

The Rule Of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The “Three Represents”), Socialist Rule Of Law, and Modern Chinese Constitutionalism

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Academic, political, and civil society elites have developed a distinct pattern of argumentation and analysis when discussing the rule of law in China. The discussion usually proceeds along the following lines.²

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China has sought to conform its institutions to the norms developed in the West. Thus, China has created State institutions as those organs of government where the will of the people as a whole can be represented.³ It has separated from these representative organs of state power the institutions of the Chinese Communist Party (CCP).⁴ That separation confirms the Western intuition that the CCP should be no more than a political faction (like the American Republican Party or the U.K. Labour Party). At best, the CCP can represent the will, however powerful, of a single political party, albeit one with current constitutional status. As such, the CCP must give way to a superior institution, the state, through which the will of all of the political community can be most equitably expressed.

To this end, the typical analysis posits, as a positive development, the recent efforts by the Chinese to separate politics from institution. The Chinese Constitution of 1982⁵ has, as a formal matter, embraced the idea of the rule of law in its procedural aspects, that is, by constructing an

² Presented in summary form here, the argument is elaborated in more detail in Section I *infra*.

³ The powers of all state organs are specified in the Constitution of the People's Republic of China (Zhonghua Renmin Gonghuguo xian fa). XIAN FA (1982 as amended) (P.R.C.), *available translated in* <http://english.people.com.cn/constitution/constitution.html> (last visited December 11, 2006). "The National People's Congress is the highest organ of state power." *Id.* at art. 57; China.org.cn, Structure of the State: The Organ of State Power, http://www.china.org.cn/english/features/state_structure/64411.htm. The supreme administrative organ of the state is the State Council. *See* XIAN FA art. 85 (1982) (P.R.C.); Legal Position, Function and Rights of the State Council, http://www.china.org.cn/english/features/state_structure/65051.htm. (last visited Sept. 12, 2006)

⁴ The Chinese Communist Party is the party in power in China:

The CPC is a unified entity organized according to its program, constitution and the principle of democratic centralism. The Constitution of the Communist Party of China stipulates that any Chinese worker, farmer, member of the armed forces, intellectual and any advanced element of other social strata who has reached the age of 18 and who accepts the program and constitution of the CPC and is willing to join and work in one of the Party organizations, carry out the Party decisions and pay membership dues regularly may apply for membership in the CPC.

China.org.cn, Structure of the State, The Party in Power, http://www.china.org.cn/english/features/state_structure/64404.htm (last visited Dec. 11, 2006). According to a P.R.C. State website, "[a]s of June 2002, the CPC had a total membership of 66.355 million belonging to about 3.5 million grassroots organizations." China.org.cn, The Central Organizations of the CCP, http://www.china.org.cn/english/features/state_structure/64573.htm (last visited Nov. 24, 2006). A sense of the relationship between the "party in power" and the "supreme organ of state power" can be gleaned by a review of the depiction of the leadership in China on an official website maintained by the government. *See* China.org.cn, CPC Leaders, <http://www.china.org.cn/english/features/leadership/86673.htm> (last visited Nov. 24, 2006).

⁵ XIAN FA (1982) (P.R.C.).

autonomous legal order.⁶ The Preamble declares that the Constitution “is the fundamental law of the state and has supreme legal authority.”⁷ Article 5, as amended in 1999, emphasizes that “[t]he People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law.”⁸ The Chinese Constitution thus necessarily focuses, as it must, almost exclusively on institutions.

Yet the standard analysis finds these changes inadequate. It finds the rush toward Western forms of governance an empty gesture with little real effect on governance when judged by a Western governance ideal. The Chinese Constitution has avoided any attempt to embrace rule of law in the substantive aspect, even as a formal matter within the black letter of the Constitution itself. To the extent that reference is made to ideology—in the form of Marxist/Leninist, Mao Zedong, and Deng Xiao Ping thought, and after 2004, to the “important theory of Three Represents”⁹—those have little merit. These references are reminiscent of Western analysis of the “bad old days” of the Cultural Revolution¹⁰ and suggest little more than mere ideology. None can implicate substantial rule-of-law issues in the substantive or procedural aspects. Moreover, even the formal compliance with process rule-of-law aspects hides the reality of deficiencies in the implementation of these safeguards.

The focus of this standard model of Chinese rule of law is the political state, including its formal institutions. Chinese efforts, like those of other nations, are usually measured against the State in its idealized form, which is usually conceived as the ultimate legal personality, formally manifested through its constitution, lawmaking authority, and an institutionalized

⁶ See Bo Li, *What is Rule of Law?*, 1(5) PERSPECTIVES (Apr. 30, 2000).

The core of "rule of law" is an autonomous legal order. Under rule of law, the authority of law does not depend so much on law's instrumental capabilities, but on its degree of autonomy, that is, the degree to which law is distinct and separate from other normative structures such as politics and religion.

Id.

⁷ XIAN FA (1982) (P.R.C.) (“This Constitution affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state in legal form; it is the fundamental law of the state and has supreme legal authority.”).

⁸ XIAN FA art. 5 (1982) (P.R.C) (1999 amendment).

⁹ See discussion *infra* at Section II; note 110.

¹⁰ See, e.g., MICHAEL SCHOENHALS, CHINA'S CULTURAL REVOLUTION, 1966-1969: NOT A DINNER PARTY (1996); MARC BLECHER, CHINA AGAINST THE TIDES: RESTRUCTURING THROUGH REVOLUTION, RADICALISM AND REFORM 77-86 (1997). For a useful bibliography of English-language work, see TONY H. CHANG, CHINA DURING THE CULTURAL REVOLUTION, 1966-1976: A SELECTED BIBLIOGRAPHY OF ENGLISH LANGUAGE (1999).

government.¹¹ The formal institutional elements of the state apparatus are also evaluated in terms of core Western liberal notions.¹² The foundation of this system posits that an institutionalized element of a particular sort comprises the supreme elements of the hierarchy of political authority in every political community.¹³ Since the state is the supreme autonomous entity within a political territory, it is assumed to hold all formal political authority derived from the people. This authority is expressed through its governmental institutions, throughout which its supreme political power is distributed.¹⁴ Constitutionalism, in this view, tends to focus on substance rather than form; the existence of a document labeled “constitution” does not

¹¹ See, e.g., Herman Schwartz, *Building Blocks for a Constitution*, 9(1) ISSUES OF DEMOCRACY: CONSTITUTIONALISM AND EMERGING DEMOCRACIES (Mar. 2004), <http://usinfo.state.gov/journals/itdhr/0304/ijde/schwartz.htm>.

¹² For a sense of these notions, see Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001); Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 39, 40-41 (Michel Rosenfeld, ed., 1994) (identifying modern constitutionalism as based on popular sovereignty, on the supremacy of law and the primacy of constitutional law within a political community, on governance through democratic principles (including limited government, checks and balances, civilian control of the military, judicial control of the police power, and an independent judiciary), on respect for international norms of human rights, on self-determination, and on the creation of an independent power to compel compliance with these principles).

¹³ See, e.g., Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891, 1897-99 (1998). This Western liberal conceptual system has recently been challenged in the Muslim world, where it finds expression in an inversion of sorts. In Iran, Afghanistan, and Iraq, for example, constitutional systems purporting to be grounded in rule-of-law notions subordinate all state power to the theology, morals, ethics, and rule systems of a particular normative religious establishment and its governance apparatus. See Larry Catá Backer, Speech at Temple University Beasley School of Law, Institute for International Law and Policy, *God Over Constitution: Religiously Based Foundations and Modern Constitution-Making in the 21st Century*, (Oct. 29, 2005) (transcript on file with author) to be published – MISS. C. L. REV. – (forthcoming 2007). On the nature of Iranian theocracy, see FOROUGH JAHANBAKSH, *ISLAM, DEMOCRACY AND RELIGIOUS MODERNISM IN IRAN, 1953-2000: FROM BAZARGAN TO SOROUGH* (2001).

¹⁴ In the United States, see *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176 (1803),

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. . . . This original and supreme will organizes the government, and assigns to different departments, their respective powers.

Id.

necessarily make for a legitimate constitution, conceived, thus, as a bundle of legitimating norms.¹⁵

All other entities—political, social, economic, or religious—are viewed under this analysis as having a derivative, semi-autonomous, and partial character at best. They are either creatures of the state, like corporations¹⁶ (including religious corporations),¹⁷ or illegitimate sources of sovereign political power within a state because they are not the legitimate expression of direct sovereign political power by all of the people, a power manifested only through the apparatus of the state in which the people authoritatively constitute themselves. As such, these non-governmental entities are derivative because they derive their power, principally manifested in their juridical personality and legal authority, from the instrumentalities of the state. These state instrumentalities, in the aggregate, constitute the government, or the apparatus of the state. These non-governmental entities are also semi-autonomous because their authority cannot be exercised independent of the authority from which they derive their status. Having derived their authority from the state, their autonomy is thus dependent on the state.¹⁸ Lastly, these entities are partial entities because their power, authority, independence, and characteristics can approach, but never equal or exceed, the totality of political power that is vested in the state. The state alone is said to be able to exercise the totality of this political power; it is a power that cannot be alienated.

The normative basis for evaluating the proper conduct of a state, as the locus of political power within a defined territory, is to some large extent bundled up in the complex of concepts understood as the “rule of law:”

What we in the West have come to call the “rule of law” has always been a multi-edged sword. It is most commonly deployed to guard against arbitrary use of state power by

¹⁵ For a good discussion of the legitimacy of constitutions, see Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 3-25 (Douglas Greenberg et al. eds., 1993). For a critique of this perspective on grounds of (an unfair) privileging of current Western notions, see, for example, EDWARD MCWHINNEY, *CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE* (1981).

¹⁶ See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819). (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.”).

¹⁷ See, e.g., *Late Corporation of the Church of Jesus Christ of Latter Day Saints v. U.S.*, 136 U.S. 1 (1890).

¹⁸ Globalization has begun to weaken this aspect of the relationship of state authority to the entities that operate within its territory. For a discussion, see Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 *TULSA L.J.* 4 (forthcoming 2006).

people with access to that power. It is in this sense that the rule of law is perhaps best understood. In its basic political sense it encompasses ideals such as free and fair elections, protected through the instrumentalities of the state, principally the independent judiciary, against abuse by individuals. The rule of law can also be used to protect a polity against its own excesses.¹⁹

As a consequence, conformity of the state to accepted standards of rule-of-law notions tends to be measured only against the performance of the state—principally through its government. The core of this measure is focused on the regularization of rulemaking. Power must be exercised only through regular processes of rule making.²⁰ Rules must apply fairly to all, and the mechanisms for their enactment and enforcement must also be applied fairly and equally to all.²¹ No individual is above fairly enacted rules, nor is any individual delegated the power to make rules other than as part of systems for rulemaking that are representative and not inherently arbitrary.²²

¹⁹ Larry Catá Backer, *Using Law Against Itself: Bush v. Gore Applied in the Courts*, 55 RUTGERS L. REV. 1109, 1110-11 (2003). I noted there the growing influence of these notions outside the West, citing to the work of Anwar Ibrahim, an influential Malay politician:

For Ibrahim, the rule of law encapsulates three principles. . . The first is the predominance of regular law so that the government has no arbitrary authority over the citizen. . . Secondly, all citizens are equally subject to the ordinary law administered by the ordinary courts. . . And thirdly, perhaps the most significant, the citizen's personal freedoms are formulated and protected by the ordinary law, rather than by abstract constitutional declarations.

Id. at 1109 n.1 (quoting ANWAR IBRAHIM, *THE ASIAN RENAISSANCE* 63 (1996)).

²⁰ On process and rule of law, see RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 257-301 (1998).

²¹ "The idea of the rule of law is also inextricably linked with certain basic institutional arrangements. The fundamental notion of equality, which lies close to the heart of our convictions about justice and fairness, demands an equal voice for all adult citizens in the legislative process." T.R.S. ALLAN, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* 22 (1993). See also THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1997).

²² See, e.g., Spencer Zifac, *Globalizing the Rule of Law: Rethinking Values and Reforming Institutions*, in *GLOBALISATION AND THE RULE OF LAW* 32-65 (Spencer Zifcak ed., 2005). For the earlier English version of the concept, see, e.g., A.V. DICEY, *INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION* 107-23 (Liberty Classics 1982) (1885). There is thus something of a consensus in the West with respect to the necessary connection between the form in which rulemaking power is manifested and political legitimacy. Rawls nicely summarized the consensus:

Political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human

Additionally, all laws must respect certain boundaries of state power.²³ Law must not be used for bad ends.²⁴ While this moral or ethical component can take many forms, it generally encompasses behavioral norms now commonly understood to comprise an international system of human rights.²⁵

However astute and laudable the aims and analysis, this Article suggests that the standard Chinese rule-of-law analysis model is only partially correct. The problem of rule of law in China is indeed the problem of the Chinese Communist Party. But having gotten that part right, the standard analysis tends to get everything else wrong. By treating rule-of-law principles as substantially more than a set of framework principles, and by measuring compliance with this framework against a rigid set of secondary assumptions about the *way* a state expresses rule for law compliance, that analysis invariably misses the critical element in the development of rule-of-law culture in China. That critical element is the CCP.²⁶

reason. This is the liberal principle of legitimacy. It is a further desideratum that all legislative questions that concern or border on those essentials, or are highly divisive, should also be settled, so far as possible, by guidelines and values that can be similarly endorsed.

JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 41 (2001).

²³ This is understood by some as the idea of “thick” rule of law. See Randall Peerenboom, *Varieties Of Rule Of Law: An Introduction And Provisional Conclusion*, in THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 1, 4 (Randall Peerenboom, ed., 2004) (thick rule of law theories “incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, ‘Asian developmental state’ or other varieties of capitalism), forms of government (democratic, socialist, soft authoritarian) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, ‘Asian values,’ etc.”)). In German theory it encompasses the idea of the *sozialstaat*. “The Sozialstaat stands for social justice and obligates the government to provide for the basic needs of all Germans.” DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 35 (1997).

²⁴ This idea derived great impetus from the insight that a state could conform to a process-centered rule of law to commit bad deeds against the powerless. In the Twentieth Century, the great models of rule of law states gone awry were Germany between 1943 and 1945 and Japan prior to 1945. See MERYLL DEAN, JAPANESE LEGAL SYSTEM: TEXT AND MATERIALS 76-79 (1997); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 30-41 (1997).

²⁵ Some constitutions recognize this component explicitly. See, e.g., S. AFR. CONST. 1996, art. 39(1), *available at* <http://www.polity.org.za/html/govdocs/constitution/saconst02.html?rebookmark=1#7> (“When interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”).

²⁶ Janet Ainsworth puts it nicely when she suggests that “By suppressing the significance of, on the one hand, China’s Chineseness or, on the other hand, its Marxism, . . . these perspectives seriously distort our understanding of Chinese constitutional discursive practice.” Janet E. Ainsworth, *Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China*, 43 HASTINGS L.J. 273, 298 (1992).

This Article argues that no rule-of-law analysis of China is useful or complete unless it seriously considers two structural aspects of Chinese governance usually ignored in the standard analysis. The first is the Chinese Communist Party and its formal role in political governance. The second is the generation-old and still incomplete work of the CCP to develop a sound ideological basis for rule through law in China. This Article suggests that the Chinese State Government is a combination of both the formal apparatus of government—its institutions and governing instruments—and the CCP as the party in power. The question of rule of law in Chinese terms, then, must center on the CCP, and not on the state apparatus, which the CCP controls.

For rule of law to find its way into the formal structures of Chinese government, the CCP must first internalize a rule-of-law culture into its own governance, and then into its relationship with the formal political institutions of the State through which it governs. Only when this is realized will it be possible to extend rule-of-law norms to the governing institutions of the State. China is now poised to institutionalize a rule-of-law culture throughout its systems of governance. Its latest ideological campaigns suggest the possibility of a normative foundation for that institutionalization.²⁷ These ideological campaigns have been criticized as little more than the continuance of the politics of the Cultural Revolution in a more systematic form.²⁸ But like the ideological writings represented by the Federalist Papers and certain other privileged writings of a few members of the post-colonial elite,²⁹ which served as the foundation of the ideology of American politico-legal thought, current Chinese ideological campaigns may

²⁷ See discussion *infra* at Section III.A.

²⁸ See SUJIAN GUO, POST-MAO CHINA: FROM TOTALITARIANISM TO AUTHORITARIANISM? (2000) (including a comparison of pre- and post-Mao campaigns). Guo's observations in this regard are worth highlighting:

Political campaign, a defining feature of a communist totalitarian regime, has always been employed by the Chinese communist regime as a means to achieve their goals. Although the post-Mao regime has repeatedly proclaimed their intention not to wage any further political campaigns in the course of constructing a socialist society, political campaigns have been widely and recurrently used in post-Mao China to educate the public about the official norms and current political line of the post-Mao regime.

Id. at 43-44.

²⁹ Foremost among this elite were Alexander Hamilton, James Madison, and Thomas Jefferson. The writings of these men tend to dominate the analysis of the American courts, especially in the context of interpretation of the U.S. Constitution. For important examples in modern times, see, e.g., *Reynolds v. U.S.*, 98 U.S. 145 (1878) (Madison and Jefferson); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (Hamilton); *Printz v. U.S.*, 521 U.S. 117 (1997) (Hamilton, Madison). These are the fruits of a successful ideological campaign slowly transformed over the course of centuries into a basis for authoritative constitutional interpretation.

have staying power. Certainly, it is far too early to tell. Yet, like the Federalist Papers and other influential early American ideological writings, these ideological campaigns contain what can be understood as strong organizing principles, reflecting deeply held views of the Chinese elite. At their core, these organizing principles recognize the foundational nature of some form of collectivity as basic to Chinese society and political culture. These principles also serve as recognition of the role of the Chinese Communist Party as the state actor with the mandate to serve that collectivity, at least while it stays true to those principles, over which it has no power to change. This, of course, is the essential feature of rule-of-law societies—power administered by mandate against which power may be assessed and legitimacy measured. It is in this sense that the CCP's most recent ideological campaigns contain the kernel of a set of norms for regulating a sound relationship between state and individual—norms open-ended enough to serve the construction of substantive rule-of-law values.

This Article begins with a critique of the usual approach to Chinese rule-of-law analysis. It then exposes and examines the great deficiencies of that traditional analysis: its failure to appropriately focus on the CCP, and its unwillingness to take the CCP's ideological campaigns seriously. This Article then elaborates a sounder basis for rule-of-law analysis—one based on an understanding of the critical place of the CCP in Chinese political governance, on the role that the CCP's ideological pronouncements play in the construction of a normative framework of Chinese political governance, and on the need to focus first on the institutionalization of the rule of law within a CCP that plays a more transparent role within the Chinese state. That institutionalization must be both internal—directed within the CCP itself—and external—directed to the role of the CCP as a key element of the formal state apparatus. For this purpose, this Article considers the role of the recent Sange Daibiao or “Three Represents” campaign³⁰ and its incorporation in both the constitution of the CCP³¹ and of the Chinese State.³² The Article then suggests ways in which Chinese constitutional theory has begun to formally elaborate the Three Represents and, and the utility of, ideological campaigns for this purpose. To that end, this Article briefly examines a series of recent elaborations of Sange Daibiao, focusing on the “Two Musts” campaign, the “Fish-Water” connection, the *ba rong ba chi* (Eight Honors Eight Disgraces) campaign, and the “Three Harmonies” campaign.³³ The

³⁰ See discussion *infra* at Section II.

³¹ Constitution of the Communist Party of China (2002) translated in <http://www.china.org.cn/english/features/49109.htm> (last visited December 14, 2006)..

³² XIAN FA (1982 as amended) (P.R.C.), *supra* note 3, (see especially 2004 amendments).

³³ See discussion *infra* at Section III.A.

Article ends with a suggestion of the formidable limitations on constitutional theorizing in China.³⁴

Whatever the mode of analysis—the traditional one, or the one suggested here—there is little question that China is not yet a rule-of-law state, however that is conceived.³⁵ But Chinese leaders have been moving decidedly toward the embrace of a form of rule-of-law culture. This Article on the construction of an ideological foundation within which rule of law can develop in China under the present regime, and subject to the socio-cultural and political constraints of that regime. Sange Daibiao suggests the construction of an elaborate normative system for the erection of a state apparatus that fuses political state and political party. But to function as a rule-of-law system in this context, the Party will have to conform to rule-of-law norms usually limited to states in the West (even norms constructed with Chinese characteristics or the like).

China stands at a crossroads. The choice of path will be made by the CCP. The CCP may continue to define itself as a political party increasingly remote from the edifice of the state system it is creating. Eventually this could increase the likelihood that the CCP will face the difficulties and opportunities that the Communist Party did in Eastern Europe.³⁶ Alternatively, the CCP may more openly embrace its role as a critical component of the state apparatus and assume both the obligations and privileges of that role in a rule-of-law context. Its recent behavior suggests that it is leaning toward the latter approach. If that is the case, then Western analysis will have to reorient itself if it wishes to understand the path to rule of law available to a Chinese state in which the CCP remains the “party in power.”

³⁴ See discussion *infra* at Section III.B.

³⁵ See Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471 (2002) (discussing models of thick rule of law).

³⁶ See, e.g., CHRISTIAN W. HAERPFER, DEMOCRACY AND ENLARGEMENT IN POST-COMMUNIST EUROPE: THE DEMOCRATISATION OF THE GENERAL PUBLIC IN FIFTEEN EASTERN AND CENTRAL EUROPEAN COUNTRIES 1991-1998 (2002); Cf. Anelia K. Dimitrova, *From Proletariat to People: Public Relations Metamorphosis of the Bulgarian Communist Party and Its Political Tribune Before the First Free Multi-Party Elections in 1990*, 32(2) E. EUR. Q. 167 (1998) (discussing the reinvention of the Bulgarian Communist Party from party in power to successful political faction).

I. THE DIFFICULTIES OF CONTEXTUALIZING CHINESE
CONSTITUTIONALISM WITHIN CONSTITUTIONALISM AND
WITHIN CHINA

Since the middle of the last century, the ideal of constitutional legitimacy has been grounded on the concept of the rule of law.³⁷ The rule of law is usually understood in two senses.³⁸ First, rule of law is understood as embedded in mandatory systems for maintaining firm limits on the arbitrary use of state power by the individual. This is the idea of rule of law in its process aspect, limiting the use of state power only when grounded in legitimately enacted law. Second, rule of law is understood in its substantive aspect as vesting the state with a critical role as guardian of a set of foundational communally embraced substantive norms that are to be protected and furthered through the use of state power grounded in law. In the West, the foundational expression of this substantive aspect has taken on a variety of aspects. In some jurisdictions, substantive rule of law is the most important aspect of constitutionalism and constitutional discourse. In some cases, this privileging of substantive rule of law is the product of historical experience with a process-oriented constitutionalism. France under the Vichy regime³⁹ and Germany under the Nazi regime⁴⁰ were invocations of process constitutionalism that served to legitimize the use of the state for the

³⁷ The source of the classic Anglo-American understanding of “rule of law,” that is, rule of law in states with strongly developed and integrated independent judiciaries, can be found in A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 170-410 (MacMillan 1927) (1885).

³⁸ For a nice summary description, see Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001).

³⁹ See RICHARD WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996). See also Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1, 17 (1998) (“Law thus had a dual role: it was a factor in preparing a smooth transition from constitutional democracy to fascism, but also in disguising that transition under a façade of continuity.”).

⁴⁰ See Vivian Grosswald Curran, *Fear of Formalism: Indications From the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 151-75 (2001/2002).

Anti-individualism in repudiation of Weimar legal values was a common thread of Nazi legal writing, as was the repudiation of any legal value or source of law other than the Fuhrer. Contrary to Kantorowicz's insistence on enacted law as the most privileged source of legal authority, Nazi legal theory explicitly rejected the authority of enacted law if it did not comport with Hitler's wishes.

Id. at 167; Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT'L & COMP. L.J. 199 (1997).

perpetuation of great crimes against humanity.⁴¹ In Germany today, the underlying great substantive rule-of-law norm is “human dignity,”⁴² embraced, in part, as a consequence of the experiences of Germany between 1933 and 1945. On the other hand, in the United States, the formal emphasis has been on process constitutionalism; process is privileged over substance to a great, though by no means exclusive, extent.⁴³ Substantive constitutionalism is sometimes articulated through the privileged language of process. Thus, for example, process itself (as an aspect of fairness, understood as substantive due process or equal protection) has assumed an important foundational substantive rule-of-law quality⁴⁴ within the overarching substantive rule-of-law animating principle of “democracy.”⁴⁵ As a formal expression of commands, rule of law in both of its aspects is usually associated with positive acts emanating from legitimate institutions of state power representing the political community.⁴⁶

The focus of rule-of-law analysis is usually limited to the formal state apparatus.⁴⁷ The institutions of the state apparatus—collectively its

⁴¹ CARL SCHMITT, STAAT, BEWEGUNG, VOLK: DIE DREIGLIEDERUNG DER POLITISCHEN EINHEIT 7-8 (1933) reproduced in GEORGE L. MOSSE, NAZI CULTURE: INTELLECTUAL, CULTURAL AND SOCIAL LIFE IN THE THIRD REICH 323-324 (Salvatore Attanasio trans., 1966) (“The German revolution was legal—that is, it was formally correct in accordance with the earlier tradition. . . . Besides, its legality derives from the Weimar Constitution—that is, it is legal in terms of a discarded system.”).

⁴² Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 1. translated in http://www.bundesregierung.de/nn_22672/Webs/Breg/EN/Federal-Government/FunctionAndConstitutionalBasis/BasicLaw/ContentofBasicLaw/content-of-basic-law.html (last visited Dec. 14, 2006) .

⁴³ For process theory in its most crystallized form, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88-103 (1980); Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). For a criticism, see Mark Tushnet, *Darkness on the Edge of the Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

⁴⁴ See Larry Catá Backer, *Fairness as a General Principle of American Constitutional Law: Applying Extra-Constitutional Principles to Constitutional Cases in Hendricks and M.L.B.* 33 TULSA L.J. 135 (1997).

⁴⁵ The democratic principle of political organization has become virtually mandatory since the Twentieth Century. See, e.g., NOMOS XXXV: DEMOCRATIC COMMUNITY (John W. Chapman and Ian Shapiro eds., 1993); George W. Bush, President of the United States, Second Inaugural Address, in Washington, D.C. (Jan. 20, 2005), (transcript available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-3.html>).

⁴⁶ In its Chinese context, see, e.g., Michael Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case China*, 35 N.Y.U. J. INT'L L. & POL. 1 (2002); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

⁴⁷ Hal Blanchard, *Constitutional Revisionism in the P.R.C.: “Seeking Truth From Facts,”* 17 FLA. J. INT'L L. 365 (2005).

government—are usually synonymous with those political institutions through which the legislative, executive, and judicial authority of the people is exercised. The analysis is almost always fixated on the governance norms contained in the state’s constitution—the document understood as the highest expression of the political will of the people in their role as the ultimate sovereigns, that is, as the supreme holders of state power. All other entities or expressions of power within the state are viewed as subordinate to the formal system of state power. Indeed, where state power is subordinated to some other system (for example, religion) the basic state-centered legal power hierarchy is threatened and rule of law becomes problematic.⁴⁸

Rule-of-law analysis tends to incorporate an assumption that there can be no identity between political parties and “government.” The manifestation of the state is possible only through its “apparatus,” that is, its government. Political parties serve as the principal vehicle for the manifestation of *individual* political will. Political parties operate through it’s the government or state apparatus, to which the all political parties remain distinct and subordinate, for as long as their individual representatives are successfully elected to office. Party apparatus (or government), in this system, can function only in parallel with, and subordinate to, the paramount apparatus of the state. By definition, then, party governance can never be “government,” and capture of “government” by the apparatus of any one party inverts the natural political order. This inversion is captured in the West by the notion of tyranny, the dictatorship of party apparatus over the state apparatus. This inversion is viewed as fundamentally illegitimate.

This view of the distinction between government and party is nicely captured in American political thought. Political parties are viewed as “factions” in the sense understood by James Madison in Federalist Paper No. 10:

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.⁴⁹

Such factions do not represent the people as a sovereign body. Rather, they are the expression of individual will, albeit in collective form. Madison also notes that “[c]omplaints are everywhere heard . . . that the public good is

⁴⁸ This has been the case especially in the construction of theocracies, either as an expression of indigenous sovereignty, as in Iran, or as an expression of “diversity” theoretics by the agents of Western states working with indigenous elites, as in Iraq and Afghanistan. See Backer, *God Over Constitution*, supra, note 13.

⁴⁹ THE FEDERALIST NO. 10 (James Madison) (Roy P. Fairfield ed., 1981)

disregarded in the conflicts of rival parties.”⁵⁰ Thus, from the earliest period of the American Republic, there was a strongly guarded separation between a state and its government (as representative of the entire people), on the one hand, and factions or political parties (as representative of the will of individuals), on the other hand.

There can be no formal governance power that exists outside of the state and the institutions identified in its formal governance documents. Thus, the West traditionally separates the ideology of political power—which some think represents the personal views of individuals rather than the people as a whole—from the institutions of the state, which some think is bereft of political ideology other than to the extent inherent in its very structure through which the will of the people as a whole may be expressed.

On this basis, there has been a sort of standardization of the analysis of rule-of-law issues in the People’s Republic of China. The analysis starts with the idea that, since the end of the Cultural Revolution,⁵¹ China appears finally to have begun the process of building a proper (Western style) state.⁵² China has abandoned the excesses of a lawless political culture,⁵³ at least

⁵⁰ *Id.*

⁵¹ For a discussion of aspects of the Cultural Revolution relevant to this paper, see JING LIN, *THE RED GUARDS’ PATH TO VIOLENCE: POLITICAL, EDUCATIONAL, AND PSYCHOLOGICAL FACTORS* (1991) (focusing on the developmental process that fostered the Red Guards’ aggression toward the so-called class enemies and their obedience toward the Chinese Communist leader Chairman Mao, the most visible aspect of the Cultural Revolution); LOWELL DITTMER, *LIU SHAOQI AND THE CHINESE CULTURAL REVOLUTION: THE POLITICS OF MASS CRITICISM* (M. E. Sharpe 1998) (especially for the circumstances of the fall of Peng Zhen *Id.* at 54-62, who was instrumental in the construction of early post-Mao Zedong Chinese Constitutionalism). For a good source of original source material in translation, see *CHINA’S CULTURAL REVOLUTION, 1966-1969: NOT A DINNER PARTY* (Michael Schoenhals ed., 1996).

⁵² For an acknowledgement and criticism, see Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 *MICH. J. INT’L L.* 823, 836-37 (2006). Peerenboom explains that

many commentators describe China’s efforts to implement rule of law in terms of a transplant deduced from a predetermined foreign model and implemented in top-down fashion by the central government. The assumption is often that China is moving toward a liberal democratic conception of rule of law. This assumption is unfounded, at least for the short term (and, I have argued, for the medium and long terms as well), and misses the innovative quality of rule of law in China.

Id.

⁵³ See MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN POST MAO CHINA: INSTITUTIONS, PROCESSES, AND DEMOCRATIC PROSPECTS* (1999). Tanner argues that

[u]ntil very recently, discussions of lawmaking and the legislature in China were regularly greeted by scholars, journalists and policy makers with tough

lawless in the sense that politics was substituted for law.⁵⁴ The analysis acknowledges that formal positivist law making was an important tool of the CCP in the consolidation of Communist rule in the 1950s in the initial post-Revolutionary efforts to legitimate the Socialist transformation of Chinese society. Yet the breadth and intensity with which post-Mao reformers have engaged in transplanting laws and applying legal ideas and techniques to solve contemporary, and above all, economic problems have no parallel in Chinese history since the Republican era, and in some respects may even surpass it.⁵⁵ Thus, a hallmark of post-Mao Zedong Chinese legal development is the attempts at formal institution building through the implementation of systems of law administered through a state apparatus that more closely resembles those of other states.

This analysis acknowledges that though law continues to be “conceived and operates as an instrument with which to uphold the Socialist political order and perpetuate party domination,”⁵⁶ China has also begun to organize its legal system within a proper Western-style hierarchy of law administered by State officials. For this purpose, it appears that China has lavished a lot of attention on the adoption of an amended constitution,⁵⁷ beginning the process

questions such as “why should we care how laws are made in China?” Few could be convinced that law, lawmaking politics and legislatures matter in single-party authoritarian systems such as China. . . . As recently as ten years ago a book such as this one on Chinese lawmaking politics might have caught the eye of a scholar of Asian law, but for most political scientists it would have held scant interest, since their principal fascination is the study of power.

Id. at 4.

⁵⁴ For a sense of the relationship between rules of politics at the time of the Cultural Revolution, at least as popularized in the West at the time, see Alice Erh Soon Tay, ‘*Smash Permanent Rules*’: *China as a Model for the Future*, 7 SYDNEY L. REV. 400, 400-23 (1973-76).

⁵⁵ Edward J. Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19 (Pitman B. Potter ed., 1994).

⁵⁶ *Id.*

⁵⁷ AN CHEN, RESTRUCTURING POLITICAL POWER IN CHINA: ALLIANCES AND OPPOSITION, 1978-1998 156-161 (1999). Chen notes that the

post-Mao rule of law campaign to a large extent marked the resumption of China’s state-building process. This process, interrupted after the late 1950s, propelled a transition from an undisguised rule of Party policy to a rule of state law that aimed to place Party policy under a constitutional and legal cloak.

Id. at 157. As this argument suggests, the P.R.C. has had a long experience with written constitutions. For a discussion of constitutionalism in China, see LIN FENG, CONSTITUTIONAL LAW IN CHINA (2000). The current Constitution was adopted on December 4, 1982 and was

of constituting a State apparatus superior to any other organized force within the State. Most importantly, for constitutional legitimacy purposes, the black letter of the Chinese Constitution has at last embraced rule-of-law concepts.⁵⁸ At least as a formal matter, China has also made steady progress in deepening its commitment to rule-of-law governance by adopting a broad spectrum of legislative codes, including a corporate code,⁵⁹ a securities market code,⁶⁰ an administrative litigation law,⁶¹ and a civil procedure law for foreigners.⁶² China has also started work on a comprehensive system of tort law.⁶³

The analysis suggests, then, that to progress further China must actively implement these codes and develop a sound and independent judicial system⁶⁴ or some equivalent.⁶⁵ Its rule-of-law culture will be made stable and

periodically revised through 2004. XIAN FA (2004) (P.R.C.), *translated in* <http://english.people.com.cn/constitution/constitution.html> (last visited Dec. 11, 2006).

⁵⁸ Article 5 of the P.R.C. Constitution provides:

No law or administrative or local rules and regulations shall contravene the constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the Constitution and the law.

XIAN FA, art. 5 (1986) (P.R.C.), *translated in* <http://english.people.com.cn/constitution/constitution.html> (last visited Dec. 11, 2006).

⁵⁹ See The Company Law of the People's Republic of China (revised in 2005) (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective Dec. 29, 1993), *translated in*, <http://www.law-bridge.net/english/LAW/20064/0221042566163.shtml> (last visited Dec. 11, 2006). For a recent analysis of the difficulties of Chinese corporate governance, see Donald Clarke, *The Independent Director in Chinese Corporate Governance*, 31 DEL. J. CORP. L. 125, 130-50 (2006).

⁶⁰ See, e.g., Yuwa Wei, *The Development of the Securities Market and Regulation in China*, 27 LOY. L.A. INT'L & COMP. L. REV. 479, 488-500 (2005); Alice de Jonge, *Corporate Governance in a Cross-Border Environment: Overseas Listings of Chinese Firms*, in TRENDS AND DEVELOPMENTS IN CORPORATE GOVERNANCE 91-97 (Dennis Campbell ed., 2004).

⁶¹ See Administrative Procedure Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), *available at* <http://www.cecc.gov/pages/newLaws/adminLitigationENG.php>.

⁶² See Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59 (2002).

⁶³ See George W. Conk, *People's Republic of China Civil Code: Tort Liability Law*, 5 PRIVATE L. REV. 77 (2005). *But see* Yao Hui, *Recent Development of Chinese Civil Law: Focus on Drafting the Civil Code and Jus Rerem (Law of Real Rights)*, 5 J. CHINESE & COMP. 289, 295 (2002) (questioning whether, in China, the law of torts should be separated from the law of obligations).

⁶⁴ For a discussion, see, e.g., VAI IO LO & XIAOWEN TIAN, LAW AND INVESTMENT IN CHINA: THE LEGAL AND BUSINESS ENVIRONMENTS AFTER WTO ACCESSION 15-19 (2005) ("Since the late

permanent once all stakeholders in governance, including principally the Chinese Communist Party,⁶⁶ follow the post-Soviet model⁶⁷ and become subject to the limitations of the law promulgated, in fact, as well as in law.⁶⁸ Some critiques suggest that democratization of governance should be the last step necessary to ensure that a rule-of-law culture materializes in China.⁶⁹

1970s, China has undertaken various efforts to rebuild or revitalize its judicial system. Nonetheless, in the last two decades, the Chinese judicial system has been much criticized, especially on the poor quality of judges, lack of judicial independence, and weak enforcement.” See also Mo, *supra* note 62, at 92-95. For a discussion of the problem in a specific context, see Vincent A. Pace, Comment, *The Bankruptcy of the Zhu Kuan Group: A Case Study of Cross-Border Insolvency Litigation Against a Chinese State-Owned Enterprise*, 27 U. PA. J. INT’L ECON. L. 517 (2006). For a recent critical assessment of the effect of judicial process reforms in Shanghai, see Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97 (2005).

⁶⁵ See Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT’L L. 103 (2006):

Given the institutional weaknesses of the Chinese judiciary and government limitations on citizen political participation, xinfang appeals remain a popular channel for injured citizens to prompt elite involvement in the resolution of their particular grievances. In practice, the xinfang system often replaces formal legal channels as the locus for citizen dispute resolution. Contrary to the conclusions of many foreign observers, China may not be developing a Western-style rule of law but rather a modernized form of traditional petitioning structures and practices.

Id. at 107.

⁶⁶ The Chinese Communist Party (CCP) is the party in power in the P.R.C.. For a history of the development of the CCP in the period prior to the end of the Civil War, see MARK SELDEN, *CHINA IN REVOLUTION: THE YENAN WAY REVISITED* (1995). The Chinese Communist Party began organizing itself, or at least expressing its organization, through constitutions beginning early in its history, before the establishment of the P.R.C. The CCP adopted a constitution as early as 1921 for its own internal governance. ARIF DIRLIK, *THE ORIGINS OF CHINESE COMMUNISM* 246 (1989) (describing the difficulties of the organization of the Communist party through the early 1920s). The CCP currently functions under a constitution. See *Constitution of the Communist Party of China* (2002), *supra* note 31. The CCP takes its constitution seriously. On the history of the Communist Party of China as the CCP views it, see, e.g., *A CONCISE HISTORY OF THE COMMUNIST PARTY OF CHINA* (Hu Sheng ed., 1994).

⁶⁷ See, e.g., Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.-Apr. 1998, at 95-96. This model has had its problems, some fairly well documented. See, e.g., *PATTERNS IN POST-SOVIET LEADERSHIP* (Timothy J. Colton & Robert C. Tucker eds., 1995) (essays on the difficulties of transition in Eastern Europe).

⁶⁸ See, e.g., Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L L. 43, 66-67 (2001) (noting the difficulties of reconciling rule of law notions with the primacy of the CCP); Pittman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, in *THE PEOPLE’S REPUBLIC OF CHINA AFTER 50 YEARS* 111, 113 (Richard Louis Edmonds ed., 1999).

⁶⁹ See, e.g., Dingjian Cai *The Development of Constitutionalism in the Transition of Chinese Society*, 19 COLUM. J. ASIAN L. 1 (2005) (arguing that the inequitable distribution of resources produced in the post-Mao period will produce a popular push for more rule of law reform that might lead to a real crisis for Chinese society and produce an appropriate form of

The Chinese State apparatus, under the typical analysis, fails to measure up to the ideal forms through which rule of law is expressed in political communities. As Stanley Lubman bluntly put it: “[i]nstitutions and habits of thought that have marked China since the establishment of the P.R.C. have powerfully inhibited the development of autonomy for the new legal institutions. New or revived legal bureaucracies have encountered resistance and pressure to operate in ways that are inconsistent with promoting legality.”⁷⁰ The cause of these difficulties is easy to identify—it is what Lubman might consider to be the great factional invert, the CCP. In condemning the CCP as the great impediment to legitimate rule of law state building in China, Lubman is effectively condemning a system which conflates faction (as the West understands the fundamental nature of political parties) and government (the only legitimate expression of state apparatus) within the apparatus of the CCP. “The CCP has not tolerated any threat to its control over the power of the state apparatus, and the legal reform has succeeded only to the extent that the CCP has relinquished, or more commonly, modulated and redirected its power.”⁷¹ Law reform, rather than being mandatory under accepted principles of rule of law for the development of a legitimate state apparatus representative of all of the people and empowered to limit the arbitrary discretion of any individual or group, becomes just another discretionary method of keeping the CCP in power, and thus both arbitrary and illegitimate.⁷²

On the basis of analyses like this, commentators have urged China to adjust its State apparatus (principally the instrumentalities through which state power is formally exercised) so that the State can better conform its practices to the rule-of-law ideal.⁷³ Many say that embracing this ideal will ultimately require the transformation of the Chinese state from a strict

constitutionalism in China). *But see* SUZANNE OGDEN, *INKLINGS OF DEMOCRACY IN CHINA* (2002) (arguing in part that Chinese cultural norms and Western conceptions of democracy are not compatible; the latter focuses on limitation of the government's power, the former looks to increasing the effectiveness of governmental control). For the presentation of the issue as a problem of dialectics, an irony of sorts given the nature of Marxist-Leninist confrontations with the inherent dialectics of capitalism, see Bradley L. Millwick, *Feeling for Rocks While Crossing the River: The Gradual Evolution of Chinese Law*, 14 J. TRANSNAT'L L. & POL'Y 289, 304-06 (2005).

⁷⁰ Stanley B. Lubman, *Introduction to DOMESTIC LAW REFORMS IN POST-MAO CHINA* 3, 4 (Pitman B. Potter ed., 1994).

⁷¹ *Id.*

⁷² *Id.* (“Law reform was subject to the discretion of the CCP to allow it, both as a matter of policy from above and in implementation from below.”).

⁷³ See, e.g., M. Ulric Killion *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUD. L. REV. 43, 78 (2005) (“Until China's polity incorporates a more Western model of constitutionalism with separation of powers, popular sovereignty, and independent judicial review, amendments to the 1982 Constitution that supposedly safeguard liberty and social rights will remain without effect.”).

authoritarian one to something else—perhaps a government that mimics the government of Singapore,⁷⁴ Japan,⁷⁵ or another East Asian model.⁷⁶ The CCP essentially stands in the way of the realization of the rule-of-law ideal.⁷⁷ At worst, it ought to embrace its destiny to become one of many parties in a multiparty democratic system—the Eastern European model.⁷⁸ In the best-case scenario, at least from an American political perspective, the CCP ought to disappear entirely, as inimical to the operation of a proper rule-of-law state system.⁷⁹

As applied by commentators to Chinese constitutionalism, these ideals usually translate into a criticism of the Chinese Communist Party as an impediment to the evolution of the instrumentalities of the Chinese state into a rule-of-law government. Alternatively, these commentators seek to solve the “problem” of Chinese rule-of-law transition by concentrating on the formal institutions of government and marginalizing the CCP. These generalized criticisms or marginalizations of the CCP take a number of forms, even among those sensitive to the realities of Chinese governance. A strain of rule-of-law scholarship measures the progress of Chinese constitutionalism by reference to the separation of the CCP from the

⁷⁴ For a discussion of the Singapore system of governance, see Li-Ann Thio, *Beyond the “Four Walls” in an Age of Transnational Judicial Conversations Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428 (2006).

⁷⁵ For a discussion of Japanese constitutionalism, see Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L. 3 (1996).

⁷⁶ For a discussion of “Asian Values” constitutionalism, see Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

⁷⁷ For a discussion of the transformation of Eastern European Communist Parties from the party in power to one of many in multi party democratic states, see, e.g. IAN JEFFRIES, *EASTERN EUROPE AT THE TURN OF THE TWENTY-FIRST CENTURY: A GUIDE TO THE ECONOMIES IN TRANSITION* 385-415 (2002); Thomas F. Remington, *Introduction: Parliamentary Elections and the Transitions From Communism*, in *PARLIAMENTS IN TRANSITION: THE NEW LEGISLATIVE POLITICS IN THE FORMER USSR AND EASTERN EUROPE 1* (Thomas F. Remington ed., 1994).

⁷⁸ For a discussion of the Eastern European model of Constitutionalism, see Rett R. Ludwikowski, *“Mixed” Constitutions—Product of an East-Central European Constitutional Melting Pot*, 16 B.U. INT'L.L.J. 1 (1998).

⁷⁹ The current American administration desires this model for the Communist Party of Cuba when Fidel Castro dies and the United States feels freer to effect political transition in Cuba. See U.S. DEPARTMENT OF STATE, COMMISSION FOR ASSISTANCE TO A FREE CUBA: REPORT TO THE PRESIDENT (May 6, 2004), <http://state.gov/documents/organization/32334.pdf>. See also Carlos M. Gutierrez, U.S. Commerce Secretary, Speech to the Cato Institute: Comprehensive Immigration Reform for a Growing Economy (Aug. 1, 2006), http://www.cato.org/events/pf_immigrationreform/transcript_commerce_secretary_carlosgutierrez.html; Larry Catá Backer, *Fighting the Ghosts of the Past: Should American Policy Replay the 1950s in 21st Century Cuba?*, Law at the End of the Day, July 1, 2006, <http://lcbackerblog.blogspot.com/2006/07/fighting-ghosts-of-past-should.html>.

apparatus of government.⁸⁰ It should follow that the more marginalized the CCP becomes, the more it becomes first the political party and then, eventually, merely one political party among many, the more likely this strain of scholarship is inclined to suggest that rule of law is advancing in China. For example, Jiang Jinsong and Jack R. Van Der Slik suggest that Chinese rule-of-law constitutionalism advances as the official organ of State power, the National People's Congress actually comes to fulfill the place assigned to it by the Chinese Constitution.⁸¹ Michael Dowdle has also focused on the role of the State apparatus as an indicator of the advance of rule-of-law culture in Chinese constitutionalism.⁸² Ironically, some scholars have suggested that Chinese Constitutionalism, understood in this sense, arose from a cynical manipulation of institutions by senior Party members fighting for power and influence.⁸³ For that purpose, the language of constitutionalism served the leadership of the National People's Congress, shut out of CCP leadership positions, as a source of legitimate arguments for vesting an organ outside the direct control of the CCP with institutional authority.⁸⁴

There are other, related, perspectives as well. Eric Orts, for example, is one of a number of scholars who seek to unbundle democratic theory from rule-of-law analysis.⁸⁵ The focus there is on the implementation of the rule of law within the institutions of government with the CCP playing, at best, the role of an outsider/spoiler.⁸⁶ Pat Chew also suggests the possibility of an

⁸⁰ This position is nicely summarized in Hal Blanchard, *Constitutional Revisionism in the P.R.C.: "Seeking Truth from Facts,"* 17 FLA. J. INT'L L. 365, 371-73 (2005).

Critics argue, however, that the distinction between the CPC and the P.R.C. Constitution itself is meaningless. Although the state professes to accept certain constitutional limits on its authority, the CPC maintains tight control of the political system through its appointment of key legislative officials as well as the exclusive authority of the NPC and its Standing Committee (NPCSC) to determine and interpret the constitutionality of any given law.

Id. at 372. See also discussion at notes 82-95 and accompanying text *infra*.

⁸¹ JIANG JINSONG & JACK R. VAN DER SLIK, *THE NATIONAL PEOPLE'S CONGRESS OF CHINA* (2003).

⁸² See generally Michael Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1 (1997).

⁸³ PITMAN B. POTTER, *FROM LENINIST DISCIPLINE TO SOCIALIST LEGALISM: PENG ZHEN ON LAW AND POLITICAL AUTHORITY IN THE P.R.C.* (2003).

⁸⁴ MURRAY S. TANNER, *THE POLITICS OF LAWMAKING IN POST MAO CHINA: INSTITUTIONS, PROCESSES, AND DEMOCRATIC PROSPECTS* (1999); SUN YAN, *THE CHINESE REASSESSMENT OF SOCIALISM 1976-1992* (1995).

⁸⁵ See generally Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43 (2001).

⁸⁶ *Id.*

institutionalized rule-of-law regime within the Chinese State that is not necessarily tied to Western notions of democracy.⁸⁷ Others have also suggested the difficulties of squaring the notions of rule of law with development in East Asia.⁸⁸ Still others suggest that the reality of China is an embrace of a rule of law dissimilar to that understood in the West and that adjustment rather than conformity might be the best approach.⁸⁹

Randall Peerenboom shares some sympathy for Clarke's position but focuses on the institutions of the Chinese State rather than on those of the CCP.⁹⁰ Focusing on distinctions between "thick" and "thin" notions of the rule of law, he suggests that rule of law efforts in China can only be understood in its process or "thin" aspects.⁹¹ Focusing on attainment of thin rule-of-law governance in China,⁹² Peerenboom suggests that the China continues to reject Western substantive notions of rule of law, grounded in liberal

⁸⁷ Pat K. Chew, *The Rule of Law: China's Skepticism and the Rule of People*, 20 OHIO ST. J. ON DISP. RESOL. 43, 65 (2005).

⁸⁸ John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in *LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA* 91-127 (Christoph Antons ed., 2003).

⁸⁹ See Benedict Sheehy, *Fundamentally Conflicting Views of the Rule of Law in China and the West & Implications for Commercial Disputes*, 26 NW. J. INT'L L. & BUS. 225 (2006). He suggests that

[i]n China, although it has experimented with the notion at different times in its history, currently the Chinese Communist Party ("CCP") is the basis of power and influence as well as the basis of all law. In essence, therefore, the law has been a tool of the CCP. While the CCP has been seeking to change this status, change is still at an inchoate stage, and as a result, for foreign commercial interests, access to predictable legal outcomes and enforcement has been very limited.

Id.

⁹⁰ See Peerenboom, *supra* note 35.

⁹¹ See *id.*

⁹² See Randall Peerenboom, *China and the Rule of Law: Part I*, 1(5) PERSPECTIVES, Apr. 30, 2000, http://www.oycf.org/Perspectives/5_043000/china_and_the_rule_of_law.htm. He suggests:

In contrast to thick or substantive theories of the rule of law, thin theories emphasize the formal or instrumental aspects of a legal system—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic, and indeed regardless of whether the legal system is a good one or an evil one.

Id.

democratic theory.⁹³ He explains that China must focus on the process of developing the rule of law and that a complete transformation awaits the folding of the CCP into a traditional state system in which it will serve its purpose as one of many political parties.⁹⁴ Michael Dowdle advances similar arguments, suggesting both that traditional rule-of-law arguments do not work in the Chinese context, and that, at least for the present state of development in China, there cannot be rule of law as the term is conceived in the West.⁹⁵

As a consequence, outsiders have questioned the fidelity of the Chinese state to the rule of law because of the control by a single party, the CCP, of the apparatus of state power in China, including all lawmaking power. In one sense these arguments can be reduced to a criticism of Chinese constitutionalism as illegitimate because it lacks a basis in institutionalized moral and ethical norms. These commentators suggest that China has substituted the personal desires of the leaders of the CCP for the equal and neutral application of norms to all individuals, which is the essence of the rule of law in its process aspect. In the absence of these fundamental institutional norms, the behavior of China's leaders is essentially unconstrained. As such, this behavior appears to be the essence of arbitrary governance according to Western thought. The greatest effect is on the willingness of the political culture to tolerate a tremendous amount of personal discretion in the application of rules, and the use of personal power for personal ends (career advancement and the like) or to further personal relationships (*guanxi*).⁹⁶ Rule-of-law systems cannot be legitimate or authentic in the face of party control of the apparatus of state government

⁹³ *Id.* ("I have suggested that a thin theory of rule of law is a better benchmark for making cross cultural comparisons than a thick theory, and in particular that a thin theory is a better benchmark for judging the performance of China's legal system than a liberal democratic theory since there seems to be little support for a liberal democratic rule of law in China at this time.") *Id.*

⁹⁴ Peerenboom, *supra* note 35, at 474. This builds on insights drawn from Western jurisprudence, like those nicely expressed by Robert George: "An unjust regime's adherence to the procedural requirements of legality, so long as it lasts, has the virtue of limiting the rulers' freedom of maneuver in ways that will generally reduce, to some extent, at least, their capacity for evildoing." Further, "[p]otential victims of injustice at the hands of wicked rulers will generally benefit, if only to a limited extent, from their rulers' willingness, whatever its motivation, to respect the requirements of the rule of law." Robert P. George, *Reason, Freedom and the Rule of Law: Their Significance in the Natural Law Tradition*, 46 AM. J. JURIS. 249, 253 (2001).

⁹⁵ Michael Dowdle, *Heretical Laments: China and the Fallacies of "Rule of Law,"* 11 CULTURAL DYNAMICS 287 (1999).

⁹⁶ Pitman Potter points out the complexities and difficulties of separating law and legal institutions from the traditional focus on relationships. See Pitman B. Potter, *Guanxi and the P.R.C. Legal System: From Contradiction to Complementarity*, in SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI 179 (Thomas Gold, Doug Guthrie, & David Wank eds., 2004).

because no party can represent all the people—only the institutions of the state can serve that function.

While grounded in neutral language, these arguments are, in reality, applied expressions of a particular ideology that has assumed universal acceptance outside of China in the period after the end of the Second World War. Specifically, this popular strain of rule-of-law analysis is grounded in a very specific ideal of constitutionalism that has become well developed and accepted outside of China.⁹⁷ Yet this peculiar ideal is somewhat removed from governance ideals developed within the People's Republic.⁹⁸ The international norm of deep constitutionalism that has developed since 1945 serves as the ideal against which the Chinese system is evaluated.⁹⁹ That system is

based on the idea that a universally shared system of values exists that serves to limit the extent to which any political community can express the popular (sovereign) will in their constitutions. These universally shared (and imposed) norms are developed and policed from out of an on-going discussion among the community of nations, from out of which norms are developed through consensus. These norms focus on the limits of state power, especially as expressed against individuals, represent the highest expression of universal political will, and are meant to provide the foundation for the rule of law as expressed within the constitutional traditions of a state.¹⁰⁰

Two of the most prominent among these norms are “democracy” and “human dignity,” from which globalized constitutional norm-making is grounded within a matrix of social, political, and economic rights articulated in an increasing number of pronouncements from international organizations.¹⁰¹

These approaches to analyzing China and its constitutional developments tend to say more about the cultural perspectives of the critics than about China itself. In this respect this analysis shows some sympathy for Donald

⁹⁷ See Louis Henkin, *A Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 41-42 (Michel Rosenfeld ed., 1994).

⁹⁸ See generally Peerenboom, *supra* note 35.

⁹⁹ Backer, *God Over Constitution*, *supra* note 13,

¹⁰⁰ *Id.*

¹⁰¹ See Larry Catá Backer, *President Bush's Second Inaugural Address: A Revolutionary Manifesto For International Law in Chaotic Times*, *Law at the End of the Day* (Apr. 1, 2006), <http://lcbackerblog.blogspot.com/2006/04/president-bushs-second-inaugural.html>.

Clarke's position that the standard critiques are based on an 'imperfect' realization of the Western rule-of-law ideal approach to comparative law.¹⁰² Clarke argues that systems are measured and analyzed in terms of an ideal state chosen by the analyst.¹⁰³ The system chosen is usually a Western political system—the United States or a European state. As a consequence, any sort of Western-based rule-of-law paradigm contributes little to an understanding of the evolution of Chinese governmental institutionalism.¹⁰⁴ This view, in one form or another, creates problems for rule-of-law analysis, especially as applied to East Asian states¹⁰⁵ and China.¹⁰⁶

This approach is unsatisfactory for three reasons.¹⁰⁷ First, as I argue here, it misses an important recent development in the specific context of Chinese constitutionalism—the growing importance of writing specific ideological frameworks into the Constitution.¹⁰⁸ Second, it misjudges the character of the theorizing of the CCP after Mao Zedong. Third, it misses the institutional importance of the CCP in the analysis of rule-of-law issues in China, suggesting a rhetorical but “realist” analytical place for the CCP within political and constitutional analysis in the P.R.C. as faction but not as government.¹⁰⁹

¹⁰² See Peerenboom, *supra* note 35, at 526-27 (citing Donald Clarke, *Alternative Approaches to Chinese Law: Beyond the “Rule of Law” Paradigm*, 2 WASEDA PROCEEDINGS OF COMP. L. 49, 49-62 (1999)). Peerenboom explains, “Donald Clarke, for instance, raises a number of concerns about the ‘imperfect realization of an ideal’ or ‘IRI’ approach to comparative law, an approach that shares certain similarities with my approach, although there are also important differences.” *Id.* at 526.

¹⁰³ Clarke, *supra* note 102, at 51.

¹⁰⁴ *Id.* at 52.

¹⁰⁵ See, e.g., David Clark, *The Many Meanings of the Rule of Law*, in *LAW, CAPITALISM AND POWER IN ASIA* 28-44 (Kanishka Jayasuriya ed., 1999); Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *ASIAN-PAC. L. & POL’Y J.* 13 passim (2000).

¹⁰⁶ See Pat Chew, *The Rule of Law: China’s Skepticism and the Rule of People*, 20 *OHIO ST. J. ON DISP. RESOL.* 43, 43-51, 64-66 (2005); Cf. PEERENBOOM, *supra* note 46.

¹⁰⁷ Both the first and second points are important. However, this Article will focus on the third. While each point implicates the political theoretics of normative system foundation for legal communities, the third point is fundamental to the understanding of the context in which rule of law norms will develop in the P.R.C.—the institutional place of the CCP in the state and the development of systems of rule based norms building on that understanding.

¹⁰⁸ See discussion *infra* Section II, Sange Daibiao (Three Represents) As a Path to Substantive Constitutionalism With Chinese Characteristics.

¹⁰⁹ See discussion, *supra* notes 48-55.

Ideological campaigns are basic to political discourse in the P.R.C.¹¹⁰ What is new is the way in which ideological campaigns have been transformed into a means of legal discourse.¹¹¹ The growing importance of including specific ideological frameworks within the Chinese and CCP constitutions, especially since the end of the Deng Xiaoping leadership, may have significant structural implications for both State and Party. This may suggest a greater willingness to advance the implementation of ideology and the substantive structure it represents, through state power grounded in law. As “an important vehicle for communicating regime values to Party cadres and the masses,”¹¹² ideology supplies the normative bases of appropriate institutional action that serves to define the relationship between the state/supreme political entity and the individual. However, as I explain below, because the norm structures of Chinese ideology articulated through the CCP remain either alien or antithetical to their usual Western counterparts, they remain opaque outside of China.¹¹³

More importantly, the Western approach dismisses ideological developments in Chinese constitutionalism that Western states might characterize as substantive or deep constitutionalism.¹¹⁴ Ironically, the American President treats his ideological campaign for democracy, accountability, and social responsibility as part of the important discourse of constitutional values in the United States,¹¹⁵ yet the important conversations

¹¹⁰ Jiang Zemin stated: “The Chinese Communist Party attaches great importance to the guiding role of theory.” Jiang Zemin, Report at the Fifteenth National Congress of the Communist Party of China, Hold High the Great Banner of Deng Xiaoping Theory for an All-Round Advancement of the Cause of Building Socialism With Chinese Characteristics Into the Twenty-First Century, (Sept. 12, 1997), <http://www.china.org.cn/english/features/45607.htm>. See also WEIXING CHEN, THE POLITICAL ECONOMY OF RURAL DEVELOPMENT IN CHINA, 1978-1999 11-13, 26, 34, 93, 137-155 (1999) (describing the conflation of ideological and legal campaigns).

¹¹¹ See discussion *infra* Section II, Sange Daibiao (Three Represents) As a Path to Substantive Constitutionalism With Chinese Characteristics.

¹¹² Jia Hepeng, *The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalists?*, 24 CATO J. 261, 262 (2004).

¹¹³ See discussion *infra* Section III, Building on Three Represents Fundamentals.

¹¹⁴ For some emerging scholarship seeking to understand Chinese democratization, perhaps even on its own terms, see, e.g., Randall Peerenboom, *The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China's Rise for Developing Countries, Human Rights, and Geopolitical Stability*, 7 CHI. J. INT'L L. 17, 26-29 (2006); David Bachman, *China's Democratization: What Difference Would It Make for U.S.-China Relations?*, in WHAT IF CHINA DOESN'T DEMOCRATIZE? IMPLICATIONS FOR WAR AND PEACE 95 (Edward Friedman & Barrett L. McCormick eds., 2000); BRUCE GILLEY, CHINA'S DEMOCRATIC FUTURE: HOW IT WILL HAPPEN AND WHERE IT WILL LEAD (2004).

¹¹⁵ See, e.g., Jayanth K. Krishnan, *From the ALI to the ILI: The Efforts to Export an American Legal Institution*, 38 VAND. J. TRANSNAT'L L. 1255, 1256-60 (2005); Fleur Johns, *Guantánamo and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613, 629 (2005).

within China about the role of citizen, state and party are marginalized as “mere” ideology.¹¹⁶ But it is also important to accept that Chinese constitutional conversations will occur in a manner distinct from, and use forms unfamiliar to, Western approaches to constitutionalism. While it is important to judge these efforts both within and outside of China, it is also important to base these judgments within the framework that China has chosen for itself.

What might be the ramifications of the current tendency of analysis to dismiss ideological campaigns as politics by other means? On the one hand, it takes the ideological campaigns of the CCP too literally. As a consequence, the analysis tends to minimize the importance of this theorization. Characterized as mere CCP sloganeering, ideological campaigns, it is suggested, are little more than cynical attempts to manipulate Chinese public opinion with no intended substantive effect.¹¹⁷ On the other hand, Western style analysts do not take CCP ideology literally enough, but as *invariably* little more than the politics of individual power by other means.¹¹⁸ It follows from either of these stances that ideology serves merely to mask the

¹¹⁶ Peerenboom has nicely described the difficulties of ignoring ideology in Chinese constitutional discourse:

While most commentators portray political ideology as the main obstacle to establishing rule of law in China, the biggest obstacles at present are systemic in nature and involve the lack of institutional capacity. In the future, economic factors, the interests of key institutional and social actors, and ultimately political ideology (if China remains a single-party socialist state) are likely to exert the most influence on legal reforms and their likelihood of success.

Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823, 864-65 (2006).

¹¹⁷ Fairly typical in Western writing is to posit a positive contrast between the sloganeering under Mao and the more pragmatic approach under his successors. See Ke Jian, *Environmental Justice: Can American Discourse Make Sense in Chinese Environmental Law?*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 253 (2005) (“Deng placed economic progress above the Maoist goals of class struggle and permanent revolution. Profit incentives took the place of ideological slogans as China’s leaders experimented with ways to modernize the economy.”) *Id.* at 269. There is a general sense in the West that ideology and especially slogans are a bad way to develop policy. This is nicely reflected in statements like this: “Hardline ideology, simplistic theories, and slogans make it easy to draw lines and make decisions, but not necessarily good ones.” Ellen Dannin, *To Market, To Market: Legislating on Privatization and Subcontracting*, 60 MD. L. REV. 249, 257 (2001).

¹¹⁸ See HARRY HARDING, ORGANIZING CHINA: THE PROBLEM OF BUREAUCRACY 1949-1976 179-185 (Stanford University Press, 1981). Though in fairness, there was quite a bit of sloganeering especially in the period before 1978. Consider the discussion of the use of “slogans” by Mao in the 1950s and thereafter. See DALI L. YANG, CALAMITY AND REFORM IN CHINA: STATE, RURAL SOCIETY, AND INSTITUTIONAL CHANGE SINCE THE GREAT LEAP FAMINE 29, 74, (1996) (though at times the view of ideology and sloganeering as both manipulative and merely political conflate, see *id.* at 109-113).

arbitrariness of the CCP's culture of exercising personal power without limits. But Sange Daibiao may suggest a transformation of the character and focus of ideological campaigns, as well as the naturalization of that discourse within Chinese constitutionalism.¹¹⁹ It would follow from this alternative view that the traditional analysis (including that by Chinese in the West) may misjudge the construction of a formal normative element to Chinese legal discourse through the traditional methodology of ideological campaigns.

The integral role that political ideologies play within the structure of national constitutions is often overlooked today. Each state strives to embody within its supreme constitutive document the core political principles, ideals, and standards to which it is to adhere. The ideologies of the American founding generation has provided a source of lively debate for American jurists attempting to apply and interpret the American constitution. Americans have long been among the most able political society at translating ideological campaigns into the substance of a rule of law society. The political ideology of federalists, expressed forcefully in the *Federalist Papers*,¹²⁰ has assumed iconic status in American jurisprudence. “James Madison Thought” and “Thomas Jefferson Thought” guide the deliberations of the Supreme Court, and the political branches to some extent as well, as surely as “Marxist-Leninist Mao Zedong Thought” guides Chinese constitutionalism and limits the discretion of Chinese political leaders to effect change. For example, the thoughts expressed in Madison’s *Memorial and Remonstrance Against Religious Assessments*¹²¹ and similar writings and Thomas Jefferson thought as expressed in writings such as the letter to the Danbury Baptist Association¹²²—have played a definitive role in the development of the jurisprudence of the Religion Clauses (Establishment and Free Exercise).¹²³ Yet scholars seem to ignore this important function of political ideologies, assuming, perhaps, that all constitutions are to be viewed objectively and not inherently antithetical to alternative political philosophies. Americans do not demonize the ideologies on which the United States was founded; yet American scholars tend to demonize similar

¹¹⁹ See discussion *infra* Section III, Building on Three Represents Fundamentals.

¹²⁰ THE FEDERALIST PAPERS (Roy P Airfield ed., 2d ed. 1966).

¹²¹ James Madison, *Memorial and Remonstrance Against Religious Assessments*, in FOUNDING THE REPUBLIC 89 (John J. Patrick ed., 1995).

¹²² For a discussion, see Daniel L. Dreisbach, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002) (explaining historical context of Jefferson’s letter and the use to which the letter was put thereafter).

¹²³ See, e.g., *Reynolds v. U.S.*, 98 U.S. 145 (1878) (citing to Jefferson and Madison as providing the conceptual framework for the decision); *Everson v. B. of Educ.*, 330 U.S. 1 (1947) (relying on Thomas Jefferson and James Madison thought).

ideological projects in other young political communities, especially their ideological and political competitors (enemies).

This marginalization of ideology, as something less valuable than the writings of the founders of other constitutional systems in other ideologically driven states, makes it difficult for Western scholars to appropriately weigh Chinese ideological positions. The embedding of this ideological development within the development of what is seen as a political party (authoritarian in Western terms because of its usurpation of the State apparatus through the “party-in-power rhetoric”) also tends to reduce the importance of ideology in the development of purely state-centered thought. Yet as I have suggested, the conflation of State and Party in China (for good or ill in Western terms) requires an acceptance of the role of what we term ideology in the formation of Chinese political and constitutional thought. As one commentator admonishes, “[b]y suppressing the significance of, on the one hand, China’s understanding of itself as uniquely ‘Chinese,’ or, on the other hand, its Marxism,” what we do in our scholarly analysis is “seriously distort our understanding of Chinese constitutional discursive practice.”¹²⁴ The study of the Chinese Constitution must thus be broader and not guided by comparison to strictly Western political concepts—individual autonomy, for instance—but instead to the specific political ideology espoused. This does not negate or suspend judgment, but it does require a clear-headed consideration of the system to be judged and an understanding of the nature of the judgment.

Traditionally, and with some justification, Chinese ideological campaigns have had a very bad reputation among sinologists outside of China. Fairly typical of this attitude is that of Marie Holzman, who reminded her readers as early as 2001 of the historical context in which ideological campaigns were used and misused by generations of leadership in China.¹²⁵ Unlike American or French ideological campaigns at the time of the formation of those states, Chinese ideological campaigns have been chaotic affairs, with constant and sometimes unpredictable shifting of form and substance.¹²⁶ Certainty, predictability, and fidelity to core ideas in the construction of a stable normative system have been absent for the most part. Ideological campaigns were used, especially through the end of the 1970s, as one of several covers beneath which bitter personal and factional fighting for power took place among the Chinese elite.¹²⁷ Within China and among those in the overseas

¹²⁴ Ainsworth, *supra* note 26, at 298.

¹²⁵ Marie Holzman, Human Rights in China (HRIC), The Chinese Regime’s Use of Repression and the Evolution of Its Targets, Jan. 22, 2001, <http://www.hrichina.org/public/contents/articles?revision%5fid=2770&item%5fid=2796>.

¹²⁶ See generally DITTMER, *supra* note 51; HARDING, *supra* note 118.

¹²⁷ See, e.g., GUO, *supra* note 25; TANNER, *supra* note 53; JOSEPH FEWSMITH, DILEMMAS OF REFORM IN CHINA: POLITICAL CONFLICT AND ECONOMIC DEBATE (1994).

Chinese community, then, it comes as no surprise that the attitude greeting these campaigns remains one of suspicion and derision. Successive waves of ideological campaigns are mocked (the fate of Sange Daibiao, and its progeny, for example, and the recent *ba rong ba chi* campaign)¹²⁸ and criticized as incomprehensible (as, for example, the consensus about Sange Daibiao).

Yet historical abuse ought not to blind analysis of the inherent potential of ideological campaigns. The origins of French democratic and state ideals were bound up in the almost uncontrolled violence of the French Revolution, the excesses of which still excite feeling in the West. The Revolution was followed by long periods of dictatorship, political suppression, and the abuse of ideology for nefarious personal purposes in French politics.¹²⁹ The United States did not fully embrace what passes for its eternal founding ideology until after, and as a consequence of, the military victory of the Northern elites in 1865.¹³⁰ As the reality of rule of law within the CCP takes hold and deepens, and as Party discipline grows and collective rule becomes more regularized, more bureaucratic, and less personal, the system of rules grounded in an elaborate ideology becomes more important. That normative structure and those rules can become the permanent feature of the governance apparatus and the personal becomes less powerful. The key, of course, is depersonalization of governance within a stable and deeply embedded normative system. Yet China has yet to institutionalize a governance system in which systems of rules bind individuals and constrain the form in which personal quests for power can take place.¹³¹ Sange Daibiao points toward the creation of such a system, and it could also serve as the basis for the deepening of such a system. This has been the focus of recent rule-of-law developments of the Chinese elite. Its success is by no means assured, but neither was that of Hamiltonian federalism in 1801.

Lastly, it is worth focusing in some detail on the way in which the standard analysis caricatured in this section misses the important institutional place of the CCP in the analysis of the rule of law.¹³² In Western analysis, the CCP is the elephant in the room that no one wants to

¹²⁸ See discussion *infra* Section III, Building on Three Represents Fundamentals.

¹²⁹ For a discussion of French ideological history, see SUDHIR HAZAREESINGH, *POLITICAL TRADITIONS IN MODERN FRANCE* (1994); SUDHIR HAZAREESINGH, *INTELLECTUAL FOUNDERS OF THE REPUBLIC: FIVE STUDIES IN NINETEENTH-CENTURY FRENCH REPUBLICAN POLITICAL THOUGHT* (2001); CHARLES A. MICAUD, *COMMUNISM AND THE FRENCH LEFT* (1963).

¹³⁰ See Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001).

¹³¹ See discussion *infra* Part III.

¹³² See generally Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 337 (2004).

acknowledge. It is either viewed as an impediment to attainment of the rule of law or as a vast and unruly faction that stands between the people and the apparatus of the state. It is, essentially, the group that prevents the development of democracy and independent state institutions capable of supporting a strong rule-of-law (in its procedural aspects) state.

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

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

The inward manifestation of the state apparatus—its substantive values—is represented through the formal institution of the CCP. This basic insight of Marxist-Leninist state theory does not lose its power but is folded into *Sange Daibiao*. In the context of China, the apparatus of the CCP serves as the manifestation of the ideological or substantive aspects of the rule of law. This represents the genius of the people as a whole in upholding the foundational normative structure of the State: Marxist-Leninist, Mao Zedong, Deng Xiao Ping thought, and the important thought of *Sange Daibiao*. The CCP serves as the institutional representative of the people and thus serves the important State purpose of infusing the formal institutions of State power with a normative basis for the exercise of political power.¹³³ That normative basis has found expression in a number of important pronouncements each

¹³³ XIAN FA art. 5 (1982) (P.R.C.) art. 5; XIAN FA Preamble (1999) (P.R.C.). The CCP itself, then, can serve potentially (and it is mostly potential at this stage) as the institutional incarnation of “thick” or substantive rule of law, and thus, as the actual apparatus of the state.

worthy of implementation, touching on the separation of individual from communal power. These include the Four Cardinal Principles,¹³⁴ Hu Jintao's recent Two Musts Campaign (the CCP must keep a humble attitude and must keep a hardworking spirit), the Fish-Water connection between CCP cadres and the masses, and the *ba rong ba chi* campaigns of 2006.¹³⁵ The split that the Sange Daibiao reifies is not between State and Party, but between politics and economics. In a great sense, again, Sange Daibiao owes a tremendous amount to the normative distinctions introduced by Deng Xiaoping, grounded in the concept that China was in the primary stage of socialism.¹³⁶

The Chinese Constitution attempts to establish the context on which these two aspects of government can come together—the formal institutions of the State and the oversight of values/governance role of the CCP. The Constitution carefully develops the overlap between State and Party. Yet Western commentators tend to focus more on those parts of the constitution most like their own—the sections dealing with the formal organization of the state. They tend to be blind to those portions of the Constitution that open a window on that other important aspect of government—the relation of government and CCP—that is, on the relationship between institution and ideology.

The State itself can be considered complete only when the formal State apparatus is joined with the apparatus of the CCP. For the West, this is difficult to grasp, impeded as it is by the Western limitations of considering political parties as separate from the institutions of the state. On this basis it is easier to understand the CCP's own understanding of “rule of law” as a

¹³⁴ The central role of the Four Cardinal Principles is emphasized in the Constitution of the Communist Party of China, *supra*, note 31 (“The Four Cardinal Principles -- to keep to the socialist road and to uphold the people's democratic dictatorship, leadership by the Communist Party of China, and Marxism-Leninism and Mao Zedong Thought -- are the foundation on which to build our country. Throughout the course of socialist modernization we must adhere to the Four Cardinal Principles and combat bourgeois liberalization.”).

¹³⁵ See discussion *infra* Section III.A.

¹³⁶ MARIA HSIA CHANG, RETURN OF THE DRAGON: CHINA'S WOUNDED NATIONALISM 155 (2001).

On the one hand, it is argued, China had become socialist—which meant that the Communist Party would continue to rule as the vanguard of the “dictatorship of the proletariat.” On the other hand, it was understandable that, being only in socialism's initial stage, China would still have superstructural detritus from its recent feudal past, which included Mao's one-man rule and his “patriarchal” cult of personality, as well as the bureaucratism and political sinecure of the party and government. Being in the primary stage of socialism could also explain China's poverty and justify the need for market reforms to develop the economy.

Id.

hybrid concept. This was brought out by Jiang Zemin in an important address worth quoting in full:

Ruling the country by law means that the broad masses of the people, under the leadership of the Party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, economic and cultural undertakings and social affairs, and see to it that all work by the state proceeds in keeping with law, and that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader.¹³⁷

This requires understanding that the construction of the Chinese State is different from that of traditional Western states. The Chinese state is an aggregate, a fusion of outward and inward institutional manifestations of power, and thus of CCP and state within China: “The Party has led the people in drawing up the Constitution and other laws, to which it confines its activities.”¹³⁸ The focus, then, is both on rule building and Party building. This was made clear by a discussion of Party building in 2004:

What kind of party is the Communist Party, and how do you build this party? The problem appears to be simple, but it is not easy to answer. 70 years of Soviet exploration could not solve the problem. “Three Represents”, the Sine-ization of the latest Marxist theories, a scientific answer to this question of promoting the building of the ruling party, pointed out the direction.¹³⁹

¹³⁷ Jiang, *supra* note 110.

¹³⁸ *Id.* Jiang made the relationship between State and Party quite clear in this context:

In ruling the country by law, we can unify the adherence to Party leadership, the development of people's democracy and do things in strict accordance with the law, thus ensuring, institutionally and legally, that the Party's basic line and basic policies are carried out without fail, and that the Party plays the role of the core of leadership at all times, commanding the whole situation and coordinating the efforts of all quarters.

Id.

¹³⁹ Changjiang Wang, Yi xiang shen mou yuan lu de zhan lue bu shu—lun dang de zhi zheng neng li jian she [A Prudent and Strategic Plan—Of the Party's Rule Building Capacity], PEOPLE'S DAILY ONLINE, Jul. 5, 2004, <http://www.people.com.cn/GB/guandian/1035/2616244.html> (translation by John Haverty).

Strengthening the party system, improving the party's institutions and mechanisms, is the key to the party's capacity to build rule. The overall capacity of the ruling party is an important

It is only within this context that the current ideological campaign—Sange Daibiao—assumes its importance for Chinese constitutionalism and the advancement of the rule-of-law culture in China. The expression of Sange Daibiao can be obscure. Stefan Landsberger provides a nice summary:

The theory focuses on the future role of the CCP as "a faithful representative of the requirements in the development of advanced productive forces in China, the orientation of the advanced culture in China, and the fundamental interests of the broadest masses of the people in China."¹⁴⁰

Sange Daibiao provides an ideological basis, a deep constitutional foundation, for the position of the CCP at the center of the institutional apparatus of the Chinese state. However, it does more than that. It also provides the basis for the rule of law as a framework for the proper relationship between state institutions (representing the collective) and the individual (as an instrument of that collective). As developed by the organs of the CCP, it is clear that Sange Daibiao can provide the principles through which the framework of commonly understood rule-of-law constitutionalism can be adopted with Chinese characteristics.

II. SANGE DAIBIAO (THREE REPRESENTS) AS A PATH TO SUBSTANTIVE CONSTITUTIONALISM WITH CHINESE CHARACTERISTICS.

Having suggested a theoretical basis for the constitutional importance of ideological campaigns, like Sange Daibiao, it would be useful to examine, if only briefly, the possible parameters of this construction of Chinese constitutionalism, focusing on the inclusion of Sange Daibiao in the CCP constitution after 2000 and in the Chinese Constitution after 2004.¹⁴¹ Like

fundamental aspect. Overall, the Party doesn't have the capability to simply add (to it). In practice, often the case: We equipped our cadres to important positions, and with strong individual qualities, more so once a team is formed, but inevitably contradictions of some type, will affect the ability to rule as impact the party's image among the masses. Of course, there are personal factors to this, but more critical is the factor of the system. With this in mind, the important point with regard to strengthen the party's rule building is to establish a scientific and working mechanism as an organic and indispensable component to the party's ruling capacity.

Id.

¹⁴⁰ Jiang Zemin Theory ("Three Represents"), Stefan Landsberger's Chinese Propaganda Poster Pages, <http://www.iisg.nl/~landsberger/jzmt.html> (last visited Nov. 25, 2006).

¹⁴¹ The 2004 amendment to the Constitution of the People's Republic of China, following similar modifications to the Constitution of the CCP, changed the language in the P.R.C. Constitution's Preamble from "along the road of building socialism with Chinese characteristics . . ." and "under the guidance of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory . . ." to "along the road of Chinese-style socialism . . ." and "under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of 'Three Represents' . . ." XIAN FA, amend. IV, para. 1 (2004) (P.R.C.) (Approved on Mar. 14, 2004 by the 10th NPC at its 2nd Session). Unlike some Western constitutions, it is clear that the Preamble to the Chinese Constitution can have full constitutional effect. In this respect, it is understood as operating in a

the earlier constitutional assimilation of Deng Xiaoping Theory and its core “Four Cardinal Principles,”¹⁴² the adoption of Sange Daibiao may serve, at least as a formal matter, to further incorporate substantive rule-of-law elements into Chinese constitutionalism. The framework for the connection between ideological basis and rules of acceptable conduct, between State and Party, became clear with implementation of the Four Cardinal Principles.¹⁴³ “When expression diverged too far from what he deemed acceptable, Deng cracked down. Such crackdowns allowed more ideologically oriented conservatives to criticize ‘bourgeois liberalization’ for a while, but inevitably Deng would dampen the expression of such themes and re-emphasize economic development.”¹⁴⁴

The changed importance of ideological focus for the purpose of State construction through the CCP was a critical break by Deng from the governance principles of Mao.

The post-Mao regime has attempted to resurrect the political tradition and political theory of the mid-1950s and base the

way similar to the French Constitution. For further discussion, see Larry Catá Backer, *Restraining Power from Below: The European Constitution’s Text and the Effectiveness of Protection of Member State Power Within the EU Framework*, THE FEDERAL TRUST FOR EDUCATION AND RESEARCH ONLINE PAPER NO. 15/04 (2004), http://www.fedtrust.co.uk/eu_constitution. Other States have declared that their preambles may have no constitutional effect. See, e.g., Martin Prozesky, *The Proselytization Problem: Principles, Practices, and National Constitutions in South Africa*, 14 EMORY INT’L L. REV. 849, 872 (2000). The new Catalan autonomy statute also vests its preamble with constitutional effect. See Larry Catá Backer, *The Debate Over the New Autonomy Statute for Catalonia: Perspectives From the Left*, Law at the End of the Day, June 5, 2006, <http://lbackerblog.blogspot.com/2006/06/debate-over-new-autonomy-statute-for.html>.

¹⁴² JOSEPH FEWSMITH, CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION 27 (2001). As Fewsmith explains it:

For Deng, the “four cardinal principles” (upholding the socialist road, the dictatorship of the proletariat [later, the people’s democratic dictatorship], the leadership of the Communist Party, and Marxism—Leninism—Mao Zedong Thought), which he had enunciated in the spring of 1979 to curtail liberal criticisms of Mao and the socialist system, did not constitute a vision of socialist ideology but rather a boundary line defining the limits of acceptable public expression.

Id.

¹⁴³ The Four Cardinal Principles serve as an important ideological base of the purpose and organization of the Chinese Communist Party. “The basic line of the Communist Party of China at the primary stage of socialism is to lead the people of all our ethnic groups in a concerted, self-reliant and pioneering effort to turn China into a prosperous, strong, democratic and culturally advanced modern socialist country by making economic development our central task while adhering to the Four Cardinal Principles and persevering in the reform and opening up.” Constitution of the Communist Party of China, *supra*, note 31, Preamble.

¹⁴⁴ *Id.* at 27.

political doctrine of the post-Mao regime on the "Four Cardinal Principles," proclaimed as defining the core elements of the post-Mao regime: Marxism-Leninism and Mao Zedong Thought, the socialist road, the dictatorship of the proletariat, and the leadership of the Communist Party.¹⁴⁵

The foundations of the Four Cardinal Principles provided the "thick" ideological basis for their construction of a CCP-based rule-of-law structure. The principles are grounded in the fundamental "claim [that] the CCP itself [is] in possession of universal truth and assert[s] the necessity for a ruling ideological orthodoxy as the guiding principle of China's socialist revolution and construction."¹⁴⁶

Sange Daibiao may serve as a way to broaden the reach of the Four Cardinal Principles. In this sense, Sange Daibiao may not be an advance so much as the marker of a consolidation of the ideas of Deng Xiaoping in concentrated form. In this respect, Sange Daibiao represents a deepening of the conservative trend in political theory that seems to accompany the liberalization of economic theory since Deng's time.¹⁴⁷

Why did China only start implementing Sange Daibiao within the past few years? Sange Daibiao would have been impossible in the absence of Deng Xiaoping Theory and with the liberalization that occurred after the end of the Mao Zedong period in the 1970s. Deng Xiaoping Theory made possible the opening of the CCP and the State to influences and elements beyond the narrowness of class struggle. That opening is reflected in both the expansion of potential Party members and in the broad identification of the CCP with progress and socio-cultural elements. Sange Daibiao would also have been impossible in the absence of the Tiananmen Square violence and its aftermath. That episode suggested the need to separate politics from

¹⁴⁵ GUO, *supra* note 28, at 43.

¹⁴⁶ *Id.* Guo rightly suggests that "It is in this fundamental sense that we are able to distinguish between a totalitarian communist regime and an authoritarian dictatorship rather than in the sense of how many 'pragmatic' elements in the post-Mao ideological doctrine." *Id.*

¹⁴⁷ Joseph Fewsmith recounts the circumstances of Deng's political conservatism as he moved forward on economic moderation:

Another factor prompting Deng's conservative turn at this time may have been his vulnerability to the criticism from other socialist states. It is said that while the Theory Conference was in session, Kim Il-sung made a secret visit to China and grilled Deng Xiaoping on whether or not he was intending to become another Khrushchev, whether or not he intended to uphold socialism, whether or not he would maintain the leading role of the Communist party, and so forth. Deng, whose power was not yet secure, feared that he would indeed be labeled another Khrushchev.

FEWSMITH, *supra* note 142, at 82.

economics and to find a way to legitimate the allocation of political power to the CCP, leaving economic power to the people. Sange Daibiao has to do with the desire to integrate and modernize China within the global economy, for which clarity in law is needed. It also comes from the need to tie together political and moral foundations, and to find a basis for legitimating the CCP's role as the perpetual party in power.

These connections are clearly visible in the 2006 revisions to school textbooks originating in Shanghai,¹⁴⁸ the power center of Jiang Zemin.¹⁴⁹ The revisions emphasized “ideas and buzzwords that dominate the state-run media and official discourse—economic growth, innovation, foreign trade, political stability, respect for diverse cultures and social harmony.”¹⁵⁰ The news story reporting of these text revisions also suggested a direct connection between these changes in Shanghai and Jiang's Sange Daibiao as augmented by Hu Jintao's recent “Three Harmonies” principles.¹⁵¹ The news story also suggested that

the Shanghai textbooks reflected the political viewpoints of China's top leaders [Jiang and Hu]. . . . Mr. Jiang's “Three Represents” slogan was aimed to broaden the Communist Party's mandate and dilute its traditional emphasis on class struggle. Mr. Hu coined the phrase “harmonious society” which analysts say aims to persuade people to build a stable, prosperous, unified China under one-party rule.¹⁵²

Within the context of the two faces of State power in China, the Three Represents is important for a number of reasons. First, it is important

¹⁴⁸ See Joseph Kahn, *Where's Mao? Chinese Revise History Books*, N.Y. TIMES, Sept. 1, 2006, at A1.

¹⁴⁹ For a discussion of Jiang and his connection to a Shanghai power base, see Lindsay Beck, *Beijing Corruption Case Signals Political Battle*, REUTERS, June 21, 2006 (suggesting an attempt by Hu Jintao to erode Jiang Shanghai power base in the context of Hu's anti-corruption campaigns).

¹⁵⁰ Kahn, *supra* note 148, at A6.

¹⁵¹ For a discussion of the politics of Hu Jintao's Three Harmonies, see Willy Lam, *Hu Jintao's Theory of the “Three Harmonies,”* 6(1) CHINA BRIEF, Jan. 3, 2006, http://www.jamestown.org/publications_details.php?volume_id=415&issue_id=3571&article_id=2370615 (“This ‘triple harmony’ can be rendered as ‘seeking peace in the world, reconciliation with Taiwan, and harmony in Chinese society.’”). Lam suggested that the development of this supplement to the Sange Daibiao was Hu's attempt to solidify his position within the CCP leadership and to distinguish himself from his reportedly more aloof predecessor by broadening the reach of the CCP's ideological campaigns. *Id.* (“Hu is anxious to render the Hu-Wen team more appealing to the general populace.”).

¹⁵² Kahn, *supra* note 148. Kahn goes on to report that “[t]he new textbooks de-emphasize dynastic change, peasant struggle, ethnic rivalry and war, some critics say, because the leadership does not want people thinking that such things matter a great deal.” *Id.*

because of the deepening of a new (post-1978) pattern of parallelism—incorporating changes in both the CCP constitution and the Chinese Constitution. This appears to solidify a parallelism in the institutionalization of the rule of law—the CCP and its expression as the State apparatus (usually the National People’s Congress and the State Constitution) moving in lock step on rule-of-law behavior. This is a parallelism that has served as a constant within Chinese jurisprudence since 1983 and the elevation of Peng Zhen as head of the National People’s Congress.¹⁵³ The Three Represents, as a basic norm of both Chinese constitutionalism and the CCP, provides a bridge between the State apparatus and the CCP apparatus. It confirms the need for parallel development among the two. It also suggests the separation between state and Party. It might even suggest the possibility of supremacy of the Constitution over the Party itself, at least as the source of authority within the Chinese State apparatus. This supremacy is possible in Three Represents theory precisely because it is grounded in the primacy of the CCP within the formal apparatus of the State.¹⁵⁴ By conceding everything, it concedes nothing to the State (and specifically to the NPC).

But it does more than that. Here, at least from a theoretical perspective, one can appreciate the great value of the Three Represents as a mandatory bridge between, and perhaps ultimately the very undoing of the parallel in the development of State and CCP apparatus. The Constitution might be the supreme instrument of State power, imposing on all elements of the political order an obligation to act within its rule order. But within that hierarchical, rule-of-law bound, constitutional system, the Three Represents theory makes clear that the CCP retains supreme authority. In a sense, Chinese constitutionalism is now locked into rule-of-law development within the framework of the CCP, rather than being potentially independent of it. In particular, the Three Represents provides a method of curbing the independent role of the NPC without appearing to affect its power. This effectively undoes the work of Peng Zhen of a generation earlier, without seeming to affect it at all.¹⁵⁵ Without disturbing the place of the NPC at the top of the hierarchy of the state apparatus, and without questioning the role of the NPC, the Three Represents suggests a socialist aspect to Chinese

¹⁵³ See TANNER, *supra* note 53, at 97-101; POTTER, *supra* note 83.

¹⁵⁴ Dowdle, *supra* note 46.

¹⁵⁵ Michael Dowdle correctly explained that Peng was to some extent successful in convincing the CCP elite that the failure of the Cultural Revolution proceeded from a lack of information and understanding within the party system itself. Michael Dowdle, *Of ‘Socialism’ and ‘Socialist’ Legal Transformations in China and Vietnam*, in ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM 21, 35 (John Gillespie & Pip Nicholson eds., 2005). This lack of information, he argued, had been caused by the dismantling of the constitutional system. *Id.* He claimed that, because of the uniquely representational nature of the NPC, constitutionalism provided special access to knowledge that was vital to preventing the kinds of Party mistakes the Cultural Revolution represented. *Id.*

constitutionalism. This socialist aspect, together with the role of the CCP in the State apparatus that is itself ordered through the Chinese Constitution is both what had been missing in Chinese constitutionalism¹⁵⁶ and that which can make it distinct from constitutional theorizing originating in the West.¹⁵⁷ If the CCP represents the people's interest, it has reasserted its place over the NPC in political decision making in China and has tied that decision making more closely to the Marxist-Leninist-Maoist foundations of Chinese political culture.

Second, Sange Daibiao may represent a conservative turn in the Constitution of the State and the division of power in China. It undoes, to some extent, the great compromise of the 1950s, in which the group that defended Mao against Kao Kang's attempt to decentralize power within the CCP actually managed to reduce Mao's power.¹⁵⁸ That compromise shifted power to the Standing Committee of the National People's Congress as a means of checking the power of the CCP leadership of Mao Zedong.¹⁵⁹ That great change was only possible in the context of the rise of an institutionalization of the collective leadership principle, a concept that the CCP has struggled to consistently embrace since the 1950s.¹⁶⁰

The contest between an emphasis on obedience to organizational superiors and a need to stimulate mass initiative, between adherence to formal procedure and the resort to more flexible informal expedients, and between collective leadership and a cult of personality has lasted for

¹⁵⁶ See, e.g., ADRIAN CHAN, CHINESE MARXISM (2003).

¹⁵⁷ This later point, of course, remains a principle concern of CCP theorists like Jiang Zemin.

¹⁵⁸ See ANDREW HALL WEDEMAN, THE EAST WIND SUBSIDES: CHINESE FOREIGN POLICY AND THE ORIGINS OF THE CULTURAL REVOLUTION 12-13 (1987).

¹⁵⁹ For the story, see *id.* at 12-13; FREDERICK C. TEIWES, POLITICS & PURGES IN CHINA: RECTIFICATION AND THE DECLINE OF PARTY NORMS, 1950-1965, 166-211 (1979).

¹⁶⁰ See LOWELL DITTMER, CHINA UNDER REFORM 52-53 (1994). Citing the work of Leonard Schapiro and John Lewis, Dittmer argues that

the CCP has a 'leadership principle' (Führerprinzip). . . . Whereas in the Nazi party the führerist leadership pattern was uncontested, in China it was (according to Schapiro and Lewis) combined with the Bolshevik or Leninist principle of collective leadership, forming an uneasy compromise that lasted from the Zhengfeng movement in Yanan until the Cultural Revolution, at which point führerism predominated. Deng Xiaoping's ascendancy represents a reassertion of collective leadership with a strong informal undercurrent of personal leadership. . . .

Id. at 52 n.7 (citing Leonard Schapiro & John Wilson Lewis, *The Roles of the Monolithic Party Under the Totalitarian Leader*, in PARTY LEADERSHIP AND REVOLUTIONARY POWER IN CHINA 114-48 (J. W. Lewis ed., 1970)).

decades, and the leadership itself has changed its form from time to time depending on who prevailed.¹⁶¹

Furthermore, the change represents a renewal of the strain of Chinese Communist thought that sought to reject autarchy in favor of collective decision making.¹⁶² As such, it represents an attempt to more strongly institutionalize, as a formal matter, the more stable collective governance ideals so as to move away from the personality driven CCP which has been dominated by a single, apocryphal character.

Third, Sange Daibiao demonstrates a willingness within the CCP itself to embrace a certain transparency in governance.¹⁶³ As the faithful representative of fundamental interests of the masses in China, the Three Represents declares a commitment to legitimacy based on its representation of the people.¹⁶⁴ That faithfulness requires the Three Represents to retain the confidence of the people. In a sense, the Three Represents is meant to remind both State and Party that the CCP is the paramount apparatus of the state, and that the supreme organs of State power must be guided by a CCP that must itself reflect the highest ideals of state organization.¹⁶⁵ Those organizational ideals, then, must be directed inwards to the structure and

¹⁶¹ *Id.* at 52.

¹⁶² *See, e.g.*, WEDEMAN, *supra* note 158, at 13-14.

¹⁶³ Senior CCP officials are now more often quoted as embracing transparency. For example, Wu Guanzheng, secretary of the Central Commission for Discipline Inspection of the Communist Party of China was recently reported as ordering “officials to attend to outstanding problems that had damaged the interests of the people, and push for more transparency in administration of government, enterprises and villages.” *Senior CPC Leader Pinpoints Enhanced Party Discipline*, XINHUA NEWS AGENCY, Apr. 23, 2006, http://english.people.com.cn/200604/23/eng20060423_260387.html.

¹⁶⁴ Joseph Fewsmith suggested that

[f]rom a theoretical point of view, the most interesting of Jiang's three representatives is his call for the Party to represent the fundamental interests of the broad masses of the Chinese people. This formulation leaves room for ambiguity, but it moves away from traditional notions of the Communist Party representing the vanguard of the working class and toward the notion that it represents the interests of all the people.

FEWSMITH, *supra* note 142. This shift is particularly important in the context of the foundational organizational theory of the CCP. Fewsmith explains that “[t]he notion of an “all people's party” has long been an anathema to Marxist doctrine in China, but Jiang's formulation clearly edges in that direction, as both proponents and detractors of the “three representatives” note. *Id.*

¹⁶⁵ Fewsmith reminds us that the focus of the Sange Daibiao was on the CCP and not the State. “Jiang claimed that, in summing up the Party's history, one could conclude that it had always represented the most advanced productive forces, the most advanced culture, and the fundamental interests of the broad masses of the Chinese people.” *Id.* at 52.

behavior norms of the CCP's institutions.¹⁶⁶ Only then, and more importantly, can the insights of Sange Daibiao be directed outward as a means of providing a normative basis for the construction and deployment of state power.¹⁶⁷

Fourth, the Three Represents, at least in theory, can serve to limit the discretion of both Party and State officials. In each of its expressions of representativeness, the Three Represents emphasizes the people as a whole over the interests of any individual, faction, or interest group.¹⁶⁸ It is clear that the Three Represents can be read as providing a basis for creating and imposing a great principal of fiduciary duty on Party and State officials; an obligation to act solely in the best interests of the people.¹⁶⁹ Jiang Zemin stated:

Our powers are given to us by the people and all cadres are their servants who must be subjected to supervision by the people and the law. We should deepen the reform in this

¹⁶⁶ State Council Information Office, *White Paper: Building of Political Democracy in China* (2005), § VIII(2), available at <http://english.peopledaily.com.cn/whitepaper/democracy/democracy.html> (last visited Dec. 14, 2006) (“Promoting people’s democracy by improving inner-Party democracy is an important component of the CPC’s democratic rule.” [http://english.peopledaily.com.cn/whitepaper/democracy/democracy\(8\).html](http://english.peopledaily.com.cn/whitepaper/democracy/democracy(8).html) (last visited Dec. 14, 2006) [hereinafter *Building of Political Democracy*].

¹⁶⁷ *Building of Political Democracy, supra*. “All power in the PRC belongs to the people. This is a fundamental principle for building political democracy in China. It is also an essential requirement of the CPC’s leadership and exercise of state power. In China, the CPC leads and supports the people to be the masters of the state and ensures its realization. This provides an institutional and legal guarantee that the fundamental principle, that is, all power in the PRC belongs to the people, is fully and thoroughly implemented and embodied in every aspect of national and social activities.” *Id.*, at § II, available at [http://english.peopledaily.com.cn/whitepaper/democracy/democracy\(2\).html](http://english.peopledaily.com.cn/whitepaper/democracy/democracy(2).html) (last visited Dec. 14, 2006).

¹⁶⁸ Like Fewsmith, Guo believes that:

Jiang’s new initiative really differs little from Hu Yaobang and Zhao Ziyang’s attempt to broaden the constituency of the CCP and transform it into some sort of ‘national party’. Like Hu and Zhao, the current leadership seems to have realized that sooner or later the Party will have to reposition itself in relation to the nation and relaunch itself as a representative of the whole nation.

YINGJIE GUO, CULTURAL NATIONALISM IN CONTEMPORARY CHINA 42 (2003).

¹⁶⁹ This was intimated in recent writing. “People’s judgment of the party’s ruling capacity, strong or weak, often depends on the use of power to do things for the people.” Changjiang Wang, *Yi xiang shen mou yuan lu de zhan lue bu shu—lun dang de zhi zheng neng li jian she* [A Prudent and Strategic Plan—Of the Party’s Rule Building Capacity], PEOPLE’S DAILY ONLINE, July, 5, 2004, <http://www.people.com.cn/GB/guandian/1035/2616244.html>. But one can trace this back to Jiang’s characterizations of the rule of law in China in 1997.

connection, improve the legal system of supervision, and establish and improve a mechanism ensuring that our cadres exercise their authority within the framework of law.¹⁷⁰

The implementation is critical, but is also a harder question, which is briefly discussed in the last part of this Article. Developments like *ba rong ba chi* certainly point in the direction of increased willingness to draw attention to implementation.¹⁷¹

Fifth, though the Three Represents limits discretion, it does so within a system of flexible application, while keeping in mind the particular realities of China's position in the world. This is an idea that Jiang has been developing in the years before the unveiling of the Sange Daibiao. By 1997, Jiang was working through the nature of the intersection of the Party's involvement as a leader of the people, and its role as the representative of "the highest level of productivity."¹⁷² In that context, it embraces the historical lessons that the Party has learned from its recent past and signals that "the practical problems of the Chinese revolution"¹⁷³ must be solved, i.e. *NOT* by simply "studying Marxism-Leninism statically and in isolation"¹⁷⁴ but by following Deng Xiaoping Theory; and very importantly, understanding that "ruling the country by law . . . is also the objective demand of a socialist market economy."¹⁷⁵

¹⁷⁰ Jiang Zemin, *supra* note 110.

¹⁷¹ See discussion *infra* at Section III.A.

¹⁷² Jiang Zemin, *supra* note 110.

¹⁷³ *Id.* at Section III (Historical Status and Guiding Significance of Deng Xiaoping Theory):

During the rectification campaign in Yanan, Mao Zedong emphasized, '[a] policy should be established of focusing on the study of the practical problems of the Chinese revolution and using the basic principles of Marxism-Leninism as the guide, and the method of studying Marxism-Leninism statically and in isolation should be discarded.'

¹⁷⁴ *Id.* ("It is meaningless to talk about Marxism in isolation from a given country's reality and the development of the times. We would get nowhere if we studied Marxism statically and in isolation, and separated it from its vigorous development in actual life, or set them against each other").

¹⁷⁵ *Id.* at Section VI (Reforming the Political Structure and Strengthening Democracy and the Legal System).

Ruling the country by law is the basic strategy employed by the Party in leading the people in running the country. It is also the objective demand of a socialist market economy, an important hallmark of social and cultural progress, and a vital guarantee for the lasting political stability of the country.

This view clearly parallels Jiang's belief that "[w]e must never discard Marxism-Leninism and Mao Zedong Thought,"¹⁷⁶ and at the same time, it asserts that China should not categorically follow the latter thinkers. This idea is written into the Preamble of the constitution of the CCP.¹⁷⁷ Note the great continuity here, as a matter of substantive rule-of-law construction, between the great principles developed by Deng, and their refinement by Jiang, leading to the Sange Daibiao.¹⁷⁸ Ironically, there is danger in the new turn. The sensitivity to the distinction between Marxist-Leninist-Mao thought as theory and the flexibility of principles that can be deployed in the implementation of that theory has been used as a basis for dialogue among groups traditionally excluded from governance.¹⁷⁹ This suggests at least a

Id.

¹⁷⁶ Although Jiang Zemin states "[i]f we did, we would lose our foundation. . . .", he is mindful of the balance struck by Deng: "[i]t is meaningless to talk about Marxism in isolation from a given country's reality and the development of the times." *Id.* at Section III.

¹⁷⁷ The 1982 P.R.C. Constitution, amended and adopted at the 16th CPC National Congress on November 14, 2002, makes this clear:

Since the Fourth Plenary Session of the Thirteenth Party Central Committee and in the practice of building socialism with Chinese characteristics, the Chinese Communists, with Comrade Jiang Zemin as their chief representative, have acquired a deeper understanding of what socialism is, how to build it and what kind of a party to build and how to build it, accumulated new valuable experience in running the Party and state and formed the important thought of Three Represents.

Constitution of the Communist Party of China, *supra*, note 31, Preamble.

¹⁷⁸ There is less irony than one might suppose, then, in the title of the speech—"Hold High the Great Banner of Deng Xiaoping Thought." Jiang, *supra* note 110. Neither Jiang nor Hu can venture far from its strictures. Thus both leaders recognize its importance in the construction of a stable, normative basis for state organization (including the organization of the CCP) and the relationship between Deng Xiaoping Thought and the normative superstructure created by later ideological campaigns. *See* discussion *supra*, Part III.

¹⁷⁹ A very interesting spin comes from recent statements made by the Dalai Lama. They are useful both as a check on my analysis, and as a "related" outsider's perspective of the cumulative effects of these ideological campaigns on the construction of a substantive rule of law. *See* His Holiness, the 14th Dalai Lama, Statement on the 47th Anniversary of the Tibetan National Uprising Day (Mar. 10, 2006) (transcript available at <http://www.dalailama.com/page.70.htm>). Yet what appears to work as an internal constitutional dynamic may work less well when deployed by elements regarded as outsiders by the CCP, including the Dalai Lama. The Dalai Lama comes from the usual point of analysis—that CCP ideology has been characterized by many movements tied together only by their purported fidelity to Marxist Leninist principles. But ideology appears to turn to normative theory in the hands of Mao's successors:

Then Deng Xiaoping, through seeking truth from facts, introduced socialist market economy and brought huge economic progress. Following this, based

partial resurrection of the early distinction made by Liu Shaoqi between principle and policy.¹⁸⁰

Sixth, the Three Represents' emphasis on the role of the CCP as the representative of the highest level of productivity confirms the commitment of Chinese constitutionalism to engagement and the economic reforms of the Deng Xiaoping. Indeed, this may have been a conscious objective of Jiang in introducing Sange Daibiao.¹⁸¹ The Three Represents effectively constitutionalizes Deng's ideal of socialism with Chinese characteristics, linking the competence of the CCP to assist in the understanding and application of Marxist/Leninist Maoist thought with the legitimating authority of the Constitution and governance through the apparatus of State institutions.¹⁸² Sange Daibiao, by emphasizing (and thus connecting itself with) the *socialist* character of the post-1978 market oriented reforms of Deng

on his theory of the "Three Represents," Jiang Zemin expanded the scope of the Communist Party of China to include not just the peasants and workers, but also three other elements, namely the advanced productive forces, the progressive course of China's advanced culture, and the fundamental interests of the majority. Today, President Hu Jintao's theory of "Three Harmonies" envisages peaceful coexistence and harmony within China, as well as with her neighbours and the international community.

Id. Though the Dalai Lama clearly has a pointed political agenda—the issue of the status of Tibet—he recognizes, as few in the West do, the consequences of the turn in Chinese ideological campaigns. In this respect, at least, I think the Dalai Lama's insights are quite useful.

¹⁸⁰ Andrew Wedeman reminds us of the importance of this distinction, suppressed during the Cultural Revolution and then resurrected in the 1980s. WEDEMAN, *supra* note 158. But Liu separated politics into "questions of principle"—class struggle—and "practical and concrete" problems of administration. In 1941, for example, Liu wrote:

[Many comrades] did not understand that, while they should wage uncompromising struggle against those in the Party who hold different views on questions of principle, . . . they can and should achieve a necessary compromise on questions of current policy or on questions of a purely practical nature. . . . They fight over every issue. . . . They make no concessions on any point and won't compromise under any circumstances. They regard all contradictions as antagonistic and so adopt an antagonistic attitude toward everything.

Id. (quoting, in part, Liu Shaoqi, *On Inner-Party Struggle*, in SELECTED WORKS OF LIU SHAOQI 180, 188-89 (1984), and citing, in part, Harry Harding, Jr., *Maoist Theories of Policy-Making and Organization*, in THE CULTURAL REVOLUTION IN CHINA 113, 128 (Thomas W. Robinson ed., 1971)).

¹⁸¹ Joseph Fewsmith has noted that "even as he touted Deng's reputation and legacy, he hinted that he himself would push that legacy forward, which he has tried to do in the years since." FEWSMITH, *supra* note 142, at 193.

¹⁸² On Deng's efforts to enhance his authority and the legitimacy of his reforms by centering them squarely within the authority of the CCP and correct interpretation of Marxist/Leninist Maoist thought, see, e.g., CHAN, *supra* note 156; ALAN R. KLUVER, LEGITIMATING THE CHINESE ECONOMIC REFORMS: A RHETORIC OF MYTH AND ORTHODOXY (1996).

Xiaoping Theory, reinforces the identity between government and Party apparatus, and thus deepens a particular substantive understanding of the relationship between State and Party. As one commentator put it: “The nominal limitation to the government revealed in these reform measures is aimed at limiting abuses of power by individual officials or government organs, rather than restricting the CCP’s dominance over political powers.”¹⁸³

Seventh, Sange Daibiao cannot be understood as another isolated instance of mere rhetoric; the importance of the connection between Deng Xiaoping Theory and Sange Daibiao, and their relationship to opening the membership of the CCP to previously excluded people cannot be underestimated. It is generally well understood that Sange Daibiao developed in the context of a campaign to open membership in the CCP to the emerging capitalist class in China.¹⁸⁴ Related to that was the campaign to provide some protection for property rights, which saw significant amendments to the CCP Constitution.¹⁸⁵ A number of commentators have noted that an important CCP goal is to co-opt the capitalist or market elements of Chinese society by offering a place in the CCP in return for adherence to CCP norms, including the basic socialist foundation of state organization.¹⁸⁶ This is an important point—it suggests the very real ways in which membership in political society in China is structured around the leadership of the CCP, and that the nature of CCP leadership is more normative than political. This represents a great theoretical leap from the very structured vanguard theory of CCP membership, looking towards the conflation of a “rights rich” citizenship and with CCP membership.¹⁸⁷

Eighth, the Three Represents attempts to solve the difficulty, long noted by both Chinese and Western scholars,¹⁸⁸ of combining the organizational norms suggested by Marxist-Leninist theory, one based on a union of government and state within the CCP without an institutionalist framework,

¹⁸³ *Id.* at 263.

¹⁸⁴ Jia Hepeng, *supra* note 112, at 267 (“Initially brought forward in February 2000, the Three Represents theory was highlighted in Jiang Zemin’s July 1, 2001, speech, which was delivered to celebrate the 80th anniversary of the CCP. In the speech, Jiang also urged that capitalists and other elites be allowed to join the Party.”).

¹⁸⁵ XIAN FA art. 13 (1982) (P.R.C.) (revised effective Mar. 14, 2004) (“Citizen’s lawful private property is inviolable” and “The State, in accordance with law, protects the rights of citizens to private property and to its inheritance.”).

¹⁸⁶ Jia, *supra* note 112, at 267-69.

¹⁸⁷ On the opportunities and difficulties of this approach, see FEWSMITH, *supra* note 142, at 229-31.

¹⁸⁸ *See, e.g.*, JIANG JINSONG & VAN DER SILK, *supra* note 81; BENJAMIN I. SCHWARTZ, COMMUNISM AND CHINA: IDEOLOGY IN FLUX (1968).

with an inclusive institutionalism based on a separation between government and party.¹⁸⁹ The Three Represents suggests that in China, the CCP exists in two guises simultaneously. First, the CCP serves as a supreme political party. Second, the CCP serves as the paramount institution of state power; it is both a political (the Party) and governance (the State) entity. It continues the middle path first elaborated by Deng Xiaoping: “Deng was interested in defining a middle path, using ‘reform and opening up’ to oppose ‘leftism’ and using the ‘four cardinal principles’ to oppose ‘bourgeois liberalization.’”¹⁹⁰

The Three Represents thus highlights the basic problem of the rule of law in China and points to its solution. The problem of the rule of law in China can be understood as concentrating on the resolution of the questions of the long-term fundamental role of the CCP in China, and of the relationship between the CCP and the State apparatus it has created—and now dominates—in the service of the masses.

Despite receiving much attention in the context of the Chinese constitutional hierarchy,¹⁹¹ Sange Daibiao occupies an ambiguous place. It is not described as “thought,” the highest level of substantive ideological authority, currently reserved for Marxism-Leninism and Mao Zedong

¹⁸⁹ Institutionalism was a contradiction because the State was to wither away. Indeed, one source of the great rift between Trotsky and Stalin was Trotsky’s resistance to what he saw as Stalinist corporatism and, thus, to Stalinist repudiation of the foundations of Marxist-Leninist thought. For a taste of these difficulties in Marxist thought, see ISAAC DEUTSCHER, *THE PROPHET UNARMED: TROTSKY: 1921-1929*, 286-291 (Verso 2003) (1959); John Fitzgerald, *The Politics of the Civil War: Party Rule, Territorial Administration and Constitutional Government*, in *CHINA’S COMMUNIST REVOLUTION: FIFTY YEARS OF THE PEOPLE’S REPUBLIC OF CHINA* 50, 50-81 (Wernet Draguhn & David S.G. Goodman eds., 2002). The Cultural Revolution represented, in one sense, an attempt at purer forms of Marxist-Leninist state order. See, e.g., SCHWARTZ, *supra* note 188. But its failure confirmed the importance of institutionalization. The form of that institutionalization has been at the core of the great debates within the CCP elite ever since.

¹⁹⁰ FEWSMITH, *supra* note 142, at 27. Fewsmith observes that Deng’s use of ideology was a way to prevent ideological disputes from tearing the Party apart as they had in the past, and it was a political strategy that allowed Deng to build a coalition that upheld the center of the political spectrum. The adoption of the formula “one center and two basic points” in the spring of 1987 (in the course of the campaign against bourgeois liberalization that followed Hu Yaobang’s ouster) merely formalized long-standing practice. *Id.* at 27.

¹⁹¹ The informal hierarchy of Chinese constitutional law and legal principles has been nicely described in the popular press in Asia:

At the highest is “thought”. For now only the ideas of Mao Zedong are characterised as worthy of the intellectual pinnacle—a belief system or “thought”. Deng[’s] . . . legacy of four modernisations is only described as a “theory”. Jiang Zemin was not as modest. He apparently tried to get his idea of “three represents” endorsed by the Party as “thought” but could not succeed.

C. Raja Mohan, *Peaceful Rise, In Three Steps*, INDIA EXPRESS, Jan. 30, 2006, http://iecolumnists.expressindia.com/full_column.php?content_id=86868.

Thought. It is also not described as ‘theory,’ an important though less authoritative level of substantive ideological principles, currently applied to Deng Xiaoping Theory. Translated as “the important thought of ‘Three Represents,’”¹⁹² it occupies an authoritative space *sui generis*—neither ‘Thought’ nor ‘Theory.’ But this does not mean that its place within the hierarchy of authoritative ideology is unknown. But for this purpose, the answer lies in the constitution of the CCP rather than in the P.R.C. Constitution.

Sange Daibiao is located in the same place within the “Thought/Theory” matrix of the constitution of the CCP, as it is in the P.R.C. Constitution.¹⁹³ But, the constitution of the CCP, as adopted in 2002, attempts to place Sange Daibiao within the hierarchy of governing ideology in more concrete form:

The important thought of Three Represents is a continuation and development of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory; it reflects new requirements for the work of the Party and state arising from the changes in China and other parts of the world today; it serves as a powerful theoretical weapon for strengthening and improving Party building and for promoting self-improvement and development of socialism in China; and it is the crystallized, collective wisdom of the Communist Party of China.¹⁹⁴

Within the framework of the CCP’s authoritative ideology, Sange Daibiao is accorded that status of “a guiding ideology that the Party must uphold for a long time to come. Persistent implementation of the “Three Represents” is the foundation for building our Party, the cornerstone for its governance and the source of its strength.”¹⁹⁵ It should be read and interpreted in light of the still-superior principles of Marxist/Leninist and Mao Zedong Thought. Thus, in the ‘dialog’ between State and Party constitutions, the substantive value and authority of Sange Daibiao can be understood. But from a Western perspective, that is a remarkable conversation; remarkable because it suggests, in the black letter of both constitutions, and especially in their entanglement, the problem of the rule of law in China as distinctly a problem of the State-Party construct. This is the fundamental issue of Chinese constitutionalism on which rests the normative structure of rule of law in its substantive aspects.

¹⁹² XIAN FA, amend. IV, para. 1 (1982) (P.R.C.), (amendment enacted Mar. 14, 2004, by the 10th National People’s Congress at its 2nd Session).

¹⁹³ Constitution of the Communist Party of China (2002), General Program para. 6, http://english.people.com.cn/200211/18/eng20021118_107013.shtml (“the important thought of Three Represents.”).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Applied appropriately to the central institution of authoritative and legitimate state power in China—that is, to the institutions of the Communist Party—the Three Represents can serve as the ideological basis for solidifying the autonomy of the CCP as the legitimate source of political and ideological power within the state. Indeed, the 125-page “Study Guide to the Important Thinking of the ‘Three Represents’” appears to point in that direction. For example,

Sections 8, 11, and 12 . . . discuss political construction, affirming the importance of “political civilization”—a term officially endorsed at the 16th Party Congress and given equal status with “material” and “spiritual” civilization. These sections elaborated on the need for institution-building as well as the need for “checks and balances” and “supervision” over those exercising political power.¹⁹⁶

If the fundamental question of rule of law in China should center on the CCP, then resolution depends on a shift of focus toward the role of the CCP in China. This is a choice that must be made by the political leaders of China. The choice will significantly affect the future institutional course of the development of China and the ultimate place of the Communist Party within Chinese systems of governance.

One choice that would be made under the traditional critical approach to Chinese rule-of-law analysis can be sloganeered as “Less Party More State.”

A. Less Party More State

What does this mean? The CCP would have to continue to separate itself from the State and become more like a mere political party and, ultimately, one party among many (following the Eastern European model). Eventually, the special place of the CCP, and maybe the CCP itself, would disappear within a much deeper kaleidoscope of political dialogue in a post-CCP China. This choice reflects Western views and is the easiest to apply, representing a conscious willingness to conform with, and ultimately embrace, Western values and perspectives with respect to political and social organization. Some elements of the Chinese institutional movement appear to be heading in this direction. The focus on the State apparatus and its Constitution is a sign of the push in this direction.

The CCP separates itself from the State when it furthers projects designed to treat it like a mere political party, it then deviates significantly from its earlier stance as a fundamental institutional participant in the construction of government. So resituated, the Party preserves its independence from the State, though ultimately it must accept a role subordinate to State institutions. Such has been the pattern in the West. The

¹⁹⁶ FEWSMITH, *supra* note 142, at 4.

construction of Western-style governance mechanisms will inevitably create significant institutional forces pushing both State and Party into adopting Western roles, where State institutions exclude the Party, and the Party competes with other manifestations of the public will and other sources of institutional ideology for control of the institutions of State power. Moreover, adoption of a Western pattern would produce strong expectations among foreigners that the Western model will be followed. This works very well for the West, providing a basis for strengthening the Western internationalist movement in which the CCP would play a reduced role as one among many non-institutional, non-governmental voices.

The other choice, more difficult but perhaps more in accord with the reality of China today, can be sloganeered as “More Party Less State.”

B. More Party Less State

This is the essence of Sange Daibiao theory. It suggests the irrelevance of any State-Party divide. It suggests that the CCP is no mere political faction (one or the first among equals) and the end of the State as an arena in which the fundamental ordering norms of the Chinese political community may be challenged. Sange Daibiao suggests in its own way the distinctions between speech and action or belief and action that had been the hallmark of American Constitutional jurisprudence under the First Amendment.¹⁹⁷

From the perspective of the historical development of the Chinese State and its rule-of-law institutions, this approach deepens the commitment to an institutional structure of the state in which the CCP serves not as a mere Western-style political party, but as an integral organ of State power. The focus is on the reality of the CCP *within* the State. It suggests that the best way of deepening the rule of law in China is to cultivate a strong rule-of-law ethic within the CCP, before extending it outside the CCP to the State apparatus itself. This choice incorporates the parallelism already evidenced by the constitutionalization of the CCP. However, this choice carries heavy responsibilities and obligations, highlighted by the Three Represents itself.

The “More Party, Less State” approach also implies a greater unity between the governing instruments of State and Party. The evolution of the Three Represents itself, from Party to State constitution, evidences this sort of thinking within critical elements of State and Party organs. There is no reason for the separation between the Constitution of the State and of the CCP. Why are two constitutions necessary for a single enterprise? State and Party must act as one. If the CCP means what it says, if the Party occupies the pivotal institutional space within the State apparatus, if it is instrumental in the construction and implementation of the “deep

¹⁹⁷ See *Reynolds v. United States*, 98 U.S. 145, 146 (1878) (“Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties and subversive of good order.”).

constitutionalism” described as essential for rule-of-law governance by both Western and Chinese scholars, and if the Three Represents and Two Musts are to be given their full meaning, then the CCP should strive to embrace its principles completely. That embrace would involve not only the construction of the State, but also the continued development of the CCP and the CCP within the State itself. The CCP must live the Three Represents and the Two Musts. The CCP must implement and enforce those norms within its own organization before it can fully serve as the institutional model for the rest of the State and the rule of law.

There is much work to be done, but a basic choice must be made with respect to the relationship between the State and the Party. The West expects the CCP to ease into a role as a Western-style political party. However, China may take a different path within this gradual transformation. Perhaps Dr. Wang Zhenmin’s understanding of the rule of law, as it might be naturalized within Chinese political culture, captures the importance of the Three Represents in developing Chinese constitutional thought that joins State and Party.¹⁹⁸ Dr. Wang suggests that the

general understanding of the rule of law is multi-faceted. First, the rule of law is the means by which human activities can be regulated and is essential to a modern industrial society. Such a society cannot prosper under the rule of man (i.e. a society governed solely by the decisions of those in power).¹⁹⁹

This understanding corresponds well with the understanding implicit in the first of the Three Represents—the CCP as the faithful representative of the requirements in the development of advanced productive forces in China. “Second,” says Wang, “under the rule of law, the primary purpose of the legal system is to regulate and restrain the behavior of government officials. There must be laws regulating the authority of the government and its officials—political behavior must comply with legal rules.”²⁰⁰ This is the idea underlying the second of the Three Represents—the connection between the CCP and its faithful representation of the orientation of the advanced culture in China. That advanced culture carries within it the connection between rule of law and the institution of the CCP above any single individual. “Third,” says Wang, “the rule of law necessarily assumes the existence of rights. The law should uphold the various rights that modern conceptions of citizenship entail. When the government abuses its power, citizens should have the right

¹⁹⁸ Zhenmin Wang, *The Developing Rule of Law in China*, 4 HARV. ASIA Q. n.4 (2000), available at <http://www.asiaquarterly.com/content/view/88/40> (last visited Dec. 14, 2006).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

to seek legal remedies against the government.”²⁰¹ The CCP remains the faithful representative of the Chinese people’s fundamental interests by embracing this third aspect of the rule of law.

The Three Represents, like the elaboration of the rule of law for the assertion of state power, deals with the manifestation of collective action or will. If the state is the entire manifestation of the collective action or will of the people, as it is in the West, then the rule of law must apply single-mindedly to the institutions of that collective expression. It means that all subordinate expressions of collective will, including political parties, must remain subordinate to the rule of law derived from the supreme institutions of the collective will. In this context, the Three Represents, like the rule of law itself, must be applied from and through the institutions of State power. All other entities, including the CCP, would be subject to the superior role of the State apparatus. That the CCP remains the ‘party in power’ becomes subordinated to the limitations of that power contained in the P.R.C. Constitution and its substantive norms. Thus, under this interpretation, Sange Daibiao as part of the emerging constitutionally derived rule of law complex, can be understood as a means of subordinating the CCP, even as the ‘party in power,’ to the Constitution, the State, and its rules.

There are elements in the Chinese Constitution that suggest the possibility of this track of political development in China. Standing alone, it is possible to read the Chinese Constitution as embarking on this path to development. If that is the case, then the Western rule-of-law critics gain legitimacy, and the place of the CCP as mere political party becomes more certain. This approach would also minimize the importance of Sange Daibiao. No longer foundational, it becomes reduced to ‘political’ speech.

An example of this approach can be seen among those who see the CCP as increasingly taking the position of a mere political party in the Western sense rather than as an important institution of government. For them, Sange Daibiao is criticized as a rather cynical expedient by a dictatorial faction (to which the CCP now finds itself increasingly reduced) seeking to preserve its legitimacy and thus its power.²⁰² This is an important point—to

²⁰¹ *Id.*

²⁰² M. Ulrich Killion provides a benign version of this critique. Paralleling the analytical stance of the Chinese scholar Suisheng Zhao, Killion suggests that pragmatic concerns (pragmatic nationalism (*Shiyong De Minzu Zhuyi*)) moved the CCP to institutionalize its ideology through the Chinese Constitution. M. Ulrich Killion, *Three Represents and China’s Constitution: Presaging Cultural Relativistic Asian Regionalism*, 13 CURRENTS: INT’L TRADE L.J. 23 (2005). He notes that

The consequence of a China polity constituting pragmatic nationalists lends to an explanation for proposing a constitutionalization of party ideology, or Jiang’s “Three Represents,” by amendment of the 1982 Constitution. The latter also explains a prior history of constitutionalizing party ideology, such as, “The People’s Republic of China governs the country according to law and

the extent that the CCP chooses to treat itself more as a political party than as an integral part of the institutional structure of the state, the limitations of political parties, especially as those limitations are understood in the West, will increasingly weaken the legitimacy and authority of the CCP irrespective of pronouncements in official documents. That is the great trap that the Three Represents campaign unveils.

Yet Sange Daibiao itself points to the weakness of this sort of analysis. Rather than contributing to a rule of law framework in which the CCP is marginalized, Sange Daibiao appears to move the CCP back to center stage. The current leadership has made this quite clear. Thus, for example, Jiang was careful to separate economic development—a space within which individual efforts were to be encouraged—from political development—a space in which collective action was to be consolidated through the State-Party continuum. Sange Daibiao made that explicit. Few in the West seem to listen. Jiang’s interpretation was confirmed for the West by Jiang’s successor, Hu Jintao. In a speech at Yale University in 2006, he clearly emphasized the fundamental identity at the heart of Sange Daibiao between the State, the CCP, and the people.²⁰³ In a speech in which any reference to the CCP was noticeably absent, Hu substituted the term “Chinese people” for the more usual terms—CCP, workers and peasants, vanguard forces, and the like.²⁰⁴

makes it a socialist country ruled by law . . . developing a socialist market economy,” and one of Deng Xiaoping’s Four Cardinal Principles, being “China must be made a true rule by law country . . . and other ideologies.”

Id. at 29.

²⁰³ Hu Jintao, Speech at Yale University (Apr. 20, 2006) (transcript available at <http://www.fmP.R.C..gov.cn/eng/zxxx/t 259224.htm>) [hereinafter Hu Speech].

²⁰⁴ For example, Hu explained that

fifty-seven years ago, the Chinese people succeeded in winning liberation after protracted and hard struggle and founded New China in which people became their own masters. Twenty-eight years ago, the Chinese people embarked upon the historic drive of reform, opening-up and modernization and have made phenomenal progress through unremitting efforts.

Id. The only oblique nod to the conflation was in the use of the ambiguous “we” in a key description of the construction of the current system of Chinese governance:

We care about people's value, rights and interests and freedom, the quality of their life, and their development potential and happiness index because our goal is to realize the all-round development of the people. Ensuring the right to survival and development remains China's top priority. We will vigorously promote social and economic development, protect people's freedom, democracy and human rights according to law, achieve social fairness and justice and enable the 1.3 billion Chinese people to live a happy life.

Id.

Thus, the Three Represents solidifies the State-Party continuum. For rule-of-law advocates, this is a good thing. If the State is merely the partial manifestation of the collective action of the people, a face to the outside world, there must be a parallel development of the rule of law behind the public face as well as within the institutions of the internal face of State power, the CCP. This will require the elimination of the personal elements from the institutional activities, first from the CCP, and then from the state apparatus. The black letter of State policy already has embraced the concept of socialist rule of law. CCP policy can do no less as the party in power and the will of the people.

The current foundations of this model were laid by Deng Xiaoping.²⁰⁵ Sange Daibiao points to the CCP as the solution to, rather than a problem, of rule of law in China. That is the great challenge of the Three Represents, a challenge taken up by Hu Jintao.²⁰⁶ The Three Represents provides the CCP with the opportunity to make substantial progress in this regard in a way that advances constitutionalism as theory and practice. To some extent, the CCP has begun this progress under President Hu. On the eighty-second anniversary of the founding of the CCP, Hu Jintao's Party Day Speech hinted at the opportunities for elaboration of rule-of-law theory with Chinese characteristics through the Three Represents Theory. In closing a long speech on the value of the Three Represents principles, Hu "listed some 14 questions, including how to improve the economy, how to expand employment, how to foster China's 'national spirit' (*minzu jingshen*), and how to build the CCP's 'ruling capacity' (*zhizheng nengli*). These questions will give party theorists plenty of scope to develop the three represents in the future."²⁰⁷ The next section suggests the way in which the current government is seeking to amplify and deepen the theoretical possibilities of Sange Daibiao.

III. BUILDING ON THREE REPRESENTS FUNDAMENTALS

I have argued that Sange Daibiao (Three Represents) can be viewed as an effort to articulate a substantive foundational norm for Chinese constitutionalism. It represents, in its substantive aspect, a set of norms that the State is now bound to protect and advance through the use of state power

²⁰⁵ "Deng felt, socialist legality was a means to rectify the Party. The aim was to dispel the Party's extra-legal image and eventually to reestablish the Party as a model for society. Thus, all Party and state affairs should be handled strictly in accordance with legal provisions." CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA 39 (1995).

²⁰⁶ See discussion *infra* at Section III.A.

²⁰⁷ Joseph Fewsmith, *Studying the Three Represents*, 8 CHINA LEADERSHIP MONITOR 1, 6 (2003). That elaboration has already begun with the *ba rong ba chi* campaign of 2006. See discussion *supra* at notes 146, 156, 186 and accompanying text.

grounded in law. But Sange Daibiao also embodies as a formal matter the conflation of State and Party. That conflation transfers to the CCP, as the party in power, an equal duty to internalize socialist rule-of-law norms in its own internal governance, and thus implement its values throughout the structures of the Chinese state apparatus. This substantive project has been elaborated under the presidency of Hu Jintao. This section first considers the nature of this elaboration in theory and then ends with an assessment of this elaboration as implemented.

*A. The Elaboration of the Substantive Values of Sange
Daibiao (Three Represents)*

If the first focus of a rule-of-law project in China is on the CCP, then what should be its objectives and methods of realization? The Three Represents provides a useful ideological basis for this project—in its own way as useful as the Western ideological foundations of “democracy” and “rule of law.”²⁰⁸ From a formal perspective, this requires an acknowledgement of the central role of the CCP in the operation of the State, not as party, but as institution. This institution must serve as the vanguard of rule of law if the rest of the State apparatus are to successfully follow suit.

Such an acknowledgment can be achieved within the constitutional framework of the Chinese state. There are already important references to the relationship between State and Party in the Preamble of the Constitution. Perhaps, following the French constitutional model, the primacy and constitutional value of the Preamble ought to be better stressed and applied by those whose task it is to implement the objectives and rules of the Constitution. There is little impediment to investing the Preamble with constitutional value equal to that of the other parts of the Constitution. A more radical approach would include the absorption of the institutional framework of the CCP within the Constitution of the P.R.C.. In this way, the rule of law constitutionalism in China can work only on the basis of an unbreakable fusion between State and Party. That identity of State and Party is memorialized within the P.R.C. Constitution because that document serves as the only institutional framework understood by foreigners to constitute the supreme authoritative instrument for legitimately exercising state power. But the Constitution itself in Chinese constitutionalism is, as I have tried to suggest, little more than a gateway document to the institutional framework within which power is actually lodged. This relationship between Constitution, law, and power was articulated for all the world to hear by Jiang Zemin. One commentator notes:

Jiang Zemin raised to prominence the idea of “governing the country through law” and discussed the need for greater

²⁰⁸ For a recent example from the United States, see George W. Bush, President of the United States Second Inaugural Address (Jan. 20, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html>).

institutionalization if the CCP is to act more as a ruling party and less as a revolutionary party in his July 1, 2001, speech. Similarly, it was Jiang who raised the issue of “inner-party democracy”—the notion that political participation can be expanded modestly and that, accordingly, cadre selection and decision making can be improved and greater supervision can be exercised over leading cadres, all by expanding the rights of party members and avoiding real democracy.²⁰⁹

Hu shows no sign of deviating from this path to rule of law.²¹⁰ Like Sange Daibiao itself, the principles were elaborated after the Three Represents theory was introduced to provide substantial room for interpretation.²¹¹ I will speak briefly to four of them: the Fish-Water campaign, the Two Must principles, the *ba rong ba chi* campaign, and the Three Harmonies principles.

The Two Musts (*wubi*) Campaign (the CCP must keep a humble attitude and must keep a hardworking spirit),²¹² provides a fine example of the way in which the Three Represents has been used as a means of resurrecting and reshaping important portions of Mao Zedong Thought.²¹³ The Two Musts,

²⁰⁹ Joseph Fewsmith, *Studying the Three Represents*, 8 CHINA LEADERSHIP MONITOR, 2003, at 3.

²¹⁰ *See id.* (“Hu may have different notions about how to implement these ideas, but there is no apparent conflict over these policy goals”).

²¹¹ Thus, for example, with respect to the Three Harmonies, it has been noted that

The three harmonies should be read in the passive voice. China does not actively “seek peace in the world.” China wants the world to regard her as a peaceful world power. Nor is China at present “actively seeking” a non-peaceful resolution to the Taiwan problem but “waiting” for a peaceful resolution. Most importantly to the Beijing authorities, “social harmony” means controlled conformity against social and ideological liberalization.

Sol W. Sanders, *Reading the Chinese Tea Leaves and Coming Up Worried*, WORLD TRIBUNE.COM, Feb. 2, 2006, http://www.worldtribune.com/worldtribune/WTARC/2006/s2_03.html.

²¹² *See* Jia Hepeng, *supra* note 112, at 262.

²¹³ Li Liang, *Two Generations of Leadership in China: The Echo of History in their Paths to Power*, PRESS INTERPRETER, Mar. 10, 2005 (Zhou Li trans.), <http://www.pressinterpreter.org/node/77>. The conservative nature of the efforts is clear, as are the distinctions between political conservatism and economic liberalism. The article notes

December 5 and 6, 2002, Hu Jintao the newly elected General Secretary of the Central Committee of the Communist Party of China (CPC), made his first study and inspection tour to Xibaipo Hebei the former revolutionary seat of the CPC central committee. During that eloquent visit, Hu Jintao restated the “two musts” (comrades must be taught to remain modest, prudent and free from arrogance and rashness in their style of work; comrades must be taught to preserve the style of plain living and hard struggle) which was strongly advocated before the CPC took control of Beijing [in January 1949].

which Mao Zedong articulated at the Seventh CCP Central Committee, have been put forward as a means of understanding more deeply the meaning of the Three Represents.²¹⁴ The State-run media made a point of connecting the resurrection of the Two Musts campaign with the study of the Sange Daibiao, especially among the most important sectors of Chinese society.²¹⁵ The Two Musts was thus resurrected to serve as a methodology. For methodology, the CCP went to some unusual lengths to make the Two Musts (and thus Sange Daibiao) relevant.²¹⁶ Yet even in the West, this kind of attempt to inculcate knowledge through the medium of modern culture is not unique. The Roman Catholic Church, for example, has made use of similar devices, including

Id.

²¹⁴ *Id.* (“In March, 1949, the Second Plenary Session of the Seventh CPC Central Committee was held in Xibaipo. In Party history, the meeting has strategic significance because it came at a time when, at the dawn of Liberation, the CPC needed to seize the momentum and adjust its policies.”).

²¹⁵ Thus, for example, The People’s Liberation Army media was careful to work into ordinary stories these two campaigns in a related way. See Liu Zhengyun & Zhang Xiaodong, *Liao Xilong meets with Li Suzhi’s Advanced Deeds Reporting Team*, PLA DAILY ONLINE, Nov. 11, 2004, http://english.pladaily.com.cn/site2/militarydatabase/2004-11/29/content_76904.htm. Reporting on a meeting of 1,500 personnel to honor a long term member of a PLA logistics sector member stationed in Tibet, the article reported that

Liao Xilong, member of the Central Military Commission and director of the PLA General Logistics Department, cordially met with the members of the team, during which he stressed that all the PLA officers and men, particularly medical workers and leading cadres, should earnestly learn from Comrade Li Suzhi to become more conscious in implementing the important thought of “Three Represents”, and should remember all the time the “Two Musts” requirements, and work hard with selfless devotedness and be brave in blazing new trails, so as to make greater contributions to the military logistics revolutions with Chinese characteristics and logistics preparedness for the military struggles.

Id.

²¹⁶ Lawrence Van Gelder, Arts Briefing, *China, Rapping With Mao*, N.Y. TIMES, Dec. 29, 2003, at E-2.

A new rap album that takes lyrics from the writings of Mao Zedong (1893-1976) was part of a low-key observance in China on Friday for the 110th anniversary of his birth. A rap titled “The Two Musts” appears on the album “Mao Zedong and Us,” taken from sayings by that Communist Party chairman. The lyrics say: “You must preserve modesty and prudence. You must preserve the style of plain living and hard struggle”.

Id.

releasing a musical recording.²¹⁷ But the Two Musts was not pioneered in its new form by Hu Jintao. His predecessor, Jiang Zemin, relied on the Two Musts in his efforts to strengthen and institutionalize behavioral expectations within the People's Liberation Army.²¹⁸ Indeed, there were echoes of the Two Musts as an important basis for conservation and administrative discipline.²¹⁹

The connections between the CCP as the party in power, the CCP's role in (or as) THE State apparatus, and Sange Daibiao have been emphasized by the current Chinese leadership not only through the revival of the "Two Musts" but also by amplification of the Fish-Water connection between the CCP and the people. During a trip full of very pointed symbolism, President Hu stressed these connections in 2002:

On December 5, just days after being elected as the general secretary of the CCP, Hu Jintao went to inspect Xibaipo, a holy revolutionary land of the CCP. The trip was highly symbolic, representing the new general secretary's zeal to embrace the traditional Party line. The speech Hu made in Xibaipo, which was published one month later, emphasized that the Party leadership must keep a humble attitude and a hardworking spirit, which are called two musts (wubi). In the speech, Hu linked the Three Represents to the hardworking attitude and the so-called fish-water connection between the Party cadres and the masses.²²⁰

Thus, like the Two Musts, the Fish-Water connection between CCP cadres and the masses serves to bridge the distance between the foundational assumptions of Sange Daibiao and behavioral expectations for individuals as members of the Chinese polity, and especially as members of the CCP in their institutional roles.

1. Ba Rong Ba Chi

In March 2006, the President of the People's Republic of China, Hu Jintao, announced the commencement of a new ideological campaign, "*Ba*

²¹⁷ See POPE JOHN PAUL II, *THE ROSARY WITH THE POPE* (Aec Music, Dec. 22, 1994). See also POPE JOHN PAUL II, *ABBA PATER* (Sbme Import, Apr. 21, 2005) (original release date Mar. 23, 1999).

²¹⁸ See, e.g., Ta-chen Cheng, *Jiang Zemin's Military Thought And Legacy*, 6(2) INT'L REL. OF THE ASIA-PAC. 227-47 (2006).

²¹⁹ Thus, the Two Musts played a role in the framework for a budgetary report. "In line with the "two musts" and the requirements for developing a conservation-minded society, we must continue to work hard, carefully make budget calculations and do everything in an economical manner." *Report on China's Central and Local Budgets*, CHINA VIEW, Mar. 15, 2005, http://news.xinhuanet.com/english/2005-03/15/content_2699526_9.htm.

²²⁰ Jia Hepeng, *supra* note 112, at 262.

rong ba chi” or the “eight honors, eight disgraces.” Liu Dan reported in an article published to a P.R.C. website²²¹ that *ba rong ba chi* is meant to become “the new moral yardstick to measure the work, conduct and attitude of Communist Party officials.”²²² As translated on this website, the eight honors and eight disgraces are meant to reflect the Mandarin original that was written to read “like rhyming couplets and [to] sound[] almost poetic.”²²³ Rendered in English, *ba rong ba chi* provides

Love the country; do it no harm.
 Serve the people; do no disservice.
 Follow science; discard ignorance.
 Be diligent; not indolent.
 Be united, help each other; make no gains at other's expense.
 Be honest and trustworthy; do not spend ethics for profits.
 Be disciplined and law-abiding; not chaotic and lawless.
 Live plainly, struggle hard; do not wallow in luxuries and pleasures.²²⁴

Beyond the poetry, of course, is a clear effort to associate *ba rong ba chi* with good fortune. The emphasis on the number eight was not accidental. Eight has traditionally been associated with good fortune. The number four, on the other hand, is traditionally associated with death or bad luck.

Ba rong ba chi is aimed at corruption within the CCP.²²⁵ The website report of *ba rong ba chi* states:

The Organization Department of the CPC Central Committee has decided to use the list of do's and don'ts as an important assessment tool in order to select clean, diligent and capable

²²¹ Liu Dan, *China Focuses: CPC Sets Moral Yardstick for Officials*, XINHUA NEWS AGENCY, Apr. 4, 2006.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Hu Jintao has been careful to make that connection from almost the inception of the *ba rong ba chi* campaign. At a rally to celebrate the eighty-fifth anniversary of the founding of the CCP, Hu called on all Party members, especially cadres, to follow the good tradition of the Party, and the socialist moral concept of the *ba rong ba chi*: “We should keep doing good deeds that benefit people, be always aware of the harm of greedy desires, keep disciplining our acts, self-consciously resist money worship, hedonism and out-and-out egoism,” he said. Liu Dan, *Hu Jintao Calls on Party Members to Intensify Anti-Corruption Efforts*, XINHUA NEWS AGENCY, July 3, 2006, <http://au.china-embassy.org/eng/xw/t261034.htm>. He called for continuing adherence to the policy of adopting punishment as well as prevention measures in anti-corruption work, with more emphasis going to prevention. *Id.* He also called for the establishment of a comprehensive mechanism based on education programs, laws and regulations as well as supervision systems. *Id.*

officials for important posts. . . . The CPC will ask all its officials and members to reflect on the pairs of eight opposing values and hope it will refresh the atmosphere in official circles and have a positive influence on all citizens.²²⁶

The basis of this anti-corruption campaign is grounded in the construction of a clearer moral system elaborated from the basic principles of Marxism-Leninism on which the Chinese political system is grounded. Indeed, Hu Jintao described *ba rong ba chi* as the basis of a socialist morality.²²⁷

In this sense, *ba rong ba chi* provides a further elaboration of the now constitutionalized Sange Daibiao campaign. Indeed, *ba rong ba chi* should not be read in a vacuum; it reveals its importance only in the context of the CCP's efforts to flesh out the Sange Daibiao principles, announced in 2000 as "the nucleus of Jiang Zemin Theory."²²⁸ *Ba rong ba chi* is particularly important as an elaboration of the second of the Three Represents—of the role of the CCP as a faithful representative of the advanced culture in China. The CCP has characterized *ba rong ba chi* as "an organic integration of socialist morality and China's traditional ethics, said Li at Tuesday's meeting of the central direction committee on achieving socialist ethics and cultural progress."²²⁹ Sange Daibiao provides that the CCP is the "faithful representative of the requirements in the development of advanced productive forces in China, the orientation of the advanced culture in China, and the fundamental interests of the broadest masses of the people in China." These foundational relationships can remain legitimate only as long as CCP cadres advance the interests of the Chinese people, rather than those of more narrow classes of people—their families, their cronies, etc. Anti-corruption thus lies at the heart of Sange Daibiao.

Ba rong ba chi provides a basis for fleshing out the meaning of avoiding corruption in a way that might have meaning for CCP cadres. Its principles can serve as a basis for predictable, consistent, and fair application to the behavior of CCP cadres and in that way begin to establish a pattern of consistent discipline. That pattern can then serve as a basis for behavioral norms beyond the power of any individual to bend without at least the threat of consequences. In a sense, then, *ba rong ba chi* can contribute to the rise of

²²⁶ Liu Dan, *supra* note 225.

²²⁷ See, e.g., *Senior Party Official Calls For Further Study of New Concept on Socialist Morality*, XINHUA NEWS AGENCY, May 16, 2006.

²²⁸ Landsberger, *supra* note 140.

²²⁹ *Li Changchun Calls for Further Study of New Concept on Socialist Morality*, XINHUA NEWS AGENCY, May 16, 2005, <http://www.idcpc.org.cn/english/events/060516.htm> (quoting Li Changchun, a member of the Standing Committee of the Political Bureau of the Communist Party of China).

a rule-of-law society in China by helping to institutionalize rule-based discipline within the CCP itself. If the CCP can govern itself by rules rather than through individual will, then the CCP can stand as a legitimate institution for the rule based governance of the state.

In this context, *ba rong ba chi* joins the earlier “Two Musts” campaign (the CCP must keep a humble attitude and must keep a hardworking spirit), and the Fish-Water connection between CCP cadres and the masses, as part of the current leadership’s attempt to provide a thick set of principles for the institutionalization of governing principles for the Communist Party in a rapidly changing China. *Ba rong ba chi* provides a self-consciously constructed socialist morality targeted toward individual behavior to supplement Sange Daibiao’s more generalized concentration on the relationship of Party to State to people. Sange Daibiao provides the basis for legitimating the CCP’s development of its *ba rong ba chi* systems of morals and ethics. Taken together, these ideological campaigns provide the CCP leadership with both a basis for asserting power to impose a behavioral system, and for the construction of the behavioral system itself. Thus constructed, this system of principles serves as a basis for the neutral application of rules to all members of the Communist Party as the leading political force in the state. Should this actually occur, the CCP could bolster its legitimacy within a rule-of-law framework.

But *ba rong ba chi* has been met with a certain amount of mockery and cynicism. For example, commentators have suggested that *ba rong ba chi* is better understood in the context of the run up to the 2008 Olympics and the CCP’s drive to control political expression.²³⁰ But this is a position the Chinese government itself has taken.²³¹ *Ba rong ba chi* has also been mocked as another bit of evidence of the fickleness of Chinese ideological campaigns. In this case, *ba rong ba chi* is seen as a means by which Hu can write Jiang Zemin out of power completely, replacing the ideological foundation of Sange Daibiao with his own formulation.²³² Indeed, there is a certain amount of bathos attendant on the introduction of *ba rong ba chi*, though the bathos

²³⁰ Rowan Callick, *30,000 Net Police Extend Great Firewall of China Before Olympics*, THE AUSTRALIAN, <http://www.theaustralian.news.com.au/story/0,20876,19213793-2703,00.html>.

²³¹ *Beijing as Olympic City Should Improve Social Ethics*, PEOPLE’S DAILY ONLINE, Apr. 7, 2006, http://english.people.com.cn/200604/07/eng20060407_256542.html (last visited Dec. 12, 2006) (quoting Li Changchun, a member of the Standing Committee of the Political Bureau of the CCP: “[t]he list of eight do’s and don’t’s should be taken as a guide to improve citizen’s behavior and create a sound social atmosphere for the Olympic Games . . .”).

²³² See also Edward Lanfranco, *Hu’s Moral Code*, UNITED PRESS INT’L, Apr. 7, 2006, <http://www.upi.com/archive/view.php?archive=1&StoryID=20060407-084719-8524r> (last visited Dec. 14, 2006) (“Hu Jintao, holder of the three key positions (party, state and military) . . . making him the undisputed first among equals, has now fully stepped out of Jiang’s shadow by replacing the ‘Three Represents’ with his list of eight exhortations as the latest word from the supreme leader.”).

may be more acute to Western ears.²³³ Despite the criticisms, *ba rong ba chi*, within the realm of foundational principles announced by the CCP leadership since the institutionalization of the Sange Daibiao in the constitutions of the P.R.C. and the CCP, presents China with substantial constitutional opportunity, along with great risk.

Ba rong ba chi will fail if it remains an individual effort among CCP cadres, if the CCP fails to institutionalize its principles, and if it fails to provide a fair and consistently applied system for its implementation throughout the CCP apparatus. It will be that much harder to avoid the ultimate corruption of the system as presently set up—the reduction of the CCP as an organized collective for personal profit. *Ba rong ba chi* provides people with a normative basis for grounding rules in something other than the arbitrary whim of officials. In this sense, a failed *ba rong ba chi* can augment rather than diminish corruption.

If *ba rong ba chi* is treated as an isolated set of principles governing individual behavior, it will fail. *Ba rong ba chi* must govern the behavior of institutions as well as individuals. The bad behavior of provincial Party cadres targeted in part by this campaign cannot be successfully overcome unless the institutional bad behavior of local Party institutions is also overcome. Yet this requires both a recognition that corruption can be institutional as well as individual, and a commitment to the creation of the sort of institutional response capable of modifying bad institutional behavior. The CCP has the capability, and it now appears to have the principles, to increase its success. It needs now to ensure that any such success can outlive the individuals whose efforts have driven the campaign to date. That is the essence of the difference between rule by individual and rule by law.

If *ba rong ba chi* stands alone as a principle of governance, it will also fail. Interpreting *ba rong ba chi* is impossible outside the context of Sange Daibiao and that context requires consideration of a number of other principles already mentioned (e.g., the Two Musts). Each modifies the other. All are necessary to ameliorate the effects of the quick move from the anti-acquisitive culture of Cultural Revolution China to the get rich culture of modern China. Together, these campaigns may help maintain the Deng

²³³ See *Roundup: Hu Jintao's New Ethic Concept Gets Support*, XINHUA NEWS AGENCY, Apr. 6, 2006:

A number of new songs have even been composed with lyrics straight from Hu's new slogan and composed by both civilians and Army musicians and sung by people of all ages. . . . The General Political Department of the Chinese People's Liberation Army (PLA) has selected six of these songs and ordered the service personnel to learn them.

Xiaoping middle path by encouraging the search for prosperity within a moral system. That certainly is the aim of *ba rong ba chi*.²³⁴

Of course, the price of failure is great. The scope of *ba rong ba chi* and its connection to Sange Daibiao provides clear evidence of the risk. The CCP has committed itself publicly, before its own people and the international community, and has embraced certain governance principles. These principles are meant to provide certainty, predictability, and fairness to the relationships between the state and its citizens, and among those with a responsibility for political governance and others. *Ba rong ba chi* as empty vessels will do little to enhance the legitimacy of the CCP and its control of the State apparatus in China. Having committed to Sange Daibiao and its supporting principles, the CCP has committed itself to a course of action that could substantially weaken its position as the leading progressive force in the State, especially if it fails to make good on promised moral principles, like those of *ba rong ba chi*, and now constitutional principles like Sange Daibiao.

The price of failure is even greater in China than in systems where the state apparatus embraces merely political principles. *Ba rong ba chi* evidences an intention to clothe government legitimacy not in political, but in moral principles. Where political systems stake their legitimacy on moral principles the stakes can be great indeed. The Americans learned this at the cost of a great civil war in the context of ideological campaigns revolving around the issue of slavery. Theocratic states like Iran face the same risks if a moral basis of political legitimacy is perceived as corrupt. If the CCP is to be a source of moral as well as political legitimacy, the institutional basis for implementing those systems must eventually be in place.

Ba rong ba chi, in any case, evidences the deep commitment of the CCP to the course charted by Sange Daibiao. It will be interesting to see if the promise of these principles can be realized and the nature of the CCP state relationship that will emerge from the proper application of these principles.

Ba rong ba chi may provide a glimpse of the future. It suggests the way in which the substantive element of Chinese constitutionalism can be built, and it shows that a rule-of-law environment, with characteristics understandable as such in the West, can be created. It reflects a conservatism

²³⁴ Commentators had noted that “while the regime’s intention was to promote a competitive ethos and develop a market economy that would promote rapid economic development, an unintended consequence—in the absence of a comprehensive, internally consistent ideology—has been the burning desire to get rich, linked to a suspicion of all moral values.” Stanley Rosen, *The State of Youth/Youth and the State in Early 21st Century China: The Triumph of the Urban Rich?*, in *STATE AND SOCIETY IN 21ST CENTURY CHINA: CRISIS, CONTENTION, AND LEGITIMATION* 159, 173 (Peter Hays Gries & Stanley Rosen eds., 2004) (citing Xiaoying Wang, *The Post-Communist Personality: The Spectre Of China’s Capitalist Market Reforms*, 47 *THE CHINA J.* 1 (2002)).

and universalism in which the normative framework of Chinese governance should be greater than politics.²³⁵

Connected with the construction of a socialist morality through *ba rong ba chi* is Hu's attempt to construct a set of macro principles for cultural and political development through the elaboration of the "Three Harmonies" (the *he-ping*, *he-jie*, and *he-xie* principles) ("seeking peace in the world, reconciliation with Taiwan, and harmony in Chinese society").²³⁶ With this campaign, Hu exhibits a certain amount of confidence. These principles are not just directed inward, they suggest a constitutionalization of key pieces of foundational Chinese foreign policy, and tie those key objectives to the core of Chinese constitutionalism. One of these is the inviolability of the state as the P.R.C. sees it. Thus, the CCP has a duty to attain the goal of reuniting the whole of China—including what the P.R.C. considers the breakaway province of Taiwan. It also suggests that the P.R.C. is prepared to project its power outside its territory in accordance with the values expressed in Sange Daibiao as thereafter elaborated.²³⁷ In a sense, this represents a restating of foreign policy principles.²³⁸

²³⁵ The echoes of old Confucianism are unmistakable. For a sense of the connection, see Cao Pei, *The 'Rule of Man' in Confucianism: Original Chinese Humanism and Its Limitations*, in "FORGING A COMMON DESTINY: LIBER AMICORUM IN HONOUR OF WILLIAM E. BUTLER 97 (Natalia Iu. Erpyleva, Maryann E. Gashi-Butler, and Jane E. Henderson eds., 2005).

²³⁶ See Lam, *supra* note 151. Lam reported that

[s]ources close to the Hu camp said the 63-year-old president—who has been widely criticized for cracking the whip on intellectuals, journalists and restive peasants—wanted to boost his domestic and international standing by echoing the liberal ethos associated with his mentor Hu Yaobang, the late CCP general secretary and leader of the Communist Youth League (CYL).

Id.

²³⁷ Thus the emphasis on a reconciliation with Taiwan, though this does not break new ground. See *Id.* The focus on Taiwan is also consistent with the thrust of Chinese constitutionalism since the 1982 Constitution was promulgated. See XIAN FA, Preamble (1982) (P.R.C.).

²³⁸ See Evan S. Medeiros, *Agents Of Influence: Assessing the Role of Chinese Foreign Policy Research Organizations After the 16th Party Congress*, in CIVIL-MILITARY CHANGE IN CHINA: ELITES, INSTITUTES, AND IDEAS AFTER AHE 16TH PARTY CONGRESS 279, 285 (Andrew Scobell & Larry Wortzel eds., 2004) (commenting on the role of Chinese think tanks and research institutes in the reformulation of Chinese foreign policy and its projection abroad to a non-Chinese audience). Medeiros notes that

[a] third stage began in the mid-1990s, when Chinese scholars and analysts demonstrated a willingness to debate in public not only various international trends but also importantly the implications of these trends for Chinese foreign policy. As of 2003, a nascent marketplace of ideas (albeit a regulated one) on foreign policy is developing. Scholars and analysts now openly disagree with one another about Chinese policy options, and in some cases they express disagreement with China's official policy.

The cautious and principled conservatism of the Three Harmonies reflects the fundamental conservatism and collectivist framework of the Sange Daibiao. Like Sange Daibiao, the Three Harmonies projects this conservatism outward. It is at once conservative but also meant to be reassuring. But, in line with the harmonization that seems to be at the core of all of these ideological pronouncements, the Three Harmonies quite consciously ties these external expressions to P.R.C. internal norms. President Hu Jintao made this clear in a speech he delivered at Yale University in April, 2006:

The Chinese civilization has always given prominence to social harmony, unity and mutual assistance. Back in the early days of the Chinese nation, the Chinese already advocated that “harmony is most valuable.” They strove for harmony between man and nature, among people and between man’s body and soul, and yearned for an ideal society where “everyone loves everyone else, everyone is equal, and the whole world is one community.” Today, China is endeavoring to build a harmonious society. It is a society of democracy and rule of law, fairness and justice, integrity, fraternity, vitality, stability, order and harmony between man and nature. It is a society where there is unity between the material and the spirit, democracy and rule of law, fairness and efficiency, and vitality and order.²³⁹

The Three Harmonies and the Three Represents offer similar visions pointed in different directions. To that extent, it suggests that Hu Jintao has followed both Jiang Zemin and Deng Xiaoping in their middle path conservatism—using elaborate ideological (and now moral) ideas that deepen a commitment to CCP political governance in a state in which individuals are encouraged to be prosperous in a global environment.²⁴⁰ The Chinese leadership continues down the path taken after 1979, at least in its construction of a normative basis for the organization of the state and party.

B. The Difficulties of Sange Daibiao and Process Constitutionalism

The CCP has long recognized the importance of combining theory with practice. It has also recognized the need for Party discipline beyond the cult of personality.²⁴¹ The CCP constitution elaborates the basics of a theoretical

Id.

²³⁹ Hu Speech, *supra* note 203.

²⁴⁰ See FEWSMITH, *supra* note 142, at 26-30.

²⁴¹ Thus, for example, the CCP Constitution speaks of the nature of the role of the CCP in these terms:

system for Party discipline that might work well enough.²⁴² But that recognition and those provisions suffer from a failure of implementation, or perhaps from an excess of caprice in their implementation.²⁴³ Criticism usually centers on the treatment of rules as a form of political expression.²⁴⁴ The post-Sange Daibiao campaigns have also been criticized as empty expression, free of any connection to the reality of Chinese governance.²⁴⁵ When personality is permitted to have an unbounded power over politics in a representative capacity, the difficulties of implementation increase dramatically. The CCP itself admits to difficulties of implementation.²⁴⁶

In order to lead the people of all ethnic groups in China in attaining the great goal of socialist modernization, the Communist Party of China must adhere to the Party's basic line in strengthening and improving Party building, persist in the principle that the Party exercises self-discipline and is strict with its members, and carry forward its fine tradition and style of work.

Constitution of the Communist Party of China, General Program para. 18 (2002), http://english.people.com.cn/200211/18/eng20021118_107013.shtml.

²⁴² See Constitution of the Communist Party of China Ch. VII ("Party Discipline"), Ch. VIII ("Party Organs for Discipline Inspection"), (2002), http://english.people.com.cn/200211/18/eng20021118_107013.shtml.

²⁴³ Especially in the context of local visits by high ranking CCP officials, it is common for State organs to periodically call for "energizing party discipline and advancing the anti-corruption drive." *Senior CPC Leader Pinpoints Enhanced Party Discipline*, XINHUA NEWS AGENCY, Apr. 23, 2006, http://english.people.com.cn/200604/23/eng20060423_260387.html (quoting Wu Guanzheng, secretary of the Central Commission for Discipline Inspection of the Communist Party of China).

²⁴⁴ In a sense, law under the CCP has transformed the traditional notion of *ren zhi* (rule of men) into a more collective but no less personal project. See, e.g., Teema Ruskola, *Law Without Law, or is "Chinese Law" an Oxymoron?*, 11 WM. & MARY BILL OF RTS. J. 655, 659-60 (2003).

²⁴⁵ See, e.g., Lam, *supra* note 151, at 3 ("It will not be surprising, then, that perhaps for the rest of the decade, Chinese society will only exude a kind of artificial, party-sanctioned harmony that endures at the pleasure of New Strongman Hu.").

²⁴⁶ A recent White Paper was fairly frank of the extent of the difficulties facing the imposition of a rule of law society on China:

The democratic system is not yet perfect; the people's right to manage state and social affairs, economic and cultural undertakings as masters of the country in a socialist market economy are not yet fully realized; laws that have already been enacted are sometimes not fully observed or enforced, and violations of the law sometimes go unpunished; bureaucracy and corruption still exist and spread in some departments and localities; the mechanism of restraint and supervision over the use of power needs further improvement; the concept of democracy and legal awareness of the whole society needs to be further enhanced; and the political participation of citizens in an orderly way should be expanded.

Building of Political Democracy in China, *supra* note 167.

The insertion of the CCP into the formal state apparatus, and the insertion of state power rule-of-law elements into the CCP itself can be furthered in a variety of ways. One way is to increase the sincerity of the Party's alignment with the rule of law. The movement toward inner-party democracy is an interesting approach in that direction.²⁴⁷

This raises an interesting question: can the CCP be bound by a document or a set of rules (from the Constitution to the lowest levels of governance), the contents of which it controls? A "yes" answer would further the rule of law by separating the obligation to comply with the will of the Party—expressed as a series of discrete rules produced by the Party as an institution—from the will of any individual in deciding whether to comply with such rules.²⁴⁸ It is in this context that the current "anti-corruption campaigns" have their greatest challenges.²⁴⁹ As long as individuals pervert Party policies and rules for their

²⁴⁷ Zhen Xiaoying & Li Qinghua, *Yi dangnei minzhu tuijin renmin minzhu*. FEWSMITH, *supra* note 142, at 5. (discussing using inner-party democracy to promote people's democracy) See also Mark Magnier, *China's Party All Aglow, But May Be Blinkered*, L.A. TIMES, July 16, 2006, available at <http://www.uofaweb.ualberta.ca/chinainstitute/news.cfm?story=48049>.

Hu has tried to strengthen internal party discipline committees and encourage limited elections inside the organization, though it's unclear how much support he has. At the same time, he has cracked down on the media, nongovernmental organizations and most other groups that might play a watchdog function, fearful that loosening up might lead to the sort of pro-democracy "color revolutions" seen in some former Soviet republics.

Id.

²⁴⁸ Xiaoping Chen, *The Difficult Road for Rights Advocacy: An Unpredictable Future for the Development of Rule of Law in China*, 16 TRANSNAT'L L. & CONTEMP. PROBS (forthcoming 2006).

²⁴⁹ Since 2006, the CCP has significantly increased the resources and attention it devotes to the creation of a rule-based structure for assessing behavior. In a much reviewed communiqué issued in January 2006, the Hu regime specified the shape of the anti-corruption campaign, as well as its normative connection to Sange Daibiao and its progeny in six points worth describing:

First, Party discipline inspection commissions at all levels should enhance their inspection and supervision on major issues in national development. . . . Second, the Party will firmly fight outstanding problems that harm public interests, including the illegal charge of school fees, the overpricing of medicines, the delay of salary payment to rural migrant workers, and bribery in commercial activities. Third, more anti-corruption education work will be carried out among grassroots officials, while the procedure of selecting officials for promotion will be more strict. Fourth, discipline inspection departments at all levels should play a leading role in studying and implementing the Party constitution, resolutely curb any practice that goes against the constitution, and properly handle the relations between punishing and preventing corruption. . . . Fifth, administrations at all levels will further reform their working mechanism in personnel selection, justice, administrative examination and approval, fiscal management and taxation and other areas, so as to check corruption from the roots. Sixth, the Party will

own ends, the will of the individual prevails over the will of the Party (and the State), and the substantive goals of the Three Represents and the Two Musts are perverted and open the CCP to effective criticism from the West.²⁵⁰

But separating the individual from the Party may require the formalization of enforcement mechanisms that themselves must be free from the influence of the individual—mechanisms run by people whose loyalty to Party and State over the individual will be both protected and rewarded. Though this has been difficult, the task may not be impossible.²⁵¹ It can be made easier not by the separation of the Party from the State, but by the separation of the individual element from the institution of the Party. For this purpose, it may be necessary to find a means of removing and formalizing the administration of Party discipline so that it loses its individual character and becomes more oriented to institutional objectives. The first task of the State should be to discipline the individualistic elements of the Party so that the Party can effectively lead the State.

This raises a fundamental problem that the CCP must eventually face. The Sange Daibiao, the Two Musts, the *ba rong ba chi*, and Three Harmonies may seek to create a substantive normative basis for the operation of the State and Party. These efforts, by themselves, cannot serve as a basis for rules which can be implemented to direct the behavior of officials or to restrain their bad behavior. Sange Daibiao and its progeny may serve as a source of rule making, but they cannot serve as a substitute for rules. To

enhance its inspection over financial institutions and state-owned enterprises, and better supervise over the county-level administrations.

CPC Discipline Watchdog Issues Communiqué, CRI-ENGLISH.COM, Jan. 7, 2006, <http://en.china-broadcast.cn/2238/2006-1-7/118@291969.htm>.

²⁵⁰ As a recent article in the popular press noted:

Among the greatest threats to the party's grip on power and a key target of the campaign is corruption, acknowledged by Hu and others as a crucial challenge. Ouyang, of the organization department, said Thursday that 4,478 party members "with problems" were investigated and dealt with in 2005. Hu's administration continues to rely on two traditional weapons in its anti-corruption fight moral appeals and "strike hard" campaigns designed to intimidate wrongdoers, which include executions. Beijing Vice Mayor Liu Zhihua, who oversaw construction for the 2008 Olympics, was arrested last month on charges of "corruption and dissoluteness" in one such high-profile case. Many observers, however, say the problem is structural and will only get worse without more checks and balances. "It's a problem of a one-party system," said He of the People's University. When power is centralized, power is corrupted."

Mark Magnier, *China's Party All Aglow, But May be Blinkered*, L.A. TIMES, July 16, 2006, available at <http://www.uofaweb.ualberta.ca/chinainstitute/news.cfm?story=48049>.

²⁵¹ Xiaoping Chen, *supra* note 248 (on the development and difficulties of implementing lawyer assisted programs to vindicate formal rights).

some extent, the great code writing efforts of the last decade serve that purpose. However, something more specific is also required for the internal governance of power. Something more specific is also required. The CCP has begun to take steps to implement depersonalized rules of behavior and to apply systems of enforcement.²⁵² But it may still be difficult to separate rule making from the personal politics of CCP governance.

Many observers in Beijing and abroad are studying the new honest government provisions with cynicism. For example, operations within the Politburo and the CCDI remain highly secretive—and the leadership has hardly relaxed strictures forbidding the media from covering the monkey business of officials with vice ministerial ranking or above.²⁵³

This institutionalization is not limited to the need for the development of sound mechanics of enforcement of rules over individual desires. It is also important to deepen the institutionalization of targeted ideological programs and campaigns for the purpose of constructing a normative basis for public action. For this purpose, it is important to tie State action to CCP ideology—for example to the principles of democratic centralism.²⁵⁴ Democratic

²⁵² Willy Lam, *Chinese Corruption Crusade Causes New Factional Infighting*, 4(2) CHINA BRIEF 2 (2004), The Jamestown Foundation, http://www.jamestown.org/publications_details.php?volume_id=395&issue_id=2901&article_id=23474.

At a mid-January national meeting on clean governance, the Central Commission for Disciplinary Inspection (CCDI), the CCP's highest anti-corruption watchdog, announced eight new regulations for party cadres. For example, apart from being extra careful about conflict of interests, senior officials must keep a close watch on the business activities of their spouses and kids. . . . The new rules also institutionalized the rights of ordinary CCP members to blow the whistle on the assorted "economic crimes" committed by senior officials such as ministers and party secretaries. Moreover, the CCDI must within a reasonable period compile a report on every graft related complaint or petition filed by party members and other citizens.

Id.

²⁵³ *Id.* And indeed, Lam suggests, and not without reason, that the campaign presents Hu with the opportunity to further isolate the last but still very active leader, Jiang Zemin, and his Party faction centered in Shanghai. "What the Hu-Wen team wants is a sword of Damocles hanging over the offending cadres, many of whom are affiliates of the Shanghai Faction," said the Chinese source. *Id.* "Hu and Wen may not use that sword, but it can be a potent weapon in factional infighting." *Id.*

²⁵⁴ This has been the subject of continuing elaboration within China. *See generally* Progressive Labor Party, Building of Political Democracy in China, Oct. 2005, <http://english.people.com.cn/whitepaper/democracy/democracy.html>.

China's democracy is a democracy with democratic centralism as the basic organizational principle and mode of operation. Democratic centralism is the fundamental principle of organization and leadership of state power in China. When democratic centralism is practiced, it requires that we give full

centralism, now interpreted under principles of Sange Daibiao, provides the basis for the creation of a system of governance in which multiple factions may operate within the political sphere.²⁵⁵ According to the Progressive Labor Party, “[t]he salient characteristics of China's political party system are: multi-party cooperation under the leadership of the CPC, with the CPC holding power and the democratic parties participating fully in state affairs.”²⁵⁶

There is no reason why the CCP cannot set its own example through the conscious and rigorous application of the aggregate of the expressions of its ideological foundations of its substantive rule of law system. Through public and rigorous internal application of this normative rule of law system, the CCP will be better able to implement these principles within the formal state apparatus. The Four Cardinal Principles (the leading role of the CCP, adherence to socialism, dictatorship of the proletariat, and adherence to Marxist/Leninist/Mao Zedong Thought, Deng Xiaoping Theory, and the

play to democracy and discuss matters of concern collectively, so that people's wishes and demands are fully expressed and reflected. Then, all the correct opinions are pooled, and decisions are made collectively so that the people's wishes and demands are realized and met. The practice of democratic centralism also requires that “the majority be respected while the minority is protected.” We are against the anarchic call for “democracy for all,” and against anybody placing his own will above that of the collective.

Id. The concept of democratic centralism is bound up, in Chinese formulations, with the building of a socialist rule of law society and economic development with socialist characteristics under the leadership of the CCP. Democratic centralism is at the core of Leninist state-party organization. However, from the mid-1980s, China was criticized for its deviation from purer Leninist conceptions of democratic centralism held by Western communist organizations. See, e.g., Progressive Labor Party, *On Democratic Centralism*, P.L. Magazine: A Journal of Communist Theory and Practice, first published in 1982, <http://www.plp.org/pl-magazine/democent.html>.

The Party must be open to everyone who accepts its principles and its discipline. If entry is restricted, the opportunists will double and redouble their efforts to get in, figuring that membership is a sure ticket to success in a career; ordinary workers will be discouraged. The Party's goal must be to recruit every worker into the Party, to involve every worker in the democratic centralist process. The correct way to resolve the problem of the Party's relation to non-Party workers is to recruit all workers to the Party.

Id.

Ironically, Sange Daibiao turns the traditional outside criticism on its head. Where the CCP was once criticized for its exclusivity, Sange Daibiao has created an opening not only for all workers, but for the new capitalist class as well. See discussion, *infra*, at notes 171-73 and accompanying text. The basic rule of democratic centralism remains the same, though, acceptance of the principles and discipline of the CCP is a condition precedent to entry into the political community presided over by the CCP.

²⁵⁵ This is constitutionally mandated. See XIAN FA art. 3 (1982) (P.R.C.), *supra*, note 3.

²⁵⁶ *Building of Political Democracy supra* note 167.

important thought of the Three Represents), the Two Musts Campaign (the CCP must keep a humble attitude and must keep a hardworking spirit), the Fish-Water connection between CCP cadres and the masses, *ba rong ba chi* and the Three Harmonies provide a sound basis for thickening the process aspects of rule of law constitutionalism in the Chinese context—if there is sufficient will to transpose these from the great halls of Beijing to the offices of the lowest CCP cadres and state officials. For this purpose, it would seem essential that the vanguard elements of society embrace vanguard norms before such norms can be naturalized throughout the State and its organs.

The development of an administrative law structure in China might serve to institutionalize ideology. This task, however, is in its infancy and needs protection from abuse by individuals.²⁵⁷ Until the CCP is able to police or administer itself internally and develop a rule-of-law culture in its own internal affairs, it will be unable to implement a real rule-of-law system through the state.²⁵⁸ It is in this context that some of Professor Peerenboom's criticisms provide a basis for self-analysis and further development of an inward looking administrative mechanism:

The biggest obstacles to a law-based administrative system in China are institutional and systemic in nature: a legislative system in disarray; a weak judiciary; poorly trained judges and lawyers; the absence of a robust civil society populated by interests groups; a low level of legal consciousness; the persistent influence of paternalistic traditions and a culture of deference to government authority; rampant corruption; and the fallout from the unfinished transition from a centrally planned economy to a market economy, which has

²⁵⁷ John K. M. Ohnesorge, *China's Economic Transition and the New Legal Origins Literature*, 14 CHINA ECON. REV. 485; Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law In The People's Republic of China*, 19 BERKELEY J. INT'L L. 161 (2001).

²⁵⁸ Indeed, the process of selecting the leadership of the CCP itself may well provide the appropriate litmus test for the deepening and stability of a rule-of-law order within the CCP. That goal may be difficult to reach. . . Joseph Fewsmith suggests the difficulties inherent in the change. Joseph Fewsmith, *China's Ruling Elite: The Politburo and the Central Committee*, in CIVIL-MILITARY CHANGE IN CHINA: ELITES, INSTITUTES, AND IDEAS AFTER THE 16TH PARTY CONGRESS 77 (Andrew Scobell & Larry Wortzel eds., 2004).

How institutionalized was this transfer of power? The retirement of all those 70 or older suggests an incremental institutionalization of binding norms. But the increased size of the PBSC, the apparent stacking of it with Jiang's protégés, the early retirement of two Politburo members, and the leap frogging of Zeng Qinghong from alternate status on the Politburo to Standing Committee status (as well as being named head of the Secretariat) point both to the arbitrariness left in the process as well as the success Jiang had at the 15th Party Congress in getting so many of his followers onto the Politburo.

Id. at 80.

exacerbated central-local tensions and resulted in fragmentation of authority.²⁵⁹

Lastly, much more might be made of the opening of membership in the CCP.²⁶⁰ The “More Party Less State” model contains, as a corollary, the proposition that the CCP must grow to fulfill its role as the institutional leader of Chinese governance. To some extent, the Three Represents suggests a continued broadening of the base of the CCP as it becomes institutionalized within China. “This may indicate a shift in the concept of the ‘masters of the nation,’ which used to be defined as an alliance of workers-peasants-soldiers (*gongnongbing*). In the early 1980s, intellectuals were added to this triumvirate, after their status had been redefined as that of ‘mental workers.’”²⁶¹ Yet, as the First Represent makes all too clear, broadening does not mean abandoning the initial and critical first elements of CCP membership. Still, if the CCP is to attain its institutional role within the State, then it will have to embrace all elements in society that in turn embrace its ideology, rules, purposes, and commitment to Chinese style rule of law. This sort of pragmatism was not unknown among CCP theorists before the Cultural Revolution.²⁶² In another sense, this opening of the CCP solves the dilemma of opening the CCP to criticism while avoiding the rejectionism of CCP leadership that occurred during the Hundred Flower campaign and in the period leading to the Tiananmen Square suppression.²⁶³

Adherence to Party (and now State) norms, rather than status, ought to serve as a more important touchstone for Party membership. The opening of

²⁵⁹ Peerenboom, *supra* note 35, at 168-69.

²⁶⁰ For a discussion, see, e.g., B.J. Dickson, *Who Does the Party Represent?: From “Three Revolutionary Classes” to “Three Represents”*, in CHINA UNDER HU JINTAO: OPPORTUNITIES, DANGERS, AND DILEMMAS (Tun-jen Cheng, Jacques deLisle, & Deborah Brown eds., 2005).

²⁶¹ Landsberger, *supra* note 140.

²⁶² See, e.g., GERRY ROOT, MANAGING TRANSITIONS: THE CHINESE COMMUNIST PARTY, UNITED FRONT WORK, CORPORATISM, AND HEGEMONY 3-59 (2004).

²⁶³ As one scholar noted, the CCP learned a strong lesson from the criticism that erupted in the course of the Hundred Flower campaign:

The depth and vehemence of popular discontent displayed during the Hundred Flower period created a consensus among Party conservatives that the intelligentsia remained hostile to communism and the public must never again be allowed to criticize the Party. Open criticism could not be controlled and, if left unchecked, could escalate into rebellion. As a result, the Hundred Flowers episode led to an unspoken agreement that intra-Party debates be conducted behind closed doors and a public facade of unity and strength. For the infant Liu-Teng machine, such thinking helped reinforce the idea that a strong, centralized party system must be developed and maintained.

WEDEMAN, *supra* note 158, at 19.

CCP membership to emerging private sectors, as recently suggested by leaders in the CCP, provides a useful opening. Advancement in all sectors of society should be made on the basis of an adherence to the basic rules of state organization. Thus, bringing market elements into the CCP in return for a commitment to the institutional role and ideology of the CCP within the state apparatus supports the construction of a rule-of-law society in which the CCP remains the faithful representative of the broadest masses of the people of China. Membership ought to be open to all elements in China, as long as they commit to the institutional role and ideology of the CCP as an institutional force in China. More Party can then be translated into more rule of law as the rule-of-law values of the Party become part of the working culture of its members—including all of the critical elements of Chinese society. From this position, expanding rule-of-law culture to the other institutions of the state apparatus may be easier.

IV. CONCLUSION

I have argued that Sange Daibiao provides an ideological basis and a deep constitutional foundation for the position of the CCP at the center of the institutional apparatus of the Chinese state. But it does more than that—it also provides the basis for the rule of law, as a framework for the proper relationship between state institutions (representing the collective) and the individual (as an instrument of that collective). As one commentator suggests, Sange Daibiao is an “attempt to replace ideology with loyalty to the CCP without doing away with it altogether, and basically revolve around the need to identify the CCP as the moving force behind the reforms.”²⁶⁴ But I have also argued that this position is unusual in a conceptual universe in which Chinese constitutionalism is viewed as a flawed attempt to mimic Western constitutional forms without embracing its substance.

So what does the current basis of criticism of Chinese constitutionalism teach us? It teaches us that ideological campaigns may be as important a source of constitutionalism in the West as it has become in China. There is a similarity in the current ideological campaigns being waged in the United States in particular, and in the West, in general, about the need to reform government and to curb the bad habits of public officials, and that represented by the “Three Represents” Campaign in China. But, in the United States those campaigns center on the ideas of “rule of law,” “free markets” and “democracy.” In China, they necessarily focus on the core source of institutional power—the Chinese Communist Party. As such, criticisms grounded in American ideological campaigns tend to be less useful as a means of understanding both the challenges and the possibilities of progress within China today.

²⁶⁴ Landsberger, *supra* note 140 (“This downplaying of the revolutionary credentials of the Party, and stressing its relevance in the post-revolutionary period, will make the Party “forever undefeatable.”).

The Three Represents has been criticized both within and outside China as “embarrassingly obtuse dictum . . . [and] widely seen as an elitist rallying cry to justify the empowerment of the ‘new class’ of cadre entrepreneurs.”²⁶⁵ It is clear that the Three Represents is not easy to read. But it is also clear that the Three Represents provides a potentially significant foundation for constitutionalism with Chinese characteristics. It serves as a base for the construction of a system of applicable substantive constitutionalism. What has been described as obtuseness has served Jiang’s successors well in their attempts to flesh out the core notion of the Three Represents with the beginnings of a rich system of norms grounded in the fundamental notion of fusion between the State and the CCP. That grounding, as I have tried to suggest, at least on a theoretical level, does not lead to a cultural revolution-style disintegration of institutionalism and rule-of-law possibilities. The opposite is more likely. It suggests that constitutionalism is the basis for the construction of a CCP free of personality and representative of the nation, and that as the CCP is constructed, so is the state. It is no surprise that the recent anti-corruption campaigns have been targeted at the CCP functionary establishment as well as the rising business community.

The Three Represents was meant to be foundational, not comprehensive. It articulated the groundnorm from which the great principles of Chinese constitutionalism can develop. Viewed this way, the steady development of principles during Hu’s tenure does not represent an attempt to supplant or suppress Sange Daibiao as scholars and commentators outside of China have suggested.²⁶⁶ Instead, the recent ideological campaigns of Hu are better understood not as an attempt to obliterate the Sange Daibiao, but as an attempt to build on the foundations provided by the Three Represents for the construction of rule-of-law governance.²⁶⁷

All this remains theory. I have suggested a way of viewing these recent efforts as potentially potent theory indeed. Yet it is theory that remains substantially unrealized. To some extent, only time can tell if this theoretical edifice will become an integral part of the culture of governance in China. But legitimacy will to a greater extent depend on the public and successful

²⁶⁵ Lam, *supra* note 151.

²⁶⁶ Rajamohan, *supra* note 142 (explaining that it can be expected that Hu’s theory of the “three harmonies” will steadily replace his predecessor Jiang Zemin’s slogan on the “three represents”).

²⁶⁷ This is also beginning to be understood outside of China. The Singapore press, sometimes a faithful reporter of the desires of the CCP elite, reported in early 2004 that Hu was calling on the CCP theorists “to link his nascent ideological credo of ‘scientific development’ with those of his predecessors Jiang Zemin and Deng Xiaoping.” Hu has “urged them to look for ‘internal links and organic integration’ between his concept, the Deng Xiaoping Theory and Mr. Jiang’s Three Represents theory. See “*Hu aiming to be in same league as Deng and Jiang; Chinese President wants his ‘scientific development’ credo to be in Constitution*”, THE STRAITS TIMES (Singapore), Jan. 4, 2006. Not surprisingly, the story headline chose the traditional interpretive stance that the issue was about personality (the cult of Hu) rather than elaborate on a coherent theoretic.

implementation of theory, first within the CCP, and then through the CCP to all other organs of state power. But process constitutionalism has been a difficult affair in China.²⁶⁸ Yet it need not be impossible, nor need it lack Chinese characteristics; it need not mimic the West's versions of due process and the like. Its legitimacy will depend on the ability to implement a system in which rules rather than personal desires are privileged. When the CCP begins to consistently and predictably apply a set of rules to its own in the same way it applies these rules to others, it will have taken another great step toward both constituting a government for China and more firmly legitimating that government.

Within Chinese Constitutionalism, a ruling party is not a political faction. The organization of a state on democratic principles is a contradiction in terms. If the CCP represents the people of the nation, then its institutions must reflect its status as a government rather than as a mere faction. The great constitutional difficulty within China is articulating the normative basis for this identity in a way that institutionalizes the direct connection between Marxist-Leninist substantive ideals, the people, and the institutions through which their welfare is maximized.

The constitutional difficulty is understood within China, but is communicated less successfully to outsiders. The West measures rule of law and progress toward inclusive democracy by gauging the transformation of the CCP from the party in power to a mere political faction—the Madisonian perspective of American constitutionalism.²⁶⁹ Since 1949, however, the leadership elite in China have consistently embraced a different measure.²⁷⁰ Consistent with Marxist-Leninist ideals, it has gauged progress by the ability of the CCP to represent the people. In Western terms, this might be easier to understand as an ideological framework closer to the theories of Rousseau than of Madison. Rousseau stated, “were there a people of gods, their government would be democratic. So perfect a government is not for men.”²⁷¹

China must be sure of the conceptual framework it wishes to embrace. It must decide: Whether the State is to be a manifestation of the Party? Is the Party to be merely a servant of the State? Is the whole of State power to be

²⁶⁸ Peerenboom, *supra* note 195, at 161.

²⁶⁹ Madison, *supra* note 45.

²⁷⁰ I do not suggest that this measure is better or worse than another. I leave that to political theory and another day. I have suggested, however, that this is the fundamental character of the choice made. For those inclined to view the choice as wrong or bad, then it behooves them to understand its essential character if they mean to challenge it on substantive, moral, or other grounds. It is the worst of all mistakes to engage Chinese constitutionalism from a perspective grounded in false premises and misunderstandings.

²⁷¹ JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* (Bk. III, Pt. 4), *reprinted in* 38 *THE GREAT BOOKS* 387, 411 (G.D.H. Cole, trans.) (1762).

exercised only by the collective action of the institutions of the government and of the CCP acting together within the ambit of their authority? The answers to these questions hold the key to the rule-of-law issues in China.