes.com/the-mid-autumn-moon-in-classic-chinese-poetry-part-2_939675.html (discussing Du Fu traveling and returning to the capital). In effect, for most of his career Du Fu acted like a magnet pointing at the capital, the magnetic North Pole, to which he was never able to return. *See generally* DU FU: A LIFE IN POETRY (David P. Young trans., 2008) (providing a translation of 170 poems selected and set in chronological order as well as surviving information about Du Fu permits).

131. Francis Fukuyama, *Reflections on Chinese Governance*, 1 J. CHINESE GOVERNANCE 379, 381–82 (2016).

132. David Wong, *Confucian Political Philosophy*, in THE OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY 771, 771 (George Klosko ed., 2011).

to control people's behavior, the Confucianists advocated relying on virtue (*de* 德) and ritual or rites (*li* 礼).¹³³ As Confucius is reputed to have said, "Lead [the people] by political maneuvers, restrain them with punishments, [and] the people will become cunning and shameless. [But] [l]ead them by virtue [*de*], restrain them with ritual [*li*], [and] they will develop a sense of shame and a sense of participation."¹³⁴ Although the root meaning of *li* is ritual or the rites, it is important to recognize what the Confucianists meant by *li* was political philosophy and political morality.¹³⁵ As Simon Leys wrote:

The central importance of *rites* [*li*] in the Confucian order may at first appear disconcerting to some Western readers (conjuring up in their minds quaint images of smiling Oriental gentlemen, bowing endlessly to each other), but the oddity is merely semantic; one needs only to substitute for the word "rites" concepts such as "*moeurs*," "civilized usages," "moral conventions," or even "common decency," and one immediately realizes that the Confucian values are remarkably close to the principles of political philosophy which the Western world inherited from the Enlightenment. Montesquieu in particular . . . developed notions which unwittingly recouped Confucius's views that a government of rites is to be preferred to a government of laws; Montesquieu considered that an increase in law-making activity was not a sign of civilization—it indicated on the contrary a breakdown of social morality, and his famous statement "*Quand un peuple a de bonne moeurs, les lois deviennent simples*" [when a people has good morals, the laws become simple] could have been lifted straight from the *Analects* [of Confucius].¹³⁶

133. Fukuyama, *supra* note 131, at 382–83.

134. JOHN W. HEAD & YANPING WANG, *LAW CODES IN DYNASTIC CHINA: A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING* 39 (2005) (quoting *THE ANALECTS OF CONFUCIUS* ch. 2, § 2.3 (Simon Leys transl., 1997)).

135. *THE WISDOM OF CONFUCIUS* 233 (Lin Yutang ed. & trans., 1938).

136. HEAD & WANG, *supra* note 134, at 39–40 (quoting Simon Leys, *Introduction to THE ANALECTS OF CONFUCIUS*, *supra* note 134, at xxv–xxvi); see also RAYMOND DAWSON, *CONFUCIUS* 27–29 (1981) (explaining that *li* means ritual or mores, but Confucius broadened the meaning of the term because he was always more interested in the fundamental principles and ethical meanings of the term and because he emphasized the importance of having the proper attitude when performing the rituals); *THE WISDOM OF CONFUCIUS*, *supra* note 135, at 13 (explaining that *li* means "good manners" in its most general sense, but the term amounts to the same thing as "government" because both terms have to do with "putting things or people in order"). Lin Yutang also writes that *li* includes the idea of a "*rationalized social order*." *Id.* at 225.

The Confucian view of human nature is an optimistic one, far more attractive than the view implicit in Lord Acton's maxim that mankind always tends toward corruption.¹³⁷ It is also a view that could be argued to justify concentration of power without the kind of institutional checks and balances that Lord Acton's maxim requires. If man's nature starts out good and that goodness can, by excellent moral education, be strengthened, then it is possible to think some people can in effect become truly moral leaders—the *junzi* or gentlemen of the Confucian tradition.¹³⁸ These are the people who are steeped in an understanding of *li* and to whom the government and administration of the state should be entrusted.¹³⁹ The traditional form of Chinese government was an effort to institute that idea.¹⁴⁰ From early childhood, the Emperor received an education in Confucian moral philosophy from the best Confucian scholars in the kingdom.¹⁴¹ He was even expected to give lectures to the court on Confucian philosophy to show his mastery of the subject.¹⁴² When he ascended the throne, his teachers became his top advisors or Grand Secretaries.¹⁴³ The officials through whom he administered and ruled the kingdom, from the Grand Secretaries down to the lowest level of the Emperor's officials, had to prove their mastery of an education in Confucian moral philosophy by passing the national examinations, which were focused on Confucian moral philosophy and the other literary works that the Confucian tradition had accepted in its canon of Chinese classics.¹⁴⁴

Thus, for over 2,000 years, China effectively tried to structure its government as that of a philosopher king, supported by a corps of philosopher administrators—all chosen by a national exam on the key writings in the Confucian canon, consisting mainly of Confucian moral philosophy, Chinese history, and poetry.¹⁴⁵ The Chinese public was asked to rest secure in the belief that these supreme rulers were ruling only for the good of the public. If it became clear that the Emperor was not ruling for the

137. See THE WISDOM OF CONFUCIUS, *supra* note 135, at 6.

138. See HEAD & WANG, *supra* note 134, at 38.

139. See *id.* at 40.

140. *Id.*

141. HUANG, *supra* note 89, at 43.

142. See *id.* at 42.

143. See *id.* at 110.

144. For a detailed description of how this system of national examinations operated during the Ming Dynasty, see *id.* at 33–34, 49–50.

145. See *id.* at 55; see also JACQUES, *supra* note 39, at 104.

good of the public and the advisors were not able to save the situation, the Emperor lost the “mandate of Heaven” and would lose his power and life through revolt or invasion.¹⁴⁶ In its fundamental structure, the modern government of the PRC seems largely to constitute a continuation of this pattern.¹⁴⁷ The Confucian classics may have been supplanted, to some extent, by Marxist, Maoist, and CCP writings, especially under the CCP’s strong criticism of Confucius as “feudalistic”; however, China has rediscovered Confucius, and his writings are studied much more now than they were in 1981 when Professor Dawson wrote “the Confucian tradition is still far from dead.”¹⁴⁸ In fact, scholars of China agree that one cannot understand modern China without understanding Confucian ideas.¹⁴⁹

Even though much was changed by the takeover of the CCP, there appear to be startling continuities in institutional structure between government in the dynastic periods and government in the People’s Republic, and perhaps these continuities are becoming more and more apparent. In fact, it may be difficult to see much communist ideology in current Chinese thinking ever since Deng Xiaoping allowed the rich to get richer during the Reform and Opening.¹⁵⁰ Instead, the modern ethos of the CCP seems to be closer to the traditional administrative governance under the dynasties, with perhaps the addition of a more technocratic emphasis.¹⁵¹

At least one more factor plays a weighty role in Chinese thinking about the problems of governance: the issue of maintaining order. The Chinese have always, it seems, been concerned to maintain order and harmony in society. One of the Confucian classics speaks about the “Grand Unity” in society in ways that sound like the communist vision of utopia.¹⁵²

146. See SOURCES OF CHINESE TRADITION 8–9 (Wm. Theodore de Bary et al. eds., 1960).

147. See JACQUES, *supra* note 39, at 573.

148. DAWSON, *supra* note 136, at 86–87; see also JACQUES, *supra* note 39, at 247, 272–76 (continuing relevance of Confucian ideas in modern China); *supra* note 66 (noting Salmenkari’s opinion that Confucian and legalistic thought explains state relations with civil society today).

149. See generally DAWSON, *supra* note 136; JACQUES, *supra* note 39.

150. See *Deng Xiaoping*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Deng-Xiaoping> (last updated Sept. 21, 2018).

151. See JACQUES, *supra* note 39, at 573.

152. SOURCES OF CHINESE TRADITION, *supra* note 146, at 191–92 (translating and commenting on a passage from the Confucian classic, the *Book of Rites*, describing the “Grand Unity” as a time when people lived in good faith and affection, took care of each other and each other’s parents and children, and “hated to see goods lying about in

Maintaining order is a first-order value, comparable to that of cultivating *li*. Indeed, the cultivation of *li* is largely done for the purpose of maintaining order and harmony in society.¹⁵³ Because Westerners tend to believe so strongly in the power of competition, we tend to discount the costs of an openly competitive system where power is diffused so that no one power center can dominate, but to the order-conscious East Asians, the costs of competition appear to loom large.¹⁵⁴ The fact is, competitive elections are not always fair. They can be nasty. Their results may be uncertain, or they may produce paralysis in the government if the results are too evenly split between sharply contending parties. A system of open competition can threaten to create disorder and may destroy social harmony.¹⁵⁵ Jacques suggests many Chinese may reject liberal democracy, at least for now, on the grounds that it will “embroil the country in considerable chaos and turmoil.”¹⁵⁶

Jacques also suggests that countries like China, which are currently in the middle of fostering the rapid development of industry, appreciate that “there is an inherent authoritarianism involved in an industrial revolution—the need to concentrate society’s resources on a single objective—which, judging by history, people are prepared to tolerate because their own lives are dominated by the exigencies of economic survival and the desire to escape from poverty.”¹⁵⁷ At any rate, since the Reform and Opening starting in the 1970s and ’80s, it seems clear that the CCP is staking the legitimacy of its claim to rule largely on its ability to deliver economic benefits.¹⁵⁸ So far, that bet seems to be paying off.¹⁵⁹ As Jacques suggests, “For developing countries in particular, the ability to deliver economic growth, maintain ethnic harmony . . . limit the amount of corruption, and sustain order and stability, are equally, if not rather more, important considerations than

waste, yet they did not hoard them for themselves,” and as a result, “all evil plotting was prevented and thieves and rebels did not arise, so that people could leave their outer gates unbolted”).

153. See *supra* note 136.

154. See JACQUES, *supra* note 39, at 264.

155. See *id.*

156. *Id.* at 269; see also MARK LEONARD, WHAT DOES CHINA THINK? 60–64 (2008) (describing the thought of Professor Pan Wei at Beijing University, spokesman for the view that democracy is too likely to result in chaos).

157. JACQUES, *supra* note 39, at 269.

158. See MCGREGOR, *supra* note 5, at 41–42.

159. *Id.* at 42.

democracy.”¹⁶⁰ It certainly appears likely that these instrumental concerns reinforce the power of the philosophical and ideological rationales for the Chinese model already discussed.

Of course, the repressive power of the state is also being deployed to protect CCP rule in China, and we would be naïve to ignore that fact.¹⁶¹ But, I agree with Martin Jacques. We should not assume either that CCP rule will soon decline and fall apart or that China is full of frustrated liberal democrats who would quickly carry out a Jasmine Revolution if given the chance.¹⁶² We cannot explain modern China solely on the basis of repression.¹⁶³ Comparative studies suggest “the Chinese are hugely more satisfied [with their state] than anyone else.”¹⁶⁴ Even if we find the Chinese people’s reasons for satisfaction baffling in light of the absence of basic political freedoms we take for granted, we have to try seriously to understand the intellectual and political attractions of the Chinese model.

Putting repression aside, Westerners may find it difficult to appreciate the force of these explanations for the attraction of the Chinese model. With Lord Acton’s maxim in mind and our preference for fair competition, it is easy for us to discount the rationalizations for self-serving arrogations of power. We know these kinds of rationalizations in the Western world. Every Western dictator seizing power justifies it with bad-faith, or even sometimes good-faith, appeals to the public good. How is the Chinese model different?

D. The Challenge the Chinese Model Presents to Liberal Democracy

The Chinese model is not only a strong rejection of the liberal democratic model but also, I believe as explained below, the strongest challenge the model of liberal democracy has seen so far.

The liberal democratic model has always faced challenges from various forms of authoritarian dictatorships or oligarchies in which small groups of

160. JACQUES, *supra* note 39, at 267.

161. See Charlie Campbell, *Five Ways China Has Become More Repressive Under President Xi Jinping*, TIME (Oct. 6, 2016), <http://time.com/4519160/china-xi-jinping-cecc-human-rights-rule-of-law/>.

162. See JACQUES, *supra* note 39, at 269.

163. See *id.*

164. *Id.* at 277–79 (citing Pew Research Center data from 2002 through 2010); see also SCHUBERT & AHLERS, *supra* note 37, at 158 (citing a number of previous empirical studies confirming “a relatively high level of trust by Chinese citizens in the institutions and political authorities of the central state”).

people use force to maintain their power to govern a country. Indeed, one could say that liberal democracy developed in the seventeenth, eighteenth, and nineteenth centuries as a challenge to illiberal forms of governance that claimed justification on such bases as the need for strong protection from enemies, the divine right of kings, and the supposed merits of aristocratic systems or absolute monarchies. In the twentieth and twenty-first centuries, fascism and communism challenged liberal democracy from both sides of the political spectrum with one-party rule.¹⁶⁵ How is the challenge posed by the Chinese model different from all the others?

I argue the Chinese model differs from other versions of authoritarian rule in three ways that make it more sustainable than most other versions of authoritarianism. First, the Chinese model openly rejects the chief elements of liberal democracy and therefore is able to operate without having to subvert the elements of liberal democracy the way most other authoritarian governments do.¹⁶⁶ By seeking to cast themselves as exemplars of the liberal democratic model, most authoritarian governments are forced to rig elections and suppress opposition parties.¹⁶⁷ In other words, they fake a liberal democracy but are in fact illiberal.¹⁶⁸ They cannot hide the contradictions likely to undermine the regime's legitimacy in the long run because official discourse presents liberal democracy as the ideal, but the state does not come close to living up to that ideal.¹⁶⁹ China, for the most part, avoids the outright contradiction by redefining democracy and insisting that theirs is a "democracy with Chinese characteristics," not a liberal democracy in the Western mode.¹⁷⁰

165. See MICHAEL BARONE, *OUR COUNTRY: THE SHAPING OF AMERICA FROM ROOSEVELT TO REAGAN* 155, 204 (1992).

166. See *supra* Part II.B.

167. Roger Cohen, Opinion, *How Democracy Became the Enemy*, N.Y. TIMES (Apr. 6, 2018), <https://www.nytimes.com/2018/04/06/opinion/sunday/orban-hungary-kaczynski-poland.html>.

168. *Id.*

169. *Id.* Roger Cohen describes the recipe or template in Hungary: "Neutralize an independent judiciary. Subjugate much of the media. Demonize migrants. Create loyal new elites through crony capitalism. . . . Claim that the 'people's will' overrides constitutional checks and balances." *Id.* Some autocrats, like Orban in Hungary, attack the liberal model as "non-democracy." *Id.* There is great frustration with the concept of judicial review of the constitutionality of statutes: "Legal impossibilism" Polish President Kaczynski has called it. *Id.* Open rejection of the entire package of liberal democracy is rare, but Orban in Hungary proudly claims that he stands for a government of illiberal democracy. *Id.*

170. See *supra* Part II.B.

Second, the Chinese model has a long history. The model is based, essentially, on some of the deepest values, the “Confucian values,”¹⁷¹ which have been transmitted as part of Chinese culture.¹⁷² The current model is a recognizable successor to the traditional forms of government in the dynastic periods and thus represents a long history, going back over 2,000 years.¹⁷³ Few communities outside of East Asia have a cultural history that can show such long continuity with virtually the same system of governance. The Confucian emphasis on education is not something recent dictators have dreamed up to justify their power; belief in the importance and power of education represents a value that has been strongly anchored in Chinese culture for at least 2,000 years.¹⁷⁴ As I indicated earlier, I am not sure whether these beliefs are still strong enough today to account for the apparent willingness of the Chinese to accept great concentration of power, but the Confucian values still appear to be quite strong.

Third, the CCP is a very large, highly structured party that is unusually well entrenched in power.¹⁷⁵ It has a membership much larger than the population of many countries.¹⁷⁶ It has its own Constitution and a hierarchical organization headed by the General Secretary and the six other members of the Standing Committee of the Politburo.¹⁷⁷ It has its own system of disciplinary bodies for party members that is entirely separate from the courts.¹⁷⁸ Through the system of partyization, it can exert leadership in virtually every single institution within the country—public or

171. It is probably unfair to blame Confucius for these ideas or to give him too much credit. Many of the values—such as the emphasis on family unity with a strict hierarchy that puts the father at the top and requires all other members to give strict obedience to him, as well as the tendency to analogize the state to the family with the Emperor in the position of the father—are values that may well have been present in East Asian cultures long before Confucius. Probably the fairest statement is that he gave brilliant expression to these ideas and may in that way have played a role in spreading the ideas and giving them the dominance they have had in East Asia since he lived.

172. See JACQUES, *supra* note 39, at 244–52.

173. *Id.* at 111–13.

174. See *id.* at 97–98.

175. See DUMBAUGH & MARTIN, *supra* note 6, at 3–4.

176. *Statistics Within the Party Show that the Communist Party of China Has a Total of 89.447 Million Grassroots Party Organizations and 4.518 Million Party Organizations*, *supra* note 77.

177. DUMBAUGH & MARTIN, *supra* note 6, at 5.

178. Shen Chuanliang, *The CCP’s Discipline Inspection System: An Efficient Tool Against Corruption*, in FIGHTING CORRUPTION: HOW THE CPC WORKS, *supra* note 39, at 203.

private.¹⁷⁹ Moreover, the membership has been opened up, so it is no longer based so strongly on ideology.¹⁸⁰ Successful businessmen, professors, and other highly educated and successful people have been allowed to join the Party; although many successful and well educated people have not joined, the CCP can now reasonably claim to be a party of many of the best people in China, including many of the people with strongest leadership potential.¹⁸¹ No other authoritarian party can claim such a strong and well-institutionalized organization.

These very reasons suggest China is unlikely to be successful in exporting its model outside East Asia, which is the only area that bears the stamp of Confucian culture. Of those East Asian countries, only North Korea and Vietnam have not already adopted or attempted to adopt liberal democracy.¹⁸² But even if the Chinese are unlikely to be successful in exporting their model, it is still a highly successful model in China today, and that means it is the model for roughly one-fifth of the world's population.¹⁸³ The debate created by the Chinese model may be primarily a debate about China, but that does not make it any less important.

I am not arguing that the factors supporting the Chinese model necessarily prevent China from ever adopting a liberal democracy. All societies have the capacity to change. After all, three other strongly Confucian countries¹⁸⁴ in East Asia have made substantial efforts to adopt liberal democracy: Japan, Taiwan, and South Korea. But Japan, Taiwan, and South Korea have all consciously chosen to westernize themselves.¹⁸⁵ This

179. See the description of CCP control *supra* Part II.B.3.

180. DUMBAUGH & MARTIN, *supra* note 6, at 5.

181. Zhu, *supra* note 34, at 553. Dean Zhu Suli says, “[T]he CCP has pursued becoming a governing party that represents the basic interests of *the greatest number of people* and that has daily strengthened its ability as a governing party.” *Id.* at 538.

182. *Top Five Non-Democratic Countries*, BORGAN PROJECT (Jan. 10, 2017), <https://borganproject.org/top-five-non-democratic-countries/>.

183. *Compare China Population*, *supra* note 78 (stating China's population as of September 15, 2018, was over 1.4 billion people), *with World Population*, WORLDOMETERS, <http://www.worldometers.info/world-population/> (last visited Nov. 5, 2018) (stating the world's population is well over 7.6 billion). China's population thus constitutes on the order of 18 percent of the world population, or very close to one fifth.

184. JACQUES, *supra* note 39, at 273; Mary Evelyn Tucker, *Confucianism and Ecology: Potential and Limits*, F. ON RELIGION & ECOLOGY YALE (Sept. 15, 2009), <http://fore.yale.edu/religion/confucianism/>.

185. Larry Diamond, Senior Advisor, International Forum for Democratic Studies, Stanford Univ., Keynote Speech at the International Conference on Democracy in East

Article argues China has not, at least with regard to political culture. While each of those other countries has maintained some aspects of the Chinese model—especially the dominance of the state and the administrative bureaucracy and the emphasis on education and social harmony¹⁸⁶—they have also adopted the main institutions of liberal democracy: contested national elections, legal protections for free speech and freedom of association, and courts with at least some degree of independence.¹⁸⁷ China could also change as these other countries have done. But if the foregoing analysis has any power to explain the persisting attraction of the Chinese model in China, it suggests China will not quickly or easily adopt liberal democracy. The potential for the Chinese model to persist in China makes it a major rival to liberal democracy—at least in China currently and possibly for a long time to come.

III. CHINA IS NOT SO DIFFERENT: AN EXPLORATION OF COMMON CONCERNS

Having stressed how different the Chinese model is from liberal democracy and consequently how different Chinese values must be to support that model, I would now like to change tack for a brief consideration of how similar we are. Indeed, we can learn much about our own situation by learning about the Chinese people's concerns about their model and comparing them to our concerns about our model. In turning the analysis in this direction, I am inspired by Reinhold Niebuhr. In the middle of the Cold War, he was able to write a clear-eyed analysis of how both U.S. and Soviet systems shared the same concerns and weaknesses with respect to some aspects, and with respect to other aspects, they displayed reciprocal strengths and weaknesses.¹⁸⁸ This ability to look for shared concerns, reciprocal strengths, and reciprocal weaknesses is an essential part of what I call "respect for the other." It is, I believe, an important part of good

Asia and Taiwan in Global Perspective: East Asia amid the Receding Tide of the Third Wave of Democracy (Aug. 24–25, 2011), in <http://www.asianbarometer.org/publications/9047d4415457a0784a8673ab30b47f17.pdf>; Rodger Baker & Zhixing Zhang, *East Asia: Where Eastern and Western Ambitions Meet*, FORBES (Sept. 13, 2016), <https://www.forbes.com/sites/stratfor/2016/09/13/east-asia-where-eastern-and-western-ambitions-meet/#470c046f6927>.

186. JACQUES, *supra* note 39, at 273.

187. Diamond, *supra* note 185, at 7.

188. See generally REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* (1952).

comparative study¹⁸⁹ and essential for avoiding a counterproductive clash of civilizations.¹⁹⁰ I make no attempt in this Part to be comprehensive. I just want to give some examples of important common concerns.

The first thing that needs to be said from this point of view is that not all Chinese people reject liberal democracy. I certainly have met colleagues in China who are knowledgeable about liberal democracy and earnestly desire that China move as soon as possible toward institutional features of liberal democracy, such as national competitive elections, judicial independence, and protections for freedom of speech and association necessary to prevent state or Party control of elections. I do not know how many people are in this camp in China, but given the large Chinese population, there are no doubt many. A probably much larger group is comprised of those who think liberal democracy ought to be the long-term goal for China, but the people in this group are satisfied to see incremental movement in that direction because they fear the chaos that might erupt in China if change comes too quickly.¹⁹¹ Liberal democrats can obviously find common ground with both of these groups.

But let us consider those who fully support the Chinese model as the best form of democracy with Chinese characteristics. Where do their concerns intersect with those of liberal democrats? We know the U.S. version of liberal democracy is not perfect. At the top of the list of problems are such concerns as the dangers posed by unrestrained populism, perennial

189. John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 634–35 (1998).

190. *See id.* at 635–36.

191. Professor Yu Keping is a spokesman for this point of view. He says, “Only [d]emocracy [c]an [f]ully [p]rotect and [g]uarantee [h]uman [r]ights,” and “[t]he democracy that Chinese people are striving for also features public elections, power supervision, and citizens’ participation. But the election, supervision, and participation systems will have to be branded with unique Chinese characteristics.” YU, *supra* note 7, at 11, 24. “But,” he writes, “even if [Chinese democracy] is completely one of ‘Chinese characteristics,’ democracy cannot be separated from elections and competition. Consultative democracy (his term for democracy in the current Chinese model) is of course very important, but consultation does not equate to the exclusion of elections.” *Id.* at 60. As a result, Yu is clear that the long-term goal is a form of democracy with electoral competition and the rule of law. It sounds very similar to liberal democracy. Nevertheless, Yu is cautious about the process. He favors incrementalism, using Deng Xiaoping’s famous phrase about “crossing the river by feeling the stones” because “everyone fears that advancing democracy will cause a loss of order, and will bring social unrest.” *Id.* at 63. Specifically, he calls for reform moving “[f]rom intra-party democracy to social democracy; from base-level democracy to upper-level democracy.” *Id.* at 59.

disputes over the role of judicial review, and the outsized role of money in elections.¹⁹² In one way or another, the Chinese model shows concern about most of these matters too. For present purposes, this Article discusses only three issues: the question of guiding democracy by limiting popular choice, the role of judicial review, and the problem of money and public power. The first two of these issues have to do with setting limits to democratic choice; the last is about corruption in China and about election financing in the United States. The comparison between China and the United States on these points is summarized in Table 2.

192. See generally YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* (2018). For a more in-depth discussion of these pressing problems, see Tom Ginsburg, *The Jurisprudence of Anti-Erosion*, 66 *DRAKE L. REV.* (forthcoming Fall 2018). Gerrymandering of electoral districts would also be high on my list, but that does not appear to be a problem for the Chinese.

TABLE 2: CONCERNS COMMON TO LIBERAL DEMOCRACY AND THE CHINESE MODEL

Issues	Liberal Democracy	Chinese Model
Guidance for Popular Choice (Excluding Judicial Review)	Weak guidance except for judicial review; Vulnerable to popular revolts and electoral turmoil; Danger of illiberal entrenchment.	Strong guidance by CPC; Little risk of popular revolts or electoral turmoil; Already has illiberal entrenchment.
Judicial Review as Form of Guidance	Provides strong guidance for democracy, though limited to constitutional matters. Dangers of politicization of courts and de-legitimation of courts in general. Risk that judicial review could become so pervasive that there is little room for democratic choice.	No judicial review, but strong guidance for popular opinion provided by strong powers of CCP. No danger of politicization of courts; courts already lack legitimacy. CCP power leaves little room for democratic choice.
Money and Political Power	Strong laws, courts, prosecutors, competitive political parties, and a free press may reasonably be thought to contain corruption. Campaign financing rules may in effect appear to condone the buying of influence.	Corruption (use of state office for personal gain) is huge problem; weak laws and courts cannot reasonably be thought to contain corruption. Some scandals concerning vote buying, but the problem does not loom large because so few elections are competitive.

A. Guiding Democracy Through Limits on Popular Choice

It has become clear over the last several years that a wave of populism is challenging established democratic parties and their governments throughout the world. A short list of such populist revolts would include the British vote for Brexit and the presidential elections of Viktor Orban in Hungary, Recep Tayyip Erdogan in Turkey, Donald Trump in the United

States, and Andrés Manuel López Obrador in Mexico.¹⁹³ There is, of course, nothing inherently bad about populist revolts. They shake up the status quo. Many arise out of profound disgust on the part of substantial sectors of the electorate with the failure of the party or parties previously in charge to deal with current problems or to curb corruption.¹⁹⁴ Under such circumstances, a populist revolt against the parties in power seems to be exactly what liberal democracy is designed to permit.

It is a problem, however, if populism takes an illiberal turn. If a leader arrives in office with a large popular vote, he or she is likely to interpret that vote as a mandate to push for major changes—especially if the leader’s party also received a resounding majority in legislative elections.¹⁹⁵ If the party’s victory in the legislature is strong enough, the winning party members may even be able to amend the Constitution. In view of their electoral victory and their own perception of the justice behind the causes for which they fight, they may, in good or bad faith, start to think it is important for them and their government to stay in office. The ability to pass the legislation they want, and even to amend the Constitution, is then a great temptation to change the statutory and constitutional rules to entrench their power.¹⁹⁶ Remember Lord Acton’s maxim.¹⁹⁷ Many of the recent populist movements

193. William A. Galston, *The Populist Challenge to Liberal Democracy*, J. DEMOCRACY, Apr. 2018, at 5–14; see also Pranab Bardhan, *Understanding Populist Challenges to the Liberal Order*, BOS. REV. (May 11, 2017), <http://bostonreview.net/class-inequality/pranab-bardhan-understanding-populist-challenges-liberal-order>; Tracy Wilkinson & Kate Linthicum, *With Mexico Presidential Election, Another Step in Global Populism—But This Time from the Left*, L.A. TIMES (July 2, 2018), <http://www.latimes.com/world/la-fg-mexico-global-populism-20180702-story.html#>.

194. See Robert W. Merry, *The Five Most Powerful Populist Uprisings in U.S. History*, AM. CONSERVATIVE (Apr. 15, 2017), <https://www.theamericanconservative.com/articles/the-five-most-powerful-populist-uprisings-in-u-s-history/>.

195. John T. S. Keeler, *Opening the Window for Reform: Mandates, Crises, and Extraordinary Policy-Making*, 25 COMP. POL. STUD. 433, 436–38 (1993). It is understandable that winning by a large margin may make elected leaders think that they have a special mandate to govern according to their policies, but it is dangerous for democratically elected leaders to make this claim no matter how slim their margin of victory.

196. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 125 (2018).

197. See *supra* note 108 and accompanying text.

that have been successful are accused of doing precisely that.¹⁹⁸ Viktor Orbán in particular has been outspoken in his advocacy of illiberal democracy.¹⁹⁹ By adroit parliamentary moves and profiting from Hungary's disproportionate election law, Orbán's party, Fidesz, was able to convert the 53 percent it won in the party-list vote on election day into somewhat more than a two-thirds majority in Parliament, enough to pass amendments to the Constitution, and it proceeded to change the Constitution to entrench its power for the foreseeable future.²⁰⁰ In the United States, both major parties have been accused of gerrymandering electoral districts in states in which they hold legislative majorities so they can minimize the chances of the other major party winning more legislative seats.²⁰¹

Even without the dangers of illiberal entrenchment of political power, populist revolts may be extraordinarily ill-advised or destabilizing.²⁰² There may be wisdom in crowds, or there may be mass hysteria. Rapid change may be mostly for the good when it has the effect of stamping out corruption. But even if the policies are ultimately for the good, the rate of change may create negative destabilization, especially when the populist revolt is driven, as most of the recent ones seem to be, by tribalism, chauvinism, and the desire to exclude certain groups of peoples who are defined as alien and a hostile threat.²⁰³ Populist revolts fueled by a sense of fear and anger about the way people fleeing the war-torn and economically ruined areas of the Middle East and Africa have been coming in large numbers to even small countries in Europe are certainly understandable.²⁰⁴ But the danger is that demagogic leaders may manipulate overwrought fears of outsiders not only to exclude immigrants in desperate need of help but also to limit or eliminate

198. Huq & Ginsburg, *supra* note 196, at 119.

199. Galston, *supra* note 193, at 11; *see also* Bardhan, *supra* note 193; *supra* note 169.

200. Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)*, 23 J. TRANSNAT'L L. & CONTEMP. PROBS. 51, 60–61 (2014).

201. MOUNK, *supra* note 192, at 116, 118.

202. *See* WHEN MEN REVOLT AND WHY 224 (James Chowning Davies ed., Transaction Publishers 1997).

203. *See generally* David Brooks, *Our Elites Still Don't Get It*, N.Y. TIMES, Apr. 17, 2017, at A25 (interpreting Trump's appeal as a resort to tribalism); Patrick Kingsley, *Taking an Ax to Democracy as Europe Fidgets*, N.Y. TIMES, Feb. 11, 2015, at A1 (pointing out that Hungarian support for Orbán's illiberal government is largely based on concern to exclude migrants).

204. *See Europe Migrant Crisis: EU Faces 'Populist Uprising'*, BBC NEWS (May 16, 2016), <https://www.bbc.com/news/world-europe-36304721>.

the rights of certain minority groups within the country who are similarly viewed as outsiders; leaders may also use these fears to entrench their power and the power of their party to restrict or eliminate democratic competition and even to engage in corrupt self-dealing.²⁰⁵

Beyond the question of the wisdom of popular positions produced by transient concerns or chauvinistic passions, there is the broader question of the dangers of social and political turmoil and division occasioned by hard competition—legal and ethical or not—among contending political parties and groups. As already mentioned, electoral campaigns result in messy accusations and counteraccusations.²⁰⁶ Partisans on all sides are all too easily drawn to hardball tactics that sometimes cross ethical and legal lines. In some countries elections have resulted in outbreaks of major incidents of violence.²⁰⁷

For all these reasons, even supporters of democracy recognize that it may be necessary to provide some mechanisms for guiding democracy in certain situations. From its start, U.S. democracy has demonstrated a particular concern about this problem. Indeed, even though Americans like to think of themselves as champions of a broad and deep system of democracy, the United States has always hedged democracy with various limitations. My point here is not to criticize these limitations but rather to explain that even in the United States, with its strong support for a broad-based democracy, some brakes are built into the democratic structure to keep the country from careening out of control.

For example, the process for making legislation is quite cumbersome in the United States. To become a statute, a bill has to be passed by both houses of Congress and signed by the President or passed by a supermajority over his veto.²⁰⁸ The Bicameralism and Presentment Clauses of the Constitution slow down the process of legislation and are meant to ensure legislation cannot become law without the opportunity for extensive

205. See Andrea Mammone, *Trump and the Demagogues of Modern Nationalism*, HUFFPOST (May 16, 2016, 10:54 AM), https://www.huffingtonpost.com/andrea-mammone/trmp-in-the-west_b_9991262.html; see also Kingsley, *supra* note 203 (describing the way Orban entrenched his power in Hungary and enriched his inner circle of friends).

206. See *supra* notes 154–56 and accompanying text.

207. See generally Sarah Birch & David Muchlinski, *The Dataset of Countries at Risk of Electoral Violence*, TERRORISM & POL. VIOLENCE (Sept. 26, 2017), <https://doi.org/10.1080/09546553.2017.1364636>.

208. U.S. CONST. art. I, § 7, cl. 2.

legislative debate.²⁰⁹ In the British parliamentary system, the requirement for three readings of a bill before passage serves the same purpose.²¹⁰ The U.S. Founding Fathers were quite concerned that partisan passion might lead to poor legislation.²¹¹ In addition, by requiring the President's signature on a bill, the Presentment Clause was meant to ensure that before a bill becomes law it has very strong support.²¹² It either has to have the support of a majority in both houses of Congress and the one official who is elected by the whole country (and therefore is less likely to represent the narrow interests of any one region), or it has to be supported by a supermajority in both houses of Congress.²¹³

The Electoral College is even more clearly aimed at counteracting the dangers of excessive populism. The original idea allowed voters to choose their Electoral College representatives from those wise citizens nominated by the party. For purposes of the popular election of the electors, they would indicate how they intended to vote, but they were to be free to exercise their judgment when actually voting in the Electoral College.²¹⁴ Today there is a debate about whether this institution is a good idea, but the original idea was clearly rooted in a distrust of popular democracy and a desire to provide a mechanism for the guidance of popular choice.²¹⁵

209. The purposes for the Presentment and Bicameralism Clauses are set out in Chief Justice Warren Burger's opinion for the Court in *INS v. Chadha*, 462 U.S. 919 (1983).

210. *How Does a Bill Become a Law?*, PARLIAMENT.UK, <https://www.parliament.uk/about/how/laws/passage-bill> (last visited Sept. 13, 2018) (illustrating the process in the United Kingdom).

211. *Chadha*, 462 U.S. at 947–48.

212. *Id.* at 948.

213. *Id.*

214. See generally GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* 98–113 (2011) (outlining the origins of the Electoral College). For the Founding Fathers, the Electoral College design served a number of different ends, but one of the principal reasons advanced against popular elections was the concern that the average voters would not be able to make as reasoned and informed choices as a group of intermediaries. Both at and after the Constitutional Convention, the Electoral College was rationalized in part as a way to provide some intermediaries in the election of the President—either the electors themselves or state legislators, whom some of the Founders expected to control the appointment of electors. *Id.* at 101–05 (citing among other sources Joseph Story's *Commentaries on the Constitution* and Supreme Court decisions from the nineteenth and twentieth centuries).

215. See, e.g., *id.* at 111 (today “there is no justification at all for either electors or state legislatures to exercise discretion in selecting the president . . .”).

Out of a similar distrust of popular elections, federal Senators were not originally elected by popular vote. Until the Seventeenth Amendment went into effect in 1913, they were elected by state legislatures.²¹⁶ This was a striking restriction of the franchise for a federal office: “By 1825 every state but Rhode Island, Virginia, and Louisiana had achieved universal white manhood suffrage.”²¹⁷ Yet for almost another 100 years, one house of Congress (half of its institutional capacity) was elected by state legislators, a highly restricted electorate. The original rationale for this restrictive arrangement was a belief that the people’s selection of Senators should be done indirectly by a group the Founders thought would be especially trustworthy and wise guardians of the people’s liberties. But by the second half of the nineteenth century, the populace had become much more distrustful of state legislatures, and the direct election of Senators provided by the Seventeenth Amendment was part of the process by which state legislatures saw their power limited.²¹⁸

In comparison to these relatively restricted and, in part, out-moded mechanisms in the United States for guiding or limiting democracy, the Chinese model uses a much more extreme mechanism for guiding the popular will. Even though there are no open competitive elections at important levels like the NPC, there are mechanisms that involve the formulation and expression of the popular will. There is legislative voting and the possibility of deliberation in legislative bodies at all levels within the country, subject to the rule of democratic centralism, which itself gives the top leaders considerable power to guide the decision-making at lower levels of the party.²¹⁹ The CCP itself provides the main guidance for political decisions at all levels, and as of March 2018, this guidance function is

216. Prior to the Seventeenth Amendment, the Constitution itself provided that the state legislatures were to choose the Senators. U.S. CONST. art. I, § 3, cl. 1. The Seventeenth Amendment provided for direct election. *Id.* amend. XVII. *See generally* William Murphy, *Direct Election of United States Senators and the Transformation of American Politics* (2006) (unpublished Ph.D. dissertation, Syracuse University) (on file with author).

217. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 294 (1991).

218. Murphy, *supra* note 216, at 28–75.

219. Douglas Howland, *Democratic Centralism in Revolutionary China: Tensions Within a People’s Democratic Dictatorship*, 7 *OPEN J. PHIL.* 448, 451 (2017), https://file.scirp.org/pdf/OJPP_2017101216273319.pdf (summarizing the CCP’s policy as individuals following party organization and lower ranks following higher ranking government officials).

enshrined in the Chinese Constitution.²²⁰ The presence of CCP political action committees within virtually every work unit in society and the fact that a CCP member is either the leader or second in command in virtually all work units give it unparalleled power to guide the formulation of the popular opinion, which in any event does not actually control the determination of policy and law because those processes are all controlled by the Party.²²¹

As mentioned, one argument for maintaining this system and not moving closer to liberal democracy is the fear that competitive elections will produce turmoil.²²² The Chinese actually have considerable experience with how manifestations of popular opinion can threaten order.²²³ There are in fact many mass incidents of disorder in China today.²²⁴ Reports of these incidents, in which private citizens criticize government officials for corruption or confront the government with demands for justice, are often reported in the media and even more frequently spread throughout the Internet.²²⁵ Professor Yu Keping describes the way that populism can result in disorder:

[T]he politics of public opinion also gives rise to another outcome, i.e. the rise of populism. Under certain circumstances, the surging public opinion can also become a sort of “soft violence” and distort normal social and political life. Especially on the internet, some parochial and irrational opinions are engendering “internet violence”, overwhelming the rational voices of the society, interfering in the independent judicial process and routinized decision making process as well as trampling citizens’ (officials included) legal rights. Some evil-minded businessmen

220. See *supra* note 76 and accompanying text (discussing adoption of constitutional amendment recognizing the leadership of the CCP); see also *China Focus: Xi’s Thought Enshrined in CPC Constitution*, XINHUA (Oct. 24, 2017), http://www.xinhuanet.com/english/2017-10/24/c_136702802.htm.

221. See *supra* notes 73–75 and accompanying text.

222. See *supra* notes 154–56 and accompanying text.

223. See, e.g., Simon Denyer, *In China, Communist Party Takes Unprecedented Step: It Is Listening*, WASH. POST (Aug. 2, 2013), https://www.washingtonpost.com/world/in-china-government-mines-public-opinion/2013/08/02/33358026-f2b5-11e2-ae43-b31dc363c3bf_story.html (discussing the Party’s challenges in trying to control the Internet).

224. Tyler Headley & Cole Tanigawa-Lau, *Measuring Chinese Discontent*, FOREIGN AFF. (Mar. 10, 2016), <https://www.foreignaffairs.com/articles/china/2016-03-10/measuring-chinese-discontent>.

225. YU, *supra* note 7, at 29.

and politicians even hired tremendous number[s] of people to fabricate “public opinion” on the internet in order to achieve their personal interests.²²⁶

We can thus see that the concerns in China and the West about Populism are not so different, even with regard to the possible misuse of the Internet. We both search for mechanisms to temper or filter popular opinion to ensure wise decision-making by the government. The examples I have given so far show that the liberal democratic model involves quite limited methods of guiding or restricting popular political choice, especially as compared to Party-control in China, but we now need to consider a much more significant form of guidance in liberal democracies—the institution of judicial review.

B. *Judicial Review*

The most important restriction on democracy in the liberal democratic model is judicial review of the constitutionality of legislation. This restriction was pioneered by the United States, but it has now spread to become a major feature of most liberal democracies.²²⁷ Judicial review for constitutionality is both a widely admired and problematic institution, and it is still very much restricted, at least in form, in a number of Western liberal democracies.²²⁸ Judicial review of legislation for constitutionality is clearly a form of elite guidance of democracy in which a relatively small number of judges set limits for what the two political branches—the Legislature and the Executive—can do. Generally, in the liberal democratic model, it is fair to say that doctrines

226. *Id.*

227. MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 149, 185–89 (Paul J. Kollmer & Joanne M. Olson eds., 1989) (documenting the worldwide spread of judicial review after World War II and concluding that judicial review “operates principally in states with democratic philosophies”); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *AM. J. COMP. L.* 707, 711–16 (2001) (discussing the spread of judicial review around the world, primarily in connection with democratization).

228. *See* CAPPELLETTI, *supra* note 227, at 134 (limited use made of power of judicial review in Norway, Denmark, and Sweden), 145 (even more limited use in Japan). Restrictions in form are especially strong among some of the Commonwealth countries. *See generally* Gardbaum, *supra* note 227. British and New Zealand forms authorize courts to opine that a statute violates the statutory bill of rights but do not give them the power to provide the remedy of invalidating the statute or refuse to apply it if it cannot be interpreted to be consistent with bill of rights. *Id.* at 728–29, 737–38. However, the restrictions in form do not necessarily imply a restriction in effect. Gardbaum argues that the restricted Commonwealth forms are quite effective. *Id.* at 744.

of judicial review (as reflected both in actual court cases decided by judges and in arguments among the legal elite and popular media about what the constitution requires or forbids) furnish the principal way in which popular democratic choice is guided.

But judicial invalidation of legislation adopted by a duly elected legislative majority and executive in accordance with legally required procedures is in tension with the fundamental democratic tenet that elections give the party or parties in the majority the chance to make new legislation and policy.²²⁹ With respect to the constitutional issues at bar in a given case, the judges, not the representatives or political leaders, determine what law the legislature may or may not make. This result is thus, in a sense, the diametric opposite of Party control in China, so we can appreciate why China has rejected this kind of judicial review.²³⁰ But we should also appreciate the ways in which the institution of judicial review is not so different from party control.

If judicial review expanded to cover virtually all issues that could come before the legislature, judicial review would look very similar to CCP control in China in that a small number of judges in the Supreme Court would determine all the most important political issues in the country. I am not arguing that judicial review has reached that point in the United States or in other liberal democracies, but I do insist that we consider the potential for judicial review to expand. Many constitutional doctrines, like equal protection of the laws and due process, are potentially expansive ideas. My argument is merely that we should recognize that our commitment to judicial review springs from the same basic impulse to guide and set limits to political choice that we see in the Party-led state in China. We may hope that it is different in degree, but, at least with respect to the basic question of whether to limit popular political choice, I do not think we can say that is different in kind.

C. Money and Public Power

The Chinese problem with money and public power generally goes by the name of corruption: the misuse of public power to expropriate state assets; bribery; illegally profiting from public contracts or other state

229. John Reitz, *Constitutionalism and the Rule of Law: Theoretical Perspectives* [hereinafter Reitz, *Constitutionalism and the Rule of Law*], in DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE, *supra* note 4, at 111, 128–30.

230. See *supra* note 58 and accompanying text.

connections; or permitting close family members, friends, or persons to engage in such behavior.²³¹ It is often said that corruption is China's number one problem today.²³² Chinese people, at all levels, appear to be aware of the problem of corruption, and it is openly discussed by the Party and by the public.²³³ Top leaders have repeatedly declared their intention to crackdown on corruption.²³⁴

Corruption is a problem in all societies, including the liberal democratic states of the West, and it is inherently difficult to measure because it seeks to be undetected. But corruption is probably not thought of as the number one problem in liberal democratic states because of the competitive nature of those nations' political and social systems. That competitive nature results in numerous control mechanisms that may be assumed to keep the problem under control. These control mechanisms include political opponents who seek to make misuse of office an election issue; the free press and other media who consider their role to include serving as watchdogs with regard to public malfeasance and who are incentivized to publish material about official abuse of power because those kinds of stories provide them with income by attracting subscribers or advertisers; prosecutors who are incentivized to prosecute cases against corrupt politicians and officials; and even business competitors who may bring legal claims if corruption gives a competitor an unfair advantage.

Supporters of liberal democracy seem to be satisfied with this kind of system of ambition checking ambition. Perhaps we in the United States are able to sleep at night untroubled by the knowledge that there are always some people seeking to take unfair advantage of public power because we assume that the worst will be held in check by these various competitive processes. We are further assured by the thought that we have a good set of laws requiring disclosure of conflicts of interest by people holding public office and a relatively well-developed set of laws governing procurement at both the federal and state levels. We are comforted by the thought that these various laws will be enforced in courts that are relatively honest, fair, and neutral. The Chinese have some similar laws, but they may not be as persuaded that they will be enforced because their prosecutorial and court

231. See YU, *supra* note 7, at 45.

232. *Id.*

233. *Id.*

234. See, e.g., Lu Yi, *Power Must Be 'Caged' by the System*, in FIGHTING CORRUPTION: HOW THE CPC WORKS, *supra* note 39, at 143, 203.

systems are dominated by the Party and, in many cases, by the very officials whose actions might be challenged.

But we, in the United States, face a related problem that the Chinese do not generally face—the problem of campaign finance.²³⁵ Election campaigns, especially for national offices, are generally quite expensive and seem to be getting more expensive.²³⁶ Even very wealthy people may consider themselves obliged to ask for financial support for their campaign expenses. This constant need for campaign funds means special interest groups that have money are thus given an extraordinarily powerful way to get influence in the legislature and the administrative bureaucracy.²³⁷ Our state and federal capitals are full of lobbyists representing various business and ideological groups.²³⁸ Many of these lobbyists make contributions to the campaign funds of those Representatives and Senators who have indicated their support for the positions favored by the lobbyists and the groups they represent.²³⁹ Lobbyists parcel their support out over time so they can reward Representatives and Senators who vote the way the special interest wants, but if a congressperson votes against their interests, they can cut that congressperson off.²⁴⁰ There is considerable debate among political scientists

235. See generally NATHANIEL PERSILY, BENJAMIN L. GINSBERG & ROBERT F. BAUER, BIPARTISAN POL'Y CTR., CAMPAIGN FINANCE IN THE UNITED STATES: ASSESSING AN ERA OF FUNDAMENTAL CHANGE 11 (2018), <https://bipartisanpolicy.org/wp-content/uploads/2018/01/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf> (discussing the general fear of corruption in elections and citizens' desire for reform). Without regular, popular, and competitive elections outside of the villages, Chinese have less reason to worry about election irregularities. *But see supra* note 39 (discussing the vote buying scandal in Hunan provincial congressional elections).

236. *Cost of Election*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/cost.php> (last visited Sept. 28, 2018).

237. See, e.g., Chris Micheli & Tom Nussbaum, *Influencing Lawmakers: A Primer on Special Interests' Muscle*, CAPITOL WKLY. (Mar. 12, 2015), <http://capitolweekly.net/special-interests-lobby-legislature-influence/> (discussing the power of special interests in California executive and legislative branches).

238. See Charlotte Hill, *America's Lobbying System Is Broken*, HUFFPOST (June 7, 2017), https://www.huffingtonpost.com/entry/americas-lobbying-system-is-broken_us_5938a0cfe4b014ae8c69dd90.

239. John Craig & David Madland, *How Campaign Contributions and Lobbying Can Lead to Inefficient Economic Policy*, CTR. FOR AM. PROGRESS (May 2, 2014), <https://www.americanprogress.org/issues/economy/reports/2014/05/02/88917/how-campaign-contributions-and-lobbying-can-lead-to-inefficient-economic-policy/>.

240. See Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J. L. & ECON. 345, 350 (2002) (describing the method of influence).

about whether this lobbying behavior actually buys interest or just rewards the interest of sympathetic legislators, but the public is deeply concerned that the system of campaign contributions has become an effective and completely legal system for buying votes.²⁴¹ The only way to avoid the power of the special interest lobbyists is for candidates to have so much money of their own that they can self-fund their campaigns or depend solely on small donations from individual people—each of whose contributions are small enough that they have no leverage over the candidate’s votes in Congress.²⁴² But few members of Congress have been able get into office and stay there without access to some special interest money.²⁴³

The problem of campaign financing may be a narrower form of the general problem that China has with official corruption, but the U.S. problem goes to the heart of the liberal democratic model, which depends so heavily on the assumption of fair electoral competition.²⁴⁴ Elections cannot be truly open and fair if only candidates captured by special interests have any chance of winning. As a consequence, the interests of the poor, who cannot afford to buy influence, and of the general public, who are difficult to organize because of the diffuseness of their interests, are not likely to be as well represented in government. To the extent this is true, the legitimacy of liberal democracy would appear to be compromised.

One Chinese response to the problem of corruption has involved a call for greater moral, ethical, and ideological education.²⁴⁵ The reliance on

241. MOUNK, *supra* note 192, at 86; PERSILY, GINSBERG & BAUER, *supra* note 235, at 11–12 (indicating a large percentage of Americans believe that money has too much influence in American politics); Stratmann, *supra* note 240, at 345–47, 368 (documenting the debate and concluding that the author’s study of voting and contribution patterns with respect to financial services legislation supports the hypothesis that “interest groups ‘buy’ legislators’ votes with PAC contributions”).

242. Jessica Yarvin, *The Rise of the Anti-PAC Democrat*, PBS NEWS HOUR (Apr. 5, 2018), <https://www.pbs.org/newshour/politics/the-rise-of-the-anti-pac-democrat>.

243. *See id.* (discussing the recent trend among Democrats to refuse contributions from political action committees and the risk of forgoing such contributions).

244. *See supra* note 9 and accompanying text; *see also* John D. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, 68 J. POL. 911, 920 (2006) (concluding that, despite studies casting doubt on whether representatives are influenced by policy preferences of the majority of constituents, evidence from more competitive districts tends to show greater responsiveness).

245. *See* Macabe Keliher & Hsinchao Wu, *How to Discipline 90 Million People*, ATLANTIC (Apr. 7, 2015), <https://www.theatlantic.com/international/archive/2015/04/xi-jinping-china-corruption-political-culture/389787/>. President Xi Jinping’s efforts to reform the Chinese political culture have included exhortations based on Confucius and

education and ideology certainly fits China's Confucian heritage, but China has also sought to rely on vigorous prosecution and the use of the disciplinary system within the CCP.²⁴⁶ Under President Xi, China has just adopted new state offices empowered to investigate all suspected cases of corruption.²⁴⁷

But the problems of corruption also seem to have driven China to try to take advantage of the power of competition at the heart of the liberal democratic model. As Xi Jinping said in 2013 at a plenary session of the CCP's Central Commission for Discipline Inspection (CCDI) in his capacity as General Secretary, "We must enhance checks and supervision over the exercise of power, make sure that power is 'caged' by the system, and form a punishment mechanism to deter corruption, a warning mechanism to prevent corruption and a guarantee mechanism to curb corruption."²⁴⁸ As Professor Lu Yi explains, the notion of "caging" power is based on Lord Acton's maxim: "History at all times and in all countries has proved again and again that once power is not subject to checks and balances, corruption will follow. Only when power is caged by the system, can it be exercised appropriately and free from abuse."²⁴⁹ As a result, President Xi's campaign

other early Chinese Confucian philosophers. *Id.* In addition, President Xi Jinping, in his capacity as General Secretary of the Party, is reported to have made the following statement to the first group study session of the Politburo of the 18th CCP Central Committee on November 17, 2012, urging a redoubled effort to instill Communist principles in Party members as the first line of defense against the temptations of self-dealing:

It has always been the foundation for the lifeline and pursuit of all Communists to have full confidence in ideals and firm faith in communism. Belief in Marxism and faith in socialism and communism are the political soul of Communists, enabling them to withstand all tests. Put figuratively, the ideals and convictions of Communists are the marrow of their faith. Having no or weak ideals or convictions, they would be deprived of their marrow and suffer from a "lack of backbone." This has been proved true by the cases of some Party members and officials who acted improperly due to lack of ideals and confused faith.

Li Qinggang, *Commitment to Improving Party Conduct, Upholding Integrity and Combatting Corruption*, in *FIGHTING CORRUPTION: HOW THE CPC WORKS*, *supra* note 39, at 1, 32–33 (quoting President Xi).

246. See Li, *supra* note 245, at 1, 32–33; Keliher & Wu, *supra* note 245.

247. See *supra* text accompanying notes 85–89 (noting the new system of supervisory commissions added by constitutional amendment in March of 2018).

248. Li, *supra* note 245, at 35.

249. Lu, *supra* note 234, at 146. In another passage, Professor Lu endorses the logic of Lord Acton's maxim in these words:

against corruption includes the proliferation of inspection bodies to make government officials at most levels aware that their actions are being monitored and official abuse of power will be detected.²⁵⁰

It seems Lord Acton's maxim speaks to people everywhere. The problem for China is that Lord Acton's maxim suggests that fully effective competitive monitoring—a system of ambition countering ambition—cannot be combined completely with the Chinese model. Extensive monitoring by public and private groups, combined with vigorous prosecution of wrongdoing, may be effective against corruption at the lower and middle levels of the Party.²⁵¹ But what about the top level, especially the very top level of the seven members of the CCP's Standing Committee of the Politburo? If the trend at the very top toward collective government continues, it is possible that the limited separation of powers created by collective government at the level of the Politburo's Standing Committee would be enough to keep everyone honest. But if the trend toward concentration of power under personalistic rule continues, then the logic of Lord Acton's maxim is that sooner or later, the supreme leader who has absolute power will succumb to the temptation of corruption. Moreover, in a system in which ultimate power is so strongly concentrated in one person, it seems likely that the lower levels of officialdom will feel so limited by the supreme leader's unlimited power that they will not be able to function with sufficient independence to serve as effective monitors of other officials.

IV. CONCLUSION: WELCOMING DIALOGUE WITH CHINA

Despite the prominent challenge posed by the Chinese model of governance to the consensus that has developed around the ideals of Western liberal democracy, this is a time of great promise. For the first time in world history, the Western and Eastern debates about governance can be

Corruption of an official is caused by both his greed and the deficiency of external oversight. Greed is a part of human nature. Once a man of power is not effectively supervised, the greedy nature surfaces. Therefore the reason for corruption is simple: Power is excessively concentrated, while checks and oversight are deficient.

Id. at 163.

250. *See id.* at 203.

251. *See* YU, *supra* note 7, at 60 (arguing for control of the lower level of government first because that is the level that affects the Chinese people directly and in which they have the least confidence).

brought together in mutual dialogue open to the wider public, not just to a small coterie of Eastern and Western scholars whose specialized knowledge previously enabled them to bridge the divide between these two culture spheres. The Chinese challenge to liberal democracy has long been there; it has simply not been appreciated in the West—and maybe not in the East either. Now there is such a mushrooming of literature in the West about China, and in China about the West, that we can appreciate the deep roots of both traditions, as well as their contradictions and commonalities.²⁵² This literature opens up the opportunity for a much fuller discussion. At the same time, there is much more travel between the East and West, so many people are familiar with at least some of the great differences and similarities between China and the lands of liberal democracy. China can learn from us, and we can learn from China more effectively than at any time before.

Columbia University Professor Theodore de Bary was one of those specialists who devoted his life to the translation, study, and teaching of the main texts of Chinese civilization.²⁵³ As he said in a book published toward the end of his life:

For centuries a conversation has been going on in both Asia and the West about the values that could sustain a human community, but there has been only limited exchange *between* the two conversations. Today, the challenges of the contemporary world are such that the civilizing process can only be sustained through an education that includes (at least in part) sharing in the traditional curricula developed on both sides, based on classics now recognized as not only enduring but world class.²⁵⁴

As de Bary argued, we must welcome this opportunity for the wider dialogue between the East and West. The preceding Part shows that although China and the West have very different ideas about governance, many of our concerns and ideas are the same or similar. No tradition has all

252. See, e.g., Eric Fish, *Has China Discovered a Better Political System than Democracy?*, ATLANTIC (Oct. 28, 2015), <https://www.theatlantic.com/international/archive/2015/10/china-politics-communism-democracy/412663/> (reviewing debates among Western academics about the merits of the Chinese model); David Runciman, *China's Challenge to Democracy*, WALL ST. J. (Apr. 18 2018), <https://www.wsj.com/articles/chinas-challenge-to-democracy-1524756755>.

253. Douglas Martin, *Wm. Theodore de Bary, Renowned Columbia Sinologist, Dies at 97*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/world/asia/wm-de-bary-dead-columbia-university-sinologist.html>.

254. DE BARY, *supra* note 122, at ix.

the answers. The Western tradition of liberal democracy is severely tested by the problems of today's world. To learn how best to respond to these problems, we need to consider what mankind has learned about governance in the Chinese tradition, as well as in the Western tradition.