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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ABSTRACT: Since the middle of the last century, the ideal of constitutional legitimacy has been
grounded on the foundation of the concept of the rule of law. The rule of law is usually understood in two
senses: first, as embracing firm limits on an arbitrary use of power, that is, of the use of the state power
when not grounded in law (process aspect); and second, 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 (substantive aspect). The Chinese Constitution of 1982 has,
as a formal matter, embraced the idea of the rule of law in its process aspect. The Preamble declares that
the Constitution “is the fundamental law of the state and has supreme legal authority” and Article 5 as
amended in 1999 emphasizes “the People's Republic of China practices ruling the country in accordance
with the law and building a socialist country of law.” However, it is more difficult to discern even a formal
adoption of the rule of law in its substantive aspect. As a consequence, outsiders have questioned the
fidelity of the Chinese state to the rule of law because of the control by the Chinese Communist Party
(CCP) of the apparatus of law making in China. In one sense these arguments can be reduced to a criticism
of Chinese constitutionalism as illegitimate because it lacks a basis in moral and ethical norms outside of
the personal desires of the leaders of the CCP. This paper suggests that traditional criticism misperceives
the fundamental nature of Chinese Constitutionalism as it attempts to fashion its own distinct “socialist rule
of law” constitutionalism. Fundamental to this socialist rule of law is the core premise the connection
between the apparatus of the state (its institutions) and that of the Chinese Communist Party (as the Party in
power). The paper examines the way the normative basis of this socialist rule of law has been advanced
through the use of increasingly sophisticated and complex specific ideological frameworks into the
constitution. This may suggest a greater willingness to advance the implementation of ideology, and the
substantive structure it represents, through state power grounded in law. However, 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. To examine the parameters of this possible
shift in Chinese constitutionalism, the paper will examine one element in this process of incorporation—the
inclusion of sange daibiao (the ‘Three Represents”) into the governance structures of the CCP after 2000
and the Chinese Constitution after 2004. Like the earlier constitutional assimilation of Deng Xiaoping
Theory, the adoption of sange daibiao may serve, at least as a formal matter, to further incorporate
substantive rule of law elements into Chinese constitutionalism. Sange daibiao illustrates the way in
which China is seeking to construct socialist rule of law through a 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. The essay 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 the CCP controls.

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

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. China has separated from these representative organs of state power the institutions of the Chinese Communist Party (CCP). That

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


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. *Structure of the State: The Party in Party*, available at [http://www.china.org.cn/english/features/state_structure/64404.htm](http://www.china.org.cn/english/features/state_structure/64404.htm)

According to a PRC state website, “As of June 2002, the CPC had a total membership of 66.355 million belonging to about 3.5 million grassroots organizations.” *The Central Organization of
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). The CCP can represent (at best) the will (however powerful) of a mere political party (albeit one with current constitutional status). As such, it 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 analysis posits as a good thing the recent efforts by the Chinese to separate politics from institution. The Chinese Constitution of 1982 has, as a formal matter, embraced the idea of the rule of law in its process aspect. The Preamble declares that the Constitution “is the fundamental law of the state and has supreme legal authority.” Article 5, as amended in 1999, emphasizes “the People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law.” The Chinese constitution thus necessarily focuses, as it must, almost exclusively on the institutions.

But the standard analysis finds these changes inadequate. The rush toward Western forms of governance has been empty, a gesture, with little real effect on the realities of governance, judged by a Western governance ideal. The Chinese Constitution has avoided any attempt to embrace rule of law in its 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, Deng Xiaoping Thought, and after 2004 to the “important theory of Three Represents,” those have little merit. These references remind Western analysis of the bad old days of the Cultural Revolution and as such can suggest little more than mere ideology. None can implicate substantial rule of law issues in its substantive or process aspects. Moreover, even formal compliance with process rule of law aspects hides the reality of deficiencies in the implementation of these safeguards.

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5 PRC Constitution, supra, note 2.
6 Id., art. 5.
7 See discussion, infra, art Section II.
The focus of this “standard model” of Chinese rule of law is the political state, including its formal institutions. Chinese efforts are usually measured against the state in its idealized form, which is usually conceived as the ultimate legal personality, formally manifested through its constitution, law making and government. The formal institutional elements of the state apparatus are also evaluated, in conformity with core Western liberal notions.\(^9\) 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.\(^10\) 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.\(^11\) Constitutionalism, in this view, tends to focus on substance rather than form; the existence of a document labeled “constitution” does not necessarily make for a legitimate constitution, conceived, thus, as a bundle of legitimating norms.\(^12\)

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\(^9\) 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 (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. Id., at 40-42).

\(^10\) 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, in Iran, Afghanistan and Iraq, systems purporting to be rule of law systems, in which the ultimate political power is subordinate to, and must conform to the normative limits, of a religious establishment and its rule system. See Larry Catá Backer, God Over Constitutions: Religiously Based Foundations and Modern Constitution-Making in the 21st Century, (manuscript, 2006). On the nature of Iranian theocracy, see Forough Jahankash, ISLAM, DEMOCRACY AND RELIGIOUS MODERNISM IN IRAN, 1953-2000: FROM BAZARGAN TO SOROUSH (Boston: Brill, 2001).

\(^11\) In the United States, see Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803) (“That the people have an original right to establish, for their future government, such principles as, I 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”).

\(^12\) For a good discussion, see, Walter F. Murphy, Constitutions, Constitutionalism, and Democracy, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al., eds., 1993); for a critique of this perspective on grounds of (an unfair) privileging current Western notions, see, e.g., EDWARD McWHINNEY, CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE (1981).
All other entities—political, social, economic, or religious—are viewed as
derivative, semi-autonomous and partial at best. They are either creatures of the state,
like corporations\(^\text{13}\) (including religious corporations),\(^\text{14}\) or illegitimate sources of
sovereign political power within a state because they are not the expression of direct
sovereign political power by the people, a power manifested only through the apparatus
of the state in which the people 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
instrumentalities of the state, 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 as entities. Having derived their authority from the state, their autonomy is
dependent on the state.\(^\text{15}\) 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, 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 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.\(^\text{16}\)

\(^{14}\) See, e.g., The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. U.S., 136
U.S. 1 (1890).
\(^{15}\) 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, e.g., Larry Catá Backer, The
Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning
\(^{16}\) Larry Catá Backer, Using Law Against Itself: Bush v. Gore Applied in the Courts, 55 Rutgers
L. Rev. 1109 (2003). I noted there the growing influence of these notions outside the West,
citing to the work of Anwar Ibrahim, an influential Malay politician. Id., at 1109. 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
As a consequence, conformity of state to accepted standards of rule of law notions tend 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. Rules must apply fairly to all, and the mechanisms for its enactment and enforcement must also be applied fairly and equally to all. No individual is either above rules fairly enacted, nor may any individual delegated the power to make rules other than as part of systems for rulemaking that are representative and not inherently arbitrary. Additionally, all law must respect certain boundaries of state power. Law must not be used for bad ends.

thirdly, perhaps the most significant, the citizen’s personal freedoms are formulated and protected by the ordinary law, rather than by abstract constitutional declarations.


18 “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 (Oxford: Oxford University, 1994). See also THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (Oxford: Oxford University Press, 1997).

19 See, e.g., discussion in Spencer Zifack, Globalizing the rule of law Rethinking values and reforming institutions in GLOBALISATION AND THE RULE OF LAW 32-65 (Spencer Zifack, ed., New York: Routledge, 2005). For the earlier English version of the concept, see, e.g., A.V. Dicey, A.V. INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION 107-123 (Liberty Classics ed., 1982) (8th ed., 1915). “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 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 (Cambridge, MA: Harvard University Press, 2001).

20 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 (Randal Peerenboom, ed., New York: RoutledgeCurzon, 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.)” Id., at 4). In German theory it encompasses the idea of the sozialstaat.

21 This idea derived a great impetus from the insight that a state could conform to a process centered rule of law to commit great bad deeds against the powerless. In the Twentieth Century, the great models of rule of law states gone badly were Germany between 1933-45 and Japan prior
While this moral or ethical component can take many forms, it generally encompasses behavior norms now commonly understood to comprise an international system of human rights.\textsuperscript{22}

However astute and laudable the aims and the analysis, this essay suggests that the standard Chinese rule of law analysis model has it only partially right. 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 suppressing the significance of, on the one hand, China’s “Chinese-ness” or, on the other hand, its Marxism, both of these perspectives seriously distort our understanding of Chinese constitutional discursive practice.”\textsuperscript{23}

This essay argues that no rule of law analysis of China is useful or complete unless it takes seriously 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. The essay 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.” \textit{The question of rule of law in Chinese terms, then, must center on the CCP, and not on the state apparatus 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 China. Only when that is a reality 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.\textsuperscript{24} These ideological campaigns have been criticized as little more than the continuance of the politics of the

\textsuperscript{22} Some constitutions recognize this component explicitly. See, e.g., Constitution of South Africa art. 39 (1996) (“39. (1) 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 (3) may consider foreign law”) available at http://www.polity.org.za/html/govdocs/constitution/saconst02.html?rebookmark=1#7.


\textsuperscript{24} See discussion, \textit{infra}, at Section III.A.
The essay 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. The essay 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 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, the essay considers the

25 “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.” SUIJIAN GUO, POST-MAO CHINA: FROM TOTALITARIANISM TO AUTHORITY? 43 (Westport, CN: Praeger Publishers, 2000) (includes a comparison of pre and post Mao campaigns, id., at 44).

26 Foremost among them were Andrew 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 American Federal 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). Here are the fruits of a successful ideological campaign slowly transformed over the course of centuries into a basis for authoritative constitutional interpretation.
role of the recent *Sange Daibiao* or Three Represents campaign, and its incorporation both in the constitution of the CCP and the Chinese state. The essay then suggests the ways in which the Three Represents have begun to be formally elaborated in Chinese constitutional theory, and the utility of ideological campaigns for this purpose. To that end, the essay 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. The essay ends with a suggestion of the formidable limitations of constitutional theorizing in China.

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. But Chinese leaders have been moving decidedly toward the embrace of a form of rule of law *culture*. It is to 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 that this essay focuses. *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 state sin the West (even norms constructed with Chinese characteristics or the like).

China stands at a crossroads. The path chosen will be made by the CCP. Either the CCP will continue to define itself as a political party increasingly remote from the edifice of the state system it is creating. Eventually this increases the likelihood that the CCP will face the difficulties and opportunities of the communist parties in Eastern Europe. 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 has suggested, that it is leaning to 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.”

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27 See discussion, infra, at Section II.
29 PRC Constitution (1982), supra, note 2 (see especially 2004 amendments),
30 See discussion, infra, at Section III.A.
31 See discussion, infra, Section III.B.
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 foundation of the concept of the rule of law. The rule of law is usually understood in two senses: First, in its process aspect – as embracing firm limits on an arbitrary use of power, that is, of the use of the state power when not grounded in law; and second, 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 has assumed a primacy of place as a consequence of historical experience with a process-oriented constitutionalism. France under the Vichy regime, and Germany under the Nazi regime, invocations of process constitutionalism served to legitimate the use of the state for the perpetuation of great crimes against humanity. In Germany, the underlying great substantive rule of law norm is “human dignity,” 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

33 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 107-277 (Liberty Classics ed., 1982) (8th ed., 1915).
34 For a nice summary description, see, e.g., Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 S. CAL. L. REV. 1307 (2001).
35 See RICHARD WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE (NYU Press, 1996)
36 See also Vivian Grosswald Curran, The Legalization of Racism in a Constitutional State: Democracy’s Suicide in Vichy France, 50 HASTINGS L.J. 1 (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.” Id., at 17).
37 “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.” CARL SCHMITT, STAAT, BEWEGUNG, VOLK: DIE DREIGLIEDERUNG DER POLITISCHEN EINHEIT 7-8 (Hamburg, 1933) translated and reproduced in GEORGE L. MOSE, NAZI CULTURE: INTELLECTUAL, CULTURAL AND SOCIAL LIFE IN THE THIRD REICH 323-324 (Salvatore Attanasio, trans., 1966).
38 GG art. 1.
been on process constitutionalism; process is privileged over substance to a great, though by no means exclusive extent.\(^39\) 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 quality.\(^40\) within the overarching substantive rule of law animating principle of “democracy.”\(^41\) As a formal expression of commands, rule of law in both of its aspects is usually associated with positive acts (law) emanating from legitimate institutions of state power representing the political community.\(^42\)

The focus on rule of law analysis is usually limited to the formal state apparatus.\(^43\) The institutions of the state apparatus, collectively its government, are usually synonymous with those political institutions through which the legislative, executive and judicial authority of the people is exercised. It 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.\(^44\)

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\(^44\) 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 Larry Catá Backer, God Over Constitutions: Religiously Based Foundations and Modern Constitution-Making in the 21st Century, (manuscript, 2006).
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.”45 Such factions do not represent the people as a sovereign body. Rather, they are the expression of individual will, even in collective form. Madison also refers to: “Complaints are everywhere heard...that the public good is disregarded in the conflicts of rival parties.”46 Thus, from the earliest period of the American Republic, there was a strongly guarded separation between a state and its instrumentalities (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 is thought to represent the personal views of individuals rather than the people as a whole, from the institutions of the state, which is thought instead to be 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,47 China appears finally to have begun the process of building a proper (Western style) state.48 China has abandoned the excesses of

46 Id.
48 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) (“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
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a political culture that was lawless, at least in the sense that politics was substituted for law. The analysis acknowledges that though it might have been true enough that many laws were made in the Chinese Soviets and again in the consolidation of Communist rule in the 1950s to legitimate the Socialist transformation of Chinese society. But the breadth and intensity with which post-Mao reformers have engaged in transplanting laws and applying legal ideas and techniques to solve contemporary, above all, economic problems have no parallel since the Republican era and in some respects even surpass it. Thus, a hallmark of post Mao Zedong Chinese legal development has been on 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 tough law continues to be “conceived and operates as an instrument with which to uphold the Socialist political order and perpetuate party domination,” China has also begun to organize its legal system within a proper Western style hierarchy of law administered by state officials. China has lavished a lot of attention on the adoption of an amended Constitution, which has begun the process of constituting a state apparatus superior to any other organized force within the state. Most importantly, for constitutional legitimacy purposes, the Chinese Constitution has at last embraced rule of law concepts within the black letter of that

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., at 836).


Until very recently, discussions of lawmaking and the legislature in China were regularly greeted by scholars, journalists and policy makers with tough 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 3.

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 E. S. Tay, Smash Permanent Rules: China As a Model for the Future, 2 SYDNEY L. REV. 400-423 (1973-76).


Id.

Actually, the PRC 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 has been periodically revised through 2004. For an English language version of the current form of the Chinese Constitution, Constitution of the People’s Republic of China, see available at http://english.people.com.cn/constitution/constitution.html.
instrument. 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, a securities market code, an administrative litigation law, and a civil procedure law for foreigners. It has started work on a comprehensive tort law.

The analysis then suggests that where China has further to go is in implementation of these codes and in developing a sound and independent judicial system, or some sort of equivalent alternative. Its rule of law culture will be made

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54 Article 5 of the PRC 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.” Constitution of the People’s Republic of China, art. 5, available at http://english.people.com.cn/constitution/constitution.html.


59 For a discussion, see, e.g., VAI IO LO AND XIAOWEN TIAN, LAW AND INVESTMENT IN CHINA: THE LEGAL AND BUSINESS ENVIRONMENTS AFTER CHINA'S WTO ACCESSION 15-19 (London: RoutledgeCurzon, 2005) (“Since the late 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.” Id., at 15); Mo Zhang, International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System, 25 B.C. INT’L & COMP. L. REV. 59, 92-95 (2002). 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,
stable and permanent once all stakeholders in governance, including principally the Chinese Communist Party, follow the post-Soviet model and become in fact, as well as in law, subject to the limitations of law. Indeed, some, but by no means all, rule of law critiques then suggest that democratization of governance is the last step necessary to ensure the materialization of a rule of law culture in China.


See Carl F. Minzner, Xinfang: An Alternative To Formal Chinese Legal Institutions, 42 STAN. J. INT’L L. 103 (“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).


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 constitutionalism in China). But see SUZANNE OGDEN, INKLINGS OF DEMOCRACY IN CHINA (Cambridge, MA: Harvard University Press, 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
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.

[I]nstitutions and habits of thought that have marked China since the establishment of the PRC 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. 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. 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.66

China is urged 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.67 Ultimately, many say, embrace of this ideal will require the transformation of the Chinese state from a strict authoritarian state to something else—perhaps a government that mimics that of Singapore,68 or Japan,69 or other East Asian models.70 The CCP essentially stands in the way of the realization of the rule of law ideal.71 At worst, it ought to embrace its destiny to become one of many

68 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).
71 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 (London: Routledge, 2002); Thomas F. Remington, Introduction:
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 to 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 marginalization 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 apparatus of government. 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 is this strain of scholarship inclined to suggest that rule of law is advancing in China. For example, Jinsong and Jack R. Van Der Slik suggested that Chinese rule of law constitutionalism advances as the official organ of state power, the National People’s Congress actually comes to fulfill the rhetorical place assigned to it by the Chinese Constitution.\(^\text{74}\) 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.\(^\text{75}\) Ironically, some scholars have suggested that Chinese Constitutionalism, understood in this sense, arose from a cynical manipulation of...
institutions at hand by senior Party members fighting for power and influence.\textsuperscript{76} For that purpose, the language of constitutionalism served the leadership of the National People’s Congress, shut our of CCP leadership positions, with a source of legitimating arguments for vesting an organ outside the direct control of the CCP with institutional authority in its own right.\textsuperscript{77}

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. But the focus there is on the institution of rule of law within the institutions of government with the CCP playing, at best, the role of an outsider/spoiler in this institutional context.\textsuperscript{78} Pat Chew also suggests the possibility of an institutionalized rule of law regime within the Chinese state that is not necessarily tied to Western notions of democracy.\textsuperscript{79} Others have also suggested the difficulties of squaring the notions of rule of law with development in East Asia.\textsuperscript{80} 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.\textsuperscript{81}

Randall Peerenboom shares some sympathy for Clarke’s position but also focuses on the institutions of the Chinese state rather than on those of the Chinese Communist Party. He focuses on distinctions between “thick” and “thin” notions of rule of law. Focusing on attainment of thin rule of law governance in China, Peerenboom suggests that the rule of law in China is in a very youthful stage. He explains that China must focus on the process aspects of the rule of law and that a complete transformation awaits the folding of the Chinese Communist Party into a traditional state system in which it will


\textsuperscript{78} Eric W. Orts, \textit{The Rule of Law in China}. 34 VANDERBILT J. TRANSNATIONAL LAW 43 (2001).


\textsuperscript{81} See Benedict Sheehy, \textit{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 “in 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., at 226-227.
serve its purpose as one of many political parties.\textsuperscript{82} Michael Dowdle advances similar arguments in suggesting both that traditional rule of law arguments don’t 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 in conceived in the West.\textsuperscript{83}

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 law making 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 are essentially unconstrained--the essence of arbitrary governance in 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). Rule of law systems cannot be legitimate or authentic in the face of party control of the apparatus of state government 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 universalistic aspirations in the period after the end of the Second World War outside of China. 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. But this peculiar ideal is somewhat removed from governance ideals developed within the People’s Republic. The international norm system of deep constitutionalism developed since 1945 serves as the ideal against which the Chinese system is evaluated (Backer 2006). 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” (Backer 2006). Two of the most prominent among these norms are “democracy,” and “human dignity,” from which globalized constitutional norm making is grounded within a complex of social, political and


economic rights articulated in an increasing number of pronouncements from international organizations.

These approaches to an analysis of China and of Chinese constitutional developments tend to tell us more about the cultural perspectives of the critics of Chinese developments than about China itself, the ostensible object of that analysis. In this respect my analysis shows some sympathy for Donald Clarke’s position that the standard critiques are based on an “imperfect realization of an ideal” or IRI approach to comparative law. Clarke argues that systems are measured and analyzed in terms of an ideal state chosen by the analyst. 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. This view, in one form or another, has served both to problematize rule of law analysis especially as applied to East Asian states, and its application to China.

I want to suggest that this approach is unsatisfactory for three reasons. First, it misses an important recent development in the specific context of Chinese constitutionalism—the growing importance of writing specific ideological frameworks into the constitution. Second, it misjudges the character of the theorizing of the CCP after Ma Zedong. Third, it misses the importance of the institutional place 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 PRC.

Ideological campaigns are basic to political discourse in the PRC. What is new is the way in which ideological campaigns have been transformed into a means of legal discourse. The growing importance of writing specific ideological frameworks within the Chinese and CCP constitutions, especially since the end of the Deng Xiaoping leadership, might have significant structural implications for both state and Party. This may suggest a greater willingness to advance the implementation of ideology, and the substantive

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87 Both the first and second points are important. I will, however, focus this essay on the third. While each implicates the political theoectics of normative system foundation for legal communities, the third point I raise is fundamental to the understanding of the context in which rule of law norms will develop in the PRC—the institutional place of the CCP in the state, and the development of systems of rule based norms building on that understanding.
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structure it represents, through state power grounded in law. “Ideology has become again an important vehicle for communicating regime values to Party cadres and the masses.” Ideology serves to supply the normative bases of appropriate institutional action that serves to define the relationship between state/supreme political entity and the individual. However, 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.

More importantly, it dismisses as ideology developments in Chinese constitutionalism that in Western States might be characterized as the development of substantive or deep constitutionalism. It has struck me as ironic that the American President’s ideological campaign for democracy, accountability and social responsibility should be treated as part of the important discourse of values constitutionalism in the United States, and yet the important conversations within China about the role of citizen, state and party be marginalized as “mere” ideology. But it is also important to accept that Chinese constitutional conversations will occur in a manner distinct from, and using forms that are not familiar 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 those judgments within the framework that China has chosen for itself.

Current analysis tends 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 it tends to minimize the importance of this theorizing. Characterized as

89 Jia Hepeng, The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalists?, 24(3) CATO JOURNAL 261, 262 (2004).
92 “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, 864-865 (2006).
mere CCP sloganeering, ideological campaigns, it is suggested, are little more than cynical attempts to manipulate Chinese public opinion with no intended substantive effect. On the other hand, Western analysts do not take CCP ideology literally enough as little more than the politics of individual power by other means. Ideology serves merely to mask the arbitrariness of the CCP’s culture of the exercise of personal power with no 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 the discourse of Chinese constitutionalism. This suggests the extent to which Western 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.

Often overlooked today is the integral role political ideologies come to play within the structure of national constitutions. Each state strives to embody within its ultimate document the core political principles, ideals, and standards by which it is to adhere to, including citizens, statesmen, and internal political structures alike. Readily noticeable in our very own U.S. Constitution is indebtedness to Jeffersonian and Madisonian political philosophy. The political ideology of federalists, expressed forcefully in the Federalist Papers, has assumed iconic status in American jurisprudence. “James Madison Thought” and “Thomas Jefferson Thought” guides the deliberations of the Supreme Court 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 and similar writings—Thomas Jefferson Thought as expressed in writings such as the letter to the Danbury Baptist Association—have played a definitive role in the development of Religion Clause jurisprudence. 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; its scholars tend to demonize similar ideological projects

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96 See, e.g., cases as diverse as Reynolds v. United States, 98 U.S. 145 (1878) (citing to Jefferson and Madison as providing the conceptual framework for the decision); Everson v. Board of Education, 330 U.S. 1 (1947) (reliance on Thomas Jefferson and James Madison Thought to same effect).
The Rule of Law, the CCP and Ideological Campaigns
Larry Catá Backer
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in other young political communities, especially ones that are 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. But 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 played by 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.”97 The study of the Chinese Constitution must thus be undertaken in a broader manner, not guided by a comparison with strictly western political concepts – individual autonomy, for instance – but instead with the specific political ideology espoused. This does not negate or suspend judgment, but it does a clear-headed consideration of the system to be judged and an understanding of the nature of the judgment.

But Chinese ideological campaigns have a very bad reputation among sinologists outside of China. Fairly typically, Marie Holzman reminded her readers as early as 2001, of the historical context in which ideological campaigns were used and perhaps misused by generations of leadership in China.98 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 of the campaigns. Certainty, predictability and fidelity to core ideas in the construction of a stable normative system have been absent for the most part as ideological campaigns were used, especially through the end of the 1970s, as one of several covers beneath which bitter personal and factional fighting occurred for power within the Chinese elite.99 Within China, and among the overseas 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, the recent *ba rong ba chi* campaign\(^{100}\)) and criticized as incomprehensible (the consensus about *sange daibiao*).

Yet historical abuse ought not to blind analysis to the potential inherent in 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, and was fallowed, after its birth, by long periods of dictatorship, political suppression and the abuse of that ideology for nefarious personal purposes in French politics.\(^{101}\) And 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.\(^{102}\) As the reality of rule of law within the CCP takes hold and deepens, 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. But China has yet to institutionalize a governance system in rules bind and is deemed superior to and the boundaries within which personal quests for power can take place.\(^{103}\) *Sange daibiao* points in the direction of the creation of such a system. But it can serve as the basis for the deepening of such a system, and it is what the Chinese elites have focused their rule of law development to date. Its success is by no means assured. But then 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 Chinese Communist Party in the analysis of rule of law in China.\(^{104}\) In Western analysis, the CCP is the elephant in the room that no one wants to 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 state apparatus, essentially the group that prevents the

\(^{100}\) See discussion *infra* at notes ***.


\(^{103}\) See discussion, *infra* at Part III.

development of democracy and independent state institutions capable of supporting a strong rule of law (in its process 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 expression of 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 faction 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 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. In a larger sense, 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 outward manifestation of the state apparatus, its formal organization of the institutions of state power, is the western style manifestation of the government of a proper political entity sporting the indicia of state institutions in a form understood 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 rule of law, serving as the representative of 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. That normative basis has found expression in a number of important pronouncements, each worthy of implementation, touching on the separation of individual from communal power. They include 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 important thought of Sange Daibiao), Hu Jintao’s recent 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, and the *ba rong ba chi* campaigns of 2006.\(^{105}\) The split the *sange daibiao* reifies is not that between state and party, but between politics and economics.\(^{106}\)

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 by the Western limitations of considering political parties as something unconnected with the state institution building. On this basis it is easier to understand the CCP’s own understanding of ‘rule of law’ as a hybrid concept:

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

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105 See discussion, *infra* at Section III.A.
106 In a great sense, again, *sange daibiao* owes a tremendous amount to the normative distinctions introduced by Deng Xiaoping.

Given the situation he inherited, the concept of a primary stage of socialism was, at once, an ingenious and expedient device that enabled Deng to explain away mistakes of the past and present while, at the same time, justifying the economic reforms that would follow. 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 "patricrachal" cult of personality, as well as the bureaucratism and political sinue of the party and government. 34 Being in the primary stage of socialism could also explain China's poverty and justify the need for market reforms to develop the economy.

change with changes in the leadership or changes in the views or focus of attention of any leader.\(^\text{107}\)

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 Party and state within China:

The Party has led the people in drawing up the Constitution and other laws, to which it confines its activities. 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.\(^\text{108}\)

It is only within this context that the current ideological campaign—\textit{Sange Daibiao} (or the "Three Represents")—assumes its importance for Chinese constitutionalism and the advancement of the rule of law culture in China.

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."\(^\text{109}\)

\textit{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. But it does more than that—it also provides the basis through which 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.*

For purposes of this essay, I will speak briefly to the parameters of this possible construction of Chinese constitutionalism, focusing on the inclusion of *Sange Daibiao* into the governance structures of the CCP after 2000 and the Chinese Constitution after 2004.110 Like the earlier constitutional assimilation of Deng Xiaoping Theory, centering on the “Four Cardinal Principles,”111 the adoption of *Sange Daibiao* may serve, at least as

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110 The 2004 amendment changed the language in the 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 Revised 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'..." XAINFA (1§982), Fourth Amendment, ¶ 1 (Approved on March 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 way similar to the French Constitution. For a 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 (July, 2004) available at [http://www.fedtrust.co.uk/euconstitution](http://www.fedtrust.co.uk/euconstitution). 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) (South Africa). 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 available at [http://lbackupblog.blogspot.com/2006/06/debate-over-new-autonomy-statute-for.html](http://lbackupblog.blogspot.com/2006/06/debate-over-new-autonomy-statute-for.html).

111 Joseph Fewsmith, *China since Tiananmen: The Politics of Transition* 27 (Cambridge: Cambridge University Press, 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. 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.
a formal matter, to further incorporate substantive rule of law elements into Chinese constitutionalism.

The post-Mao regime has attempted to resurrect the political tradition and political theory of the mid-1950s and base the 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. These fundamental principles claim the CCP itself in possession of universal truth and assert the necessity for a ruling ideological orthodoxy as the guiding principle of China's socialist revolution and construction. 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.  

In some respect, 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.

Why did China start implementing Sange Daibiao only within the past few years? Sange Daibiao would have been impossible in the absence of Deng Xiaoping theory, and 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 those who might become part of the CCP but also in the broad identification of the CCP with progress and socio-cultural elements. Sange Daibiao

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Id.


113 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.

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 economics and to find a way to legitimate the allocation of political power to the CCP, leaving economic power to be divided among 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. But it also comes form the need to tie political to 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, the power center of Jiang Zemin. “The new text focuses on 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.” The report drew a direct connection between these changes in Shanghai and Jiang’s *Sange Daibiao* as augmented by Hu Jintao’s recent “Three Harmonies” principles. It reported speculation 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.

Within the context of the two faces of state power in China, the Three Represents are important for a number of reasons. First, it is important 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 institutionalization of rule of law—the CCP and its expression as 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 of Chinese jurisprudence

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116 Id., at A-6.
118 Id. Thus, the report explains, “The 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.
since 1983 and the elevation of Peng Zhen as head of the National People’s Congress. The Three Represents, as a basic norm of both Chinese constitutionalism and the CCP apparatus, 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 the primacy of the Constitution over the Party itself, at least as the source of authority within the Chinese state apparatus. This supremacy is possible within Three Represents Theory precisely because it is grounded in the primacy of the CCP within the formal apparatus of the State. By conceding everything, it concedes nothing to the state (and specifically to the National People’s Congress).

But it does more than that. And 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 parallelism 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 potentially independent of it. In particular, the Three Represents Theory provides a method of curbing the independent role of the National People’s Congress 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. 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 as the place, the Three Represents suggests a lack of information and understanding within the party system itself. This lack of information, he argued, had been caused by the dismantling of the constitutional system. 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.

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121 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. This lack of information, he argued, had been caused by the dismantling of the constitutional system. 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.
socialist aspect to Chinese constitutionalism. This socialist aspect, bundled up 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 constitutionalism, which can make it distinct from constitutional theorizing originating in the West. If the CCP represents the people’s interest, it has reasserted its place over the NPC in political decision making in China, and tied that decision making more closely to the Marxist Leninist Maoist foundations of Chinese political culture.

Second, Sange Daibiaoj may represent conservative turn in the constitution of the state and division of power in China. It undoes, to some extent, the great compromise of the 1950s created to reduce Mao Zedong’s power by the group that had rallied to Mao’s defense against the attempt by Kao Kang to decentralize the distribution of power within the CCP. That compromise shifted power to the Standing Committee of the NPC as a means of checking the power of the CCP leadership in the form of Mao Zedong. That great change is possible only in the context of the rise of an institutionalization of the collective leadership principle, a concept that the CCP has struggled to embrace consistently since the 1950s, and represents the renewal of the strain of Chinese Communist thought that sought to reject autarchy in favor of collective decision-making. As such, it represents an attempt to more strongly institutionalize, as a formal matter, the more stable collective governance ideals in the CCP in place of the personality driven CCP dominated by a single man—Mao Zedong being the apocryphal character.

Third, it demonstrates a willingness, within the CCP itself, to embrace a certain transparency in governance. As the faithful representative of fundamental interests of the broadest masses of the people in China, the Three Represents declares a commitment

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123 This later point, of course, remains a principle concern of CCP theorists like Jiang Zemin.
126 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, April 23, 2006, available at http://english.people.com.cn/200604/23/eng20060423_260387.html
to legitimacy based on its representation of the people. That faithfulness requires the retention of 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.\textsuperscript{127} That organization must be directed inward as a guide to the structure of CCP behavioral norms, and more importantly, outward as a means of providing a normative basis for the construction and deployment of state power.

Fourth, the Three Represents can serve to limit the discretion of both Party and State officials—at least in theory. 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. It is clear that the Three Represents is meant to create and impose a great principal of fiduciary duty on Party and State officials, an obligation of acting solely in the best interests of the people that may be possible to enforce against any person exercising power in the State or the Party. The implementation is critical, but is also a harder question and treated a little in the last part of this essay. Developments like \textit{ba rong ba chi} certainly point in that direction.\textsuperscript{128}

Fifth, while the Three Represents limits discretion, it does so within a system of flexible application within the particular realities of China’s position in the world. It cross-sects with the Party’s involvement as a leader of the people, and as the representative of “the highest level of productivity.” In that context, it embraces the historical lessons the Party has learned from its recent past, and signals that “the practical problems of the Chinese revolution” must be solved, i.e. NOT “studying Marxism-Leninism statically and in isolation” but following Deng Xiaoping Theory; and very importantly, the understanding that “ruling the country by law…is also the objective demand of a socialist market economy.” This, in turn, clearly paralleled Jiang’s belief that “We must never discard Marxism-Leninism and Mao Zedong Thought,”\textsuperscript{129} but that at the same time, these latter thinkers should not be followed categorically. This idea was written into the Preamble of the Constitution of the Communist Part of China.\textsuperscript{130} 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

\textsuperscript{127} See discussion \textit{infra} at Section III.A.

\textsuperscript{128} “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.” PRC Constitution (1982), supra, note 2, General Program ¶ 6 available at \url{http://english.people.com.cn/200211/18/eng20021118_107013.shtml}. 
among groups traditionally excluded from governance. This suggests at least a partial resurrection of the early distinction made by Liu Shaoqi between principle and policy.

131 A very interesting spin comes from recent statements made, for example, by the Dalai Lama.

Looking back at the past five decades of China's history, one sees that the country saw a great many movements based on the principles of Marxism-Leninism. That was during Mao's era. Then Deng Xiaoping, through seeking truth from facts, introduced socialist market economy and brought huge economic progress. Following this, based 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. All these initiatives were undertaken in accordance with the changing times. As a result, the transition of political power and the development of the country have continued unabated. And today China is emerging as one of the major powers in the world, which she deserves considering her long history and huge population.

His Holiness, the 14th Dalai Lama, Statement of H. H. the Dalai Lama on the 47th Anniversary of the Tibetan National Uprising Day [http://www.dalailama.com/page.70.htm]. But 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.

132 Andrew Wedeman reminds us of the importance of this distinction, suppressed during the Cultural Revolution and then resurrected in the 1980s.

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.

Seventh, 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 object of Jiang in introducing sange daibiao. The Three Represents constitutionalizes Deng’s ideal of socialism with Chinese characteristics, linking the competence of the CCP to understand and apply Chinese Marxist Leninist Maoist thought with the legitimating authority of Constitution and governance through the forms of state institutions.

In this sense, certainly, the Three Represents importance of the cannot be understood as mere rhetoric standing in isolation; its development occurred in the context of a campaign to open membership in the CCP to the emerging capitalist class in China, as well as the extension of the protection of property rights to individuals. An important goal is at co-opting the capitalist or market elements of Chinese society by offering them a place in the CCP in return for adherence to CCP norms, including the basic socialist foundation of state organization. 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 the nature of that leadership as normative rather than merely political. Given this important relationship between state and Party, the Three Represents campaign is also aimed at emphasizing the socialist character of the post 1978 reforms. “The nominal limitation to the state and Party revealed in the Three Represents is aimed at limiting abuses of power by individuals rather than at restricting the CCP’s dominance or power within the state.”

Eighth, the Three Represents is meant to attempt a solution to the difficulty, long noted by Chinese and Western scholars, of combining the organizational norms

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133 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.” JOSEPH FEWSMITH, CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION 193 (Cambridge: Cambridge University Press, 2001).


135 Jia Hepeng, The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalists?, 24(3) CATO JOURNAL 261, 262 (2004).

136 Id., 267-69.

137 Id., 263.

suggested by Marxist Leninist theory, one based on a union of government and state within the CCP without an institutionalist framework, with an inclusive institutionalism based on a separation between government and party. The Three Represents suggests that in China, the CCP exits in two guises simultaneously, as political party and as the paramount institution of state power; it is both politics and governance. 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.”

The opportunities for elaboration of rule of law theory with Chinese characteristics through the Three Represents Theory were hinted at in Hu Jintao’s Party Day Speech on the 82nd anniversary of the founding of the CCP. In closing a long speech on the value of the Three Represents principles, he “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.”

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, therefore, can

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139 Institutionalism was a contradiction because the state was to wither away. Indeed, one the sources of the great rift between Trotsky and Stain 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 (LONDON: VERSO, 2003 (1959); J. 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, 50-81. W. Draguhn and D.S.G. Goodman, eds., London: RoutledgeCurzon, 2002. The Cultural Revolution represented, in one sense, an attempt at purer forms of Marxist Leninist state order. See, e.g., B.I. SCHWARTZ, COMMUNISM AND CHINA: IDEOLOGY IN FLUX. Cambridge, MA: Harvard University Press, 1968. But its failure confirmed the importance of institutionalization. The form of that institutionalization will take has been at the core of the great debates within the CCP elite ever since.

140 JOSEPH FEWSMITH, CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION 27 (Cambridge: Cambridge University Press, 2001). 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.

141 Joseph Fewsmith, Studying the Three Represents. 8 China Leadership Monitor, at 6 (2003). That elaboration has already begun with the ba rong ba chi campaign of 2006. See discussion infra at notes ---.
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 the attention paid to it, within the context of Chinese Constitutional hierarchy, \textsuperscript{142} Sange Daibiao occupies something of an ambiguous place. It seems to exist below the well-established principles of Marxism-Leninism, Mao Zedong Thought but above Deng Xiaoping Theory, but it is translated not as “Three Represents Thought,” but as “the important thought of 'Three Represents.'”\textsuperscript{143} Sange Daibiao is described in the same way in the Constitution of the CCP.\textsuperscript{144}

The Constitution of the Communist Party of China, 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. It is a guiding ideology that the Party must uphold for a long time to come. Persistent implementation of

\textsuperscript{142} The informal hierarchy of Chinese constitutional law and legal principles has been nicely described in the popular press in Asia.

Even in peddling new ideas, there is a kind of political hierarchy that the leaders tend to follow. The lowest rung belongs to “principles”. 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, who did the real nation-building in modern China, was always modest and refused to let a personality cult develop around himself or allow the party to elevate his ideas to the level of “thought”. His 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. We will have to wait and see if Hu’s theory of “three harmonies” would ever be sanctified as more exalted “thought”.


\textsuperscript{143} XIANFA (§982), Fourth Amendment, ¶ 1 (Approved on March 14, 2004, by the 10th NPC at its 2nd Session).

\textsuperscript{144} Constitution of the Communist Party of China (2002) General Program ¶ 6 available at \url{http://english.people.com.cn/200211/18/eng20021118_107013.shtml} (“the important thought of Three Represents”).
the "Three Represents" is the foundation for building our Party, the cornerstone for its governance and the source of its strength.145

But it is clear that while Sange Daibiao is more than “theory” (and therefore technically more foundational than Deng Xiaoping Theory for purposes of interpretation and application) it falls short of “Thought” and thus must be read and interpreted in light of the still superior principles of “Marxism-Leninism, Mao Zedong Thought.”

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. “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.”146

If the fundamental question of the Rule of Law in China should center on the CCP, then resolution depends on a choice of focus with significant effect on 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 slogenized as

LESS PARTY MORE STATE:

What does this mean? The CCP would have to continue to separate itself from the state; become more like a mere political party and ultimately one party among many (the Eastern European model); eventually the special place of the CCP and maybe the CCP itself will disappear within a much deeper kaleidoscope of political dialogue in a post CCP China. This choice reflects Western views. It is the easiest to apply. This choice represents a conscious willingness to conform with, and ultimately embrace, Western values and perspectives with respect to the appropriate basis for political and social organization. Some elements of 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.

When the CCP separates itself from the state, when it furthers projects designed to treat it like a mere political party, then it deviates significantly from its earlier stance as a fundamental institutional participant in the construction of government. So reconstituted, it preserves the CCP’s independence from the state but ultimately must accept a role subordinate to state institutions. That has been the pattern in the West, and the construction of Western style governance mechanisms will inevitably create significant institutional forces pushing both state and party into adopting Western roles—state institutions excluding the party, and the party competing 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 will produce strong expectations among foreigners that the Western pattern will be followed. This works very well for the West. It provides a basis for strengthening the Western internationalist movement in which the CCP will play a reduced role, 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 sloganized as

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.147

From the perspective of the historical development of the Chinese state, and the path it has chosen for the development of 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 rule of law in China is to cultivate a strong rule of law ethic WITHIN the CCP, before it is extended outside the CCP to the state apparatus itself. This choice incorporates the parallelism already in evidence in the constitutionalization of the CCP. But this choice carries heavy responsibilities, responsibilities and obligations highlighted by the Three Represents Thought itself.

147 See Reynolds v. U.S., 98 U.S. 145 (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”).
The approach—more Party less State—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 two constitutions 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 the CCP is instrumental in the construction and implementation of the “deep constitutionalism” described as essential for rule of law governance by both Western and Chinese scholars, 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 involves 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 that organization can fully serve as the institutional model for the rest of the state and rule of law.

There is much work to be done, but a basic choice must be made as well—with respect to the relationship between the State and the Party. The West expects the CCP to be eased into a role as a Western style political party. Still, there is another path that China might, but has not yet taken. Perhaps Dr. Zhenmin Wang’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 a Chinese constitutional thought that joins State and Party. 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)” (Wang). This understanding corresponds nicely 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, 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.” 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, 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 to seek legal

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149 Id.
remedies against the government.”\textsuperscript{150} The CCP remains the faithful representative of the fundamental interests of the broadest masses of the people in China by embracing this third aspect of the rule of law.

The \textit{Three Represents}, like the elaboration of the rule of law for the assertion of state power, is in either sense concerned 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 \textit{Three Represents}, like the rule of law, must apply from and through the institutions of state power and from that source of power discipline all other expressions of authority, including the CCP. There are elements in the Chinese constitution that suggest the possibility of this track of political development in China. And 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 commentators’ criticisms acquires greater legitimacy and the place of the CCP as mere political party becomes more certain.

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, \textit{sange daibiao} has also been criticized as a rather cynical expedient by a dictatorial faction (to which the CCP now finds itself increasing reduced) seeking to preserve its legitimacy and thus its power.\textsuperscript{151} And this is an important point as well—to the extent that the CCP chooses to treat itself more as a political party than as in integral part of the institutional structure of the state, then the limitations of political parties, especially as those limitations are understood in the West, will increasingly weaken the legitimacy and authority of the CCP in China, in fact, irrespective of pronouncements in

\textsuperscript{150} Id.

\textsuperscript{151} Ulrich Killion provides a benign version of this critique. Paralleling the analytical stance of the Chinese scholar Suiseheng Zhao, Killion suggests that pragmatic concerns (pragmatic nationalism (\textit{Shiyong De Minzu Zhuyi})) moved the CCP to institutionalize its ideology through the Chinese Constitution. M. Ulrich Killion, \textit{Three Represents and China’s Constitution: Presaging Cultural Relativistic Asian Regionalism}, 13 \textit{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 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
official documents. That is the great trap that the *Three Represents* campaign clearly unveils.

Yet *sange Daibiao* appears to provide a normative basis for negating the movement toward marginalization of the CCP. Jiang was careful to separate economic development, a space within which individual efforts were to be encouraged, and 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. That course was confirmed for the West by Jiang’s successor, Hu Jintao. In a speech at Yale University in 2006, he clearly expressed the conflation between people-state-party at the heart of *sange daibiao*. 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, etc.

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 within 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 manifestation of the will of the people.

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153 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.
The current foundations of this model were laid by Deng Xiaoping.\textsuperscript{154} 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.\textsuperscript{155} 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. 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 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. And it 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 as theory and then ends 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 objects and the 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.” 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 is to successfully follow suit.

Such a formal acknowledgment can be achieved within the constitutional framework of the PRC. There are already important references to the relationship between state and Party in the Preamble of the Constitution. Perhaps, following the

\textsuperscript{154} “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.”\textsuperscript{35} CARLOS WING-HUNG LO, CHINA’S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG’S ERA 39 (HongKong: Hong Kong University Press, 1995).

\textsuperscript{155} See discussion below at Section III.A.
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 itself within the Constitution of the PRC itself. In this way, the rule of law in China might have as its foundation the unbreakable fusion between state and Party within the institutional document understood by foreigners as the supreme authoritative instrument of legitimating state power.

“Jiang Zemin raised to prominence the idea of “governing the country through law” and discussed the need for greater 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. Hu may have different notions about how to implement these ideas, but there is no apparent conflict over these policy goals.”

Like sange daibiao, the principles elaborated after the Three Represents theory is introduced provide a substantial amount of room for interpretation. I will speak briefly to four of them: fish-water campaign, Two Must principles, the ba rong ba chi campaign and the Three Harmonies principles.

The Two Musts Campaign (the CCP must keep a humble attitude and must keep a hardworking spirit), provide a fine example of the way in which the Three Represents have been used as a means of resurrecting and reshaping important portions of Mao

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

But my old friend, a journalist - lexicographer, Victor Chen, points out like so many complex Chinese ideographs, there are other interpretations. "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."

Zedong Thought. The Two Musts, which Mao Zedong articulated at the 7th CCP Central Committee have been put forward as a means of understanding more deeply the meaning of the Three Represents. The state run media made a point of connecting the resurrection of the Two Musts campaign with the study of the Sange Daibiao. The Two Musts was thus resurrected to serve as a methodology. As methodology, the CCP went to some unusual lengths to make the Two Musts (and thus Sange Daibiao) relevant. Yet, even in Western terms, this attempt to inculcate knowledge through the mediums of modern culture is not unique. The Roman Catholic Church, for example, has made use of similar devices, including releasing a recording of music. But the Two Musts was not pioneered in its new form by Hu Jintao. His predecessor, Jiang Zemin had been relying on Two Musts in his efforts to strengthen and institutionalize the behavior expectations within the People’s Liberation Army. Indeed, there were intimations of

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158 Li Liang, *Two Generations of Leadership in China: The Echo History in their Paths to Power*, March 10, 2005 (Zhuo Li, trans.) available at 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. [January 1949].

Id.  

159 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.”).

160 The press ran stories that indicated that It is still being stressed that it is necessary for the cadres to establish and maintain a fine work style, and although improvement has been accordingly made in the past two years, on account of the implementation of the thinking of the “Three Represents,” more is needed: many cadres still have inappropriate and unhealthy work styles to some extent.

Id.  

161 Thus, the French press reported that “In 2003, on the eve of the 110th anniversary of Ma Zedong’s birth, the China Record Company finished the production of a powerfully red ‘Mao Zedong and Us,’ which includes the song “The Two Musts” sung to a rap beat. It was sung entirely by 20-year-olds.” Agence France Presse – English, *Mao Goes Hip-Hop As 110th Anniversary Of China Leader’s Birth Nears*, November 27, 2003.


the use of the Two Musts as the basis for a policy of conservation and administrative discipline.\footnote{In line with the "two musts" [we must always be modest, prudent and free from arrogance and rashness in our work and continue to hold to a principle of hard struggle and plain living, tr.] 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, March 15, 2005, reported in China View, available at http://news.xinhuanet.com/english/2005-03/15/content_2699526_9.htm.}

The tie in between the place of the CCP as the party in power, its role in (or as) state apparatus, and sange daibiao has been emphasized by the current Chinese leadership not only through the revival of the “Two Musts” but also by its amplification with the fish-water connection between CCP and the people. In 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.\footnote{Jia Hepeng, The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalists?, 24(3) CATO JOURNAL 261, 262 (2004).}

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 behavior expectations for individuals as members of the Chinese polity, and especially as members of the CCP their institutional role.

\textit{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 rong, ba chi" or the "eight honors, eight disgraces." As reported by Liu Dan in an article published to a PRC web site\footnote{Liu Dan, New moral yardstick: "8 honors, 8 disgraces," April 5, 2006, Xinhua, available at http://www.gov.cn/english/2006-04/05/content_245361.htm)\footnote{Id.}} ba rong, ba chi is meant to become “the new moral yardstick to measure the work, conduct and attitude of Communist Party officials.” As translated on this web site, the eight honors and eight disgraces is meant to reflect the
Mandarin original that was written to read “like rhyming couplets and sounds almost poetic.” 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.¹⁶⁹

Beyond the poetry, of course, is a clear effort to associate *ba rong ba chi* with good fortune. It was not for nothing that there are eight honors. Eight has been traditionally associated with good fortune. Four, on the other hand, is a number traditionally associated with death or bad luck.

*Ba rong, ba chi* is aimed at corruption within the Chinese Communist Party. The web site report of *ba rong, ba chi* states that

“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 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.”¹⁷⁰

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 socialist morality.¹⁷¹

In this sense, *ba rong, ba chi* provides a further elaboration of the now constitutionalized “sange daibiao” or Three Represents 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* (Three Represents) principles announced in 2000 as “the nucleus of Jiang Zemin Theory. The theory focuses on the future role of the CCP as "a faithful representative of the requirements in the development of advanced

¹⁶⁸ Id.
¹⁶⁹ Id.
¹⁷⁰ Id.
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.”

_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. But it does more than that—it also provides the basis through which 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_ might provide the principles through which the framework of commonly understood rule of law constitutionalism can be adopted with Chinese characteristics.

_Ba rong, ba chi_ is important for _sange daibiao_ as a targeted elaboration of the theory. It 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. Taken together, these ideological campaigns can have positive effect by providing CCP leadership with a system of principles necessary for 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. Thus, for example, commentators have suggested that the _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. It has also been advanced as 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 by replacing the ideological foundation of _Sange Daibiao_ with his own formulation. And indeed, there is a certain amount of bathos attendant on the introduction of _ba rong ba chi_, though the bathos may

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174 See also Edward Lanfranco, *Hu’s Moral Code*, U.P.I., April 7, 2006, available at [http://www.UPI.com](http://www.UPI.com) (“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.”).
be more acute to Western ears. Despite the criticisms, ba rong ba chi, within the complex of foundational principles announced by the CCP leadership since the institutionalization of the sange daibiao in the constitutions of the PRC and the CCP, presents China with substantial constitutional opportunity, along with great risk.

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 legitimated only as long as CCP cadres advance the interests of the Chinese people rather than those of more narrow classes of people—themselves, 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 avoidance of 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 behavior norm expectations beyond the power of any individual to bend without at least the threat of consequence. In a sense, then, ba rong ba chi can contribute to the rise of 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.

If ba rong ba chi remains an individual effort among CCP cadres, if the CCP fails to institutionalize the principles of ba rong, ba chi, and provide a fair and consistently applied system for its implementation throughout the CCP apparatus, then it will have failed. It will remain a tool of individual will and effort. It will provide the people with no assurance that it will mean something other than an individual cadre with power says it means. In this sense ba rong ba chi can augment rather than diminish corruption.

If ba rong, ba chi is treated as an isolated set of individual behavior governing principles, 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. But this requires both a recognition that corruption can be institutional as well as individual, and a commitment to create the sort of

175 “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 Development of the Chinese People’s Liberation Army (PLA) has selected six of these songs and ordered the service personnel to learn them.” Hu Jintao’s New Ethic Concept gets Support, Xinhua News Agency April 7, 2006.
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. But it needs 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 (the Two Musts, etc.). 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 Xiaoping middle path by encouraging the search for prosperity within a moral system. That certainly is the aim of ba rong ba chi.176

Of course, the price of failure is great. The scope of ba rong ba chi and it connection to sange diabiao provides clear evidence of the risk. The CCP has now committed itself publicly, before its own people and to the international community, that it has embraced certain governance principles. These principles are meant to provide a 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 can substantially weaken its position as the leading progressive force in the state if it fails to make good on the promises implied by systems of 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 cloth governance 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 a great civil war in the context of ideological campaigns revolving around the issue of slavery. Theocratic states like Iran face the

176 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, and Stanley Rosen, eds., New York: Routledge, 2004) (citing Xiaoying Wang, The Post-Communist Personality: The Spectre Of China's Capitalist Market Reforms, 47 CHINA JOURNAL 1-17 (January 2002)).
same risks if a moral basis of political legitimacy is perceived as corrupted. 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 daibia*. 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.

The *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 in that building, a rule of law environment, with characteristics understandable as such in the West, can be created. It reflects a conservatism and universalism in which the normative framework of Chinese governance is meant now to be greater than politics.177

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” (*he-ping, he-jie and he-xie*) principles (“seeking peace in the world, reconciliation with Taiwan, and harmony in Chinese society.”). 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 PRC sees it. Thus, the CCP has a duty to attain the goal of reuniting the whole of China—including what the PRC considers the breakaway province of Taiwan. It also suggests that the PRC is prepared to project its power outside it territory in accordance with the values expressed in *sange daibia* as thereafter elaborated. In a sense, this is represents a restating of a principles based foreign policy.178

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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
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 expression to PRC internal norms. This was made clear in a speech delivered by President Hu Jintao 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.

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 elaboration in ideological (and now moral) terms of ideas that deepen a commitment to CCP political governance of a state in which individuals are encouraged to be prosperous in a global environment. 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**

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one another about Chinese policy options, and in some cases they express disagreement with China’s official policy.

Id., at 285.


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. The CCP Constitution elaborates the basics of a theoretical system for Party discipline that might work well enough. But that recognition and those provisions suffer from a failure of implementation, or perhaps from an absence of caprice in implementation. The usual criticism centers on the treatment of rules as a form of political expression. The post sarge daibiao campaigns have also been criticized as empty expression, free of any connection to the reality of Chinese governance. When personality is permitted an unbounded power over politics in a representative capacity, the difficulties of implementation increase dramatically.

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. Other scholars have mentioned some of these methods. One involves an increased focus to be placed upon legitimizing the sincerity of the Party’s alignment with a rule of law; the movement toward inner-party democracy provides an interesting approach in that direction.

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1 This, for example, the CCP Constitution speaks of the nature of the role of the CCP in these terms: 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 (2002), available at http://english.people.com.cn/200211/18/eng20021118_107013.shtml (General Program ¶21).


4 See, e.g., Willy Lam, Hu Jintao’s “Theory Of The Three Harmonies,” 6(1) CHINA BRIEF Jan. 3, 2006, available at http://www.jamestown.org/publications_details.php?volume_id=415&issue_id=3571&article_id=2370615 (“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.” Id.).

This raises an interesting question: can the CCP be bound by a document or a set of rules (from the state Constitution on down 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 or not to comply with such rules. It is in this context that the current “anti-corruption campaigns” have their greatest challenges. As long as individuals pervert 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.


Since 2006, the CCP have significantly increased the resources and attention devoted to 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.

First, Party discipline inspection commissions at all levels should enhance their inspection and supervision on major issues in national development, such as enhancing the macro-economic regulation, handling problems relating to agriculture, rural areas and the farmers, improving the capacity of independent innovations, saving energy and resources, and protecting the environment. . . . 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. Violators of Party discipline and those abusing power for personal gains will receive severe punishment. Meanwhile, inspection and supervision should be strengthened in fields like finance, engineering projects, land management, mine exploring, and governmental procurement. Discipline inspection will focus more on cases gravely harming public interests, especially on cases concerning production safety, food and medicine safety, environmental protection and social stability. International anti-corruption cooperation will also be strengthened. . . . 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 enhance its inspection over financial institutions
Party policies and rules for their 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 on the CCP’s own terms.\(^{189}\)

But separating individual from Party may require the formalization of enforcement mechanisms that themselves will 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. This has been difficult (Chen 2006); but the task is not impossible. 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 ought to be to discipline the individualistic elements in the Party so that the Party can effectively lead the State.

Yet this raises a fundamental problem that the CCP must eventually face. While the *Sange Daibiao*, the *Two Musts*, the *ba rong ba chi*, and Three Harmonies may provide a useful effort to create a substantive normative basis for the operation of the state and Party, none of these efforts can serve, by themselves, as the basis for rules which can be directly implemented to direct the behavior of officials or to restrain bad behavior. *Sange Daibiao* and its progeny may serve as a source of rule making, but they cannot serve as substitute for rules. To some extent, the great code writing efforts of the last decade serve that purpose. But for the internal governance of power something more

\(^{189}\) 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."”

specific is also required. The CCP has begun to take steps to implement depersonalized rules of behavior and to apply systems of enforcement.\textsuperscript{190} 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.”\textsuperscript{191}

This institutionalization is not limited to the need to develop a 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.\textsuperscript{192}

\textsuperscript{190} Willy Lam, Chinese Corruption Crusade Causes New Factional Infighting, 4(2) China Brief (J a n . 2 0 0 6 ) a v a i l a b l e a t h t t p : / / w w w . j a m e s t o w n . o r g / p u b l i c a t i o n s _ d e t a i l s . p h p ? v o l u m e _ i d = 3 9 5 & i s s u e _ i d = 2 9 0 1 & a r t i c l e _ i d = 2 3 4 7 4 (“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.”).\textsuperscript{191} 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. “Hu and Wen may not use that sword, but it can be a potent weapon in factional infighting.”\textsuperscript{192} This has been the subject of continuing elaboration within China. See, e.g., Information Office of the State Council of the People’s Republic of China. White Paper: Building of Political Democracy in China, October 2005, Beijing available at 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 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
Democratic 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 in the political sphere. “The 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.”

There is no reason that 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 the important thought of the Three Represents), the *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, *ba rong ba chi* and the Three Harmonies theories should not apply within the CCP as well as between the other institutions of the state and the people. Indeed, 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.

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own will above that of the collective. Id., at Part I (“A Choice Suited to Chinese Conditions”).

The concept of democratic centralism is bound up, in Chinese conceptions, as joined with the ideas of building 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* (1982) available at [http://www.plp.org/pl_magazine/democent.html](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., “The Mass Line in China”).

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 text and notes 171-173. 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.

193 This is constitutionally mandated. See Constitution of the People’s Republic of China, supra, note 2, at Art. 3.

The development of an administrative law structure in China might serve to institutionalize ideology. But that task is only in its infancy and needs protection from abuse by individuals. 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. 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 exacerbated central-local tensions and resulted in fragmentation of authority.”

Lastly, much more might be made of the opening of membership in the CCP. More Party Less State 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

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196 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 and 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.


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.'”199 Yet, as the First Representative 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. His sort of pragmatism is not unknown among CCP theorists before the Cultural Revolution.200 And in another sense, this opening of the CCP serves as a method of solving the dilemma of opening the CCP to criticism while avoiding the rejectionism of CCP leadership that resulted during the Hundred Flower campaign and in the period leading to the Tiananmen Square suppression.201

Adherence to Party (and now state) norms, rather than status, ought to serve as a more important touchstone for Party membership. The opening of CCP membership to emerging private sector elements 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 at least 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 serves well 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.

200 In another
201 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.” ANDREW HALL WEDEMAN, THE EAST WIND SUBSIDES: CHINESE FOREIGN POLICY AND THE ORIGINS OF THE CULTURAL REVOLUTION 19 (Washington, D.C., Washington Institute Press, 1987).
IV. CONCLUSION

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.

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.”\(^{202}\) It is clear that the Three Represents is not easy reading. But it 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 attempt 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 state and 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 not for nothing 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 *grundnorm* from which the great principles of Chinese constitutionalism can develop. Viewed this way, it is easy to understand that 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 sometimes suggested.\(^{203}\) Instead, the


\(^{203}\) C. Rajamohan, *Peaceful Rise in Three Steps,* Indian Express, Jan. 29, 2006 available at http://icolumnists.expressindia.com/full_column.php?content_id=86868 (“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.”")
recent ideological campaigns of Hu can be better understood not as an attempt to obliterate the *Sange Daibiao* but as one to build on the foundations provided by the Three Represents for the construction of rule of law governance.²⁰⁴

*All this remains theory.* I have suggested a way of viewing these recent efforts as potentially potent theory indeed. But 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 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.²⁰⁵ 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. But 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 legitimizing that government.

Within Chinese Constitutionalism, a ruling party is not a political faction, and 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 government rather than as mere faction. The great constitutional difficulty within China, then, is to articulate 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.

This is understood within China, but is communicated less successfully to outsiders. While the West measures rule of law and progress toward inclusive democracy by gauging the transformation of the CCP from party in power to mere political faction—the

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²⁰⁴ 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.” He 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 on the elaboration of a coherent theoretics.

Madisonian perspective of American Constitutionalism, the leadership elite in China since 1949 has consistently embraced a different measure. Consistently 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 a stance closer to that of Rousseau than of Madison—“Were there a people of gods, their government would be democratic. So perfect a government is not for men.”

But China must be sure of the conceptual framework it wishes to embrace within which this is teased out: Is the state 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 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.

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207 I have not suggested that this measure is better or worse than another. I leave that to political theory and another day. I have suggested, though, 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.