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The Rule of Law in China

Eric W. Orts^{**}

ABSTRACT

This Article explores contemporary meanings of the rule of law with a focus on its meaning in Chinese history and tradition, as well as Chinese legal institutions. Part II considers the concept of law in China, from early understandings in Confucianism and Legalism to more recent treatments in Chinese Communism. It also reviews efforts that the People's Republic of China has made in recent decades to strengthen its legal institutions. Part III begins with a discussion of the Western jurisprudential idea of the rule of law and suggests a distinction between two basic understandings: (1) rule by law as an instrument of government, and (2) the rule of law as a normative and political theory. The Article proceeds to make a controversial claim that Chinese development of the rule of law may be separated from the development of Western-style democracy, at least in the present historical situation. The Article concludes with several recommendations for promoting the rule of law as a normative and political system in China.

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* Professor of Legal Studies, The Wharton School, University of Pennsylvania; Freeman Foundation Visiting Professor, Tsinghua University, Spring 2000. I thank my teaching assistant, Professor Xu Lu, and my Chinese graduate students at Tsinghua University in Beijing for helping me to better understand the legal, economic, and social situation in China today. Participants at presentations of a draft of this paper at the Law & Society annual meeting in Miami in May 2000 and at a research seminar for the Joseph Wharton Scholars in November 2000 provided helpful comments, as have Kent Greenawalt, Nicholas Howson, Randall Peerenboom, Edward Rubin, Richard Shell, and Alan Strudler. Tommy Shi served with distinction as a research assistant. I am especially grateful to the Wharton School and its alumni for the opportunity to visit and teach in China.

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[T]he political and civil laws of each nation must be proper for the people for whom they are made, so much so that it is a very great accident if those of one nation can fit another . . . [The laws] must agree . . . with the customs [of the people].¹ – Montesquieu

For governing the people there is no permanent principle save that it is the laws and nothing else which determine the government. Let the laws roll with the times and there will be good government. . . . But let the times shift without any alteration of the laws and there will be disorder.² – Han Fei

I. INTRODUCTION

Establishing the rule of law in China has become a priority for its government.³ Deng Xiaoping and his successors have recognized the folly of the Maoist period’s denigration of law and lawyers, especially the extraordinarily destructive Cultural Revolution which decimated the legal system as it then existed.⁴ The current generation of Chinese rulers has promoted “the rule of law” to the extent of adopting a constitutional amendment in 1999 to enshrine the principle.⁵ President Jiang Zemin now proclaims that the

1. 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 7 (Thomas Nugent trans., Fred B. Rothman & Co. 1991) (1751), *quoted in* STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 298 (1999).

2. 2 THE COMPLETE WORKS OF HAN FEI TZU 328 (W.K. Liao trans., 1959), *quoted in* Derk Bodde, *Basic Concepts in Chinese Law*, in LAW IN IMPERIAL CHINA 25 (Derk Bodde & Clarence Morris eds., 1967).

3. In this article, I use “China” to refer only to the People’s Republic of China, which now includes both Hong Kong (repatriated from the United Kingdom in 1997) and Macau (repatriated from Portugal in 1999). I use “greater China” to include not only the People’s Republic of China but also Taiwan, Singapore, and other independently governed territories populated largely by ethnic Chinese.

4. See *infra* notes 81-104 and accompanying text.

5. Yingyi Qian, *The Process of China’s Market Transition (1978-1998): The Evolutionary, Historical, and Comparative Perspectives*, 156 J. INSTITUTIONAL &

Chinese Communist Party is fully committed to "govern the country according to law."⁶

In part, this reform effort corresponds with China's expected entry into the World Trade Organization (WTO), which requires an internal legal system administered in a "uniform, impartial, and reasonable manner."⁷ Establishing the rule of law in China thus coincides with the notion that economic modernization requires "getting on track with the international community" (*gen gouji jiegui*).⁸ At the same time, the advocacy of new laws and an improved legal system to enforce them is intended to advance an indigenous "market economy with Chinese characteristics,"⁹ which seems to be

THEORETICAL ECON. 151, 161-62 (2000). The amendment elevates the concept of "governing the country according to law" to the highest level of Chinese jurisprudence, at least theoretically. *China: "Rule of Law" Backed with Amendment*, CHINA DAILY, Mar. 4, 2000, at 1, 2000 WL 4115271. See also Xian Chu Zhang, *China Law*, 33 INT'L LAW. 677, 693 (1999) (noting that under the amendment "governance by rule of law will be in the Constitution for the first time"). Specifically, the amendment adds the following to Article 5 of the Chinese Constitution: "The People's Republic of China shall practice ruling the country according to law, and shall construct a socialist rule-of-law state." Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 128 (Fall 1999-Spring 2000) (quoting the amendment). See also Yufan Hao, *From Rule of Man to Rule of Law: An Unintended Consequence of Corruption in China in the 1990s*, 8 J. CONTEMP. CHINA 405, 422-23 (1999) (giving a somewhat different translation).

6. *Magazine Reviews Jiang Zemin's Efforts to Give Law Bigger Say*, XINHUA ENGLISH NEWSWIRE, Mar. 24, 2000, 2000 WL 17539347. The phrase is a four-character slogan in Mandarin. LUBMAN, *supra* note 1, at 128.

7. LUBMAN, *supra* note 1, at 315 (quoting Article X of GATT). See also *China Enters Last Lap Before WTO Entry*, FIN. TIMES, June 20, 2000, at 8 (discussing the final negotiations of legal changes required for China's admission). As of this writing, high-level negotiations were scheduled to admit China formally to the WTO. Guy de Jonquières, *U.S. Acts to End Stalemate over China's WTO Entry*, FIN. TIMES, Sept. 28, 2000, at 1; Frances Williams, *Beijing Optimistic on WTO Talks*, FIN. TIMES, Jan. 11, 2001, at 8. But see *Agricultural Dispute Holds Up China's Negotiations on WTO*, ASIAN WALL ST. J., Jan. 15, 2001, at 3, 2001 WL-WSJA 2770237 (reporting a deadlock on China's right to agricultural subsidies under the WTO regime); Peggy Sito, *WTO Talks Collapse After China Stands Firm on Farm Subsidies*, S. CHINA MORNING POST, Jan. 19, 2001, at 1, 2001 WL 2304494 (noting the failure of a round of negotiations because of the agricultural issue). But see also John Stuttard & Allan Zhang, *China Aims to Comply with Terms of Eastern Promise*, TIMES (London), Jan. 25, 2001, at 32, 2001 WL 4870065 (arguing that the "opening-up" of China is "inevitable" but noting that China's "14-year marathon" of negotiations to join the WTO will require significant legal reforms to be successful). For an earlier analysis of the difficulties of China's negotiations, see Donald C. Clarke, *GATT Membership for China?*, 17 U. PUGET SOUND L. REV. 517 (1994).

8. DOUG GUTHRIE, *DRAGON IN A THREE-PIECE SUIT: THE EMERGENCE OF CAPITALISM IN CHINA* xi, 151 (1999).

9. DANIEL BURSTEIN & ARNE DE KEIJZER, *BIG DRAGON: CHINA'S FUTURE, WHAT IT MEANS FOR BUSINESS, THE ECONOMY, AND THE GLOBAL ORDER* 330 (1998).

an evolving amalgam of socialist one-party government and commercial markets.¹⁰

Recently in the United States, both Democratic and Republican political leaders have invoked promotion of the rule of law as an argument in favor of permanent normal trade relations with China.¹¹ The general argument is that increased trade with China will not only encourage further development of its legal system but also will lead to positive political change.¹² In other words, the claim is that "promoting the rule of law advances both profits and principles."¹³ This argument helped to win a close debate in Congress on the issue. President Clinton declared the vote of the House of Representatives in May 2000 in favor of normal trade relations to be a step toward "a China that is more open to our products and more respectful of the rule of law at home and abroad."¹⁴ The Senate approved permanent trade relations with China in September 2000,¹⁵ and the President signed into law the China Trade Relations Act of 2000 in October.¹⁶

10. The hybrid goal of a "socialist market economy" was announced at the Chinese Communist Party Congress in 1992. WILLEM VAN KEMENADE, *CHINA, HONG KONG, TAIWAN, INC.* 24 (Diane Webb trans., 1997). Some scholars argue that such an economy is "an oxymoron." *Id.* See also Zhang Lijia & Calum MacLeod, *Introduction to Entering the World: 1990-1999*, in *CHINA REMEMBERS* 233, 238 (Zhang Lijia & Calum MacLeod eds., 1999) (describing the "socialist market economy" as a "startling contradiction"). The eventual shape of the emerging economic and political structure of what one commentator has called "Market Stalinism" in China remains to be seen. MARC BLECHER, *CHINA AGAINST THE TIDES: RESTRUCTURING THROUGH REVOLUTION, RADICALISM AND REFORM* 115, 226-27 (1997). The best prediction for the short-term is that China's leaders wish to create "a blend of West and East, capitalism and socialism, traditional and new, a market-driven economy and a centrally planned one." BURSTEIN & DE KEIJZER, *supra* note 9, at 330.

11. Samuel R. Berger & Gene Sperling, *Trade Deal Will Hurt China's Hard-Liners*, N.Y. TIMES, May 19, 2000, at A27 (providing the view of the Clinton Administration). See also *In Bush's Words: "Join Together in Making China a Normal Trading Partner,"* N.Y. TIMES, May 18, 2000, at A14 (providing George W. Bush's argument); Alison Mitchell, *Bush, Invoking 3 Presidents, Casts "Vote" for China Trade*, N.Y. TIMES, May 18, 2000, at A1 (also providing George W. Bush's argument).

12. *E.g.*, Charlene Barshefsky, *Trade Policy and the Rule of Law*, 9 MINN. J. GLOBAL TRADE 361, 365-67 (2000); William Jefferson Clinton, *China's Opportunities, and Ours*, N.Y. TIMES, Sept. 24, 2000, § 4, at 15.

13. Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.-Apr. 1998, at 95.

14. Jackie Koszczuk, *House Approves China Trade Bill*, PHILADELPHIA INQUIRER, May 25, 2000, at A1.

15. James Kynge, *Senate Vote Ushers in New Era in U.S.-China Trade Relations*, FIN. TIMES, Sept. 21, 2000, at 5. Adoption of permanent normal trade relations between the United States and China ends a ritual of annual Congressional review of whether normal trade with China should be continued on grounds of progress (or lack thereof) on the protection of basic human rights. *Id.*

16. Lissa Michalak, *History in the Making: President Signs Permanent Normal Trade Relations into U.S. Law*, CHINA BUS. REV., Nov. 1, 2000, at 4, 2000 WL 28709233. The act does not become effective until China accedes to the WTO. *Id.* See

The George W. Bush Administration has confirmed that it will continue a policy of pressing China to follow "the rule of law."¹⁷

This Article considers exactly what the *rule of law* may mean in China now and in the future. The concept itself is notoriously difficult as a matter of jurisprudence, and different people can mean very different things by the rule of law, especially when they are speaking in different languages and from the perspectives of different cultures.¹⁸ This Article explores contemporary meanings of the rule of law in order to better understand China's legal system, as well as Western interpretations of what the rule of law may mean in China. Today, the rule of law is a "paradigm" that enjoys popularity among politicians and legal scholars in China.¹⁹ The potential for China's legal institutions to evolve from "a system of law" to "a rule of law" is likely to be critical for future political and economic development.²⁰ A contemporary Chinese slogan proclaims correctly that "the market economy is a rule-of-law economy" (*fazhi jingji*).²¹ As the Article discusses, however, there is a substantial difference from a normative perspective between the mere existence of a legal system and establishing the rule of law.²²

Inevitably, I bring a Western jurisprudential perspective to my consideration of Chinese law. Despite this cultural limitation, however, I attempt in this Article to provide a useful perspective on the idea of the rule of law to assist the development of law and legal

also People's Republic of China Trade Relations Act, Pub. L. No. 106-286, 114 Stat. 880 (2000).

17. Jane Perlez, *Bush Aides Debate Ways to Press China Over Rights*, N.Y. TIMES, Feb. 4, 2001, at 4 (quoting Secretary of State Colin L. Powell).

18. Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 CULTURAL DYNAMICS 315, 343 (1999) ("Rule of law means different things to different people."). See also GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 11 (1996) ("Of . . . all the dreams that drive men and women into the streets, from Buenos Aires to Budapest, the 'rule of law' is the most puzzling."). Various conceptions of the "rule of law" in Western and Chinese jurisprudence are explored in Part III.

19. Chen, *supra* note 5, at 155. See also Peerenboom, *supra* note 18, at 320-23 (citing recent work on the "rule of law" by Chinese legal scholars, including Jiang Lishang, Jiang Mingan, Li Buyun, Liu Hainian, Shen Zongling, Wang Jiafu, Ying Songnian, and Zhang Qi).

20. Minxin Pei, *Is China Democratizing?*, FOREIGN AFF., Jan.-Feb. 1998, at 68, 77. See also William P. Alford, *Double-Edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China*, DAEDALUS, Spring 1993, at 45, 63 (arguing for a need for "China's elite and masses . . . [to] recognize the possibility of law aspiring to serve higher ideals of justice, as well as immediate political purposes").

21. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1690 (2000).

22. As discussed below, two different Chinese characters are used to refer to *legal system* and the *rule of law*, though both are romanized in English as *fa zhi*. See *infra* notes 30-31 and accompanying text.

institutions in China. The Article also argues that Western and other non-Chinese policymakers should think carefully about the descriptive and normative complexity of the rule of law in the unique cultural and political context of contemporary China.

This Article proceeds as follows. Part II considers the concept of law in China historically and currently. Those who are quick to assume the superiority of Western legal models should remember that China's legal traditions have been evolving within a continuous civilization for more than two thousand years.²³ Part II discusses Chinese understandings of law in the traditions of Confucianism and Legalism, as well as more recent treatments of law in Chinese Communism. It also reviews the strenuous efforts that China has made in the last few decades to strengthen its legal institutions, an epic project of social engineering that has been compared with the construction of the Great Wall in the fifteenth and sixteenth centuries.²⁴

Part III then reexamines the Western jurisprudential idea of "the rule of law" in general and, drawing on a number of major sources, recommends a distinction between two basic understandings: (1) *rule by law* as an instrument of government, and (2) the *rule of law* as a normative and political theory. Both conceptions of the rule of law, the Article will argue, are important for understanding the development of law in China. Both are also essential for China to continue on a path toward social progress as a part of the world community.

23. RALPH H. FOLSOM ET AL., LAW AND POLITICS IN THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 5-7 (1992) (describing Chinese law as "one of the world's great legal traditions"); W.J.F. JENNER, THE TYRANNY OF HISTORY: THE ROOTS OF CHINA'S CRISIS 129, 137 (1992) (describing the "formidable legal tradition that developed unbroken for some 2,300 years" in China as "one of the world's great legal cultures" with a long written history); William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915, 927-28 (1986) (recounting evidence of Chinese legal history dating to at least the 12th century B.C.); Ezra F. Vogel, *Introduction: How Can the United States and China Pursue Common Interests and Manage Differences?*, in LIVING WITH CHINA: U.S.-CHINA RELATIONS IN THE TWENTY-FIRST CENTURY 17, 18 (Ezra F. Vogel ed., 1997) (noting China's "2,200 years of continuous political history"); Stephen B. Young, *Observations on the Importance of Law in China*, 1988 B.Y.U. L. REV. 501, 501 (noting that "the Chinese developed bureaucracy to a level of high legal sophistication long before Western Europeans did"). It is true that Western legal traditions also date to Biblical times, but it is difficult to argue that a continuous civilization evolved in Europe, which split into warring nation-states for most of its history, in a manner similar to the historical development of imperial China.

24. William P. Alford, *A Second Great Wall?: China's Post-Cultural Revolution Project of Legal Construction*, 11 CULTURAL DYNAMICS 193, 193-94 (1999). Construction of the Great Wall began in 1474 during the Ming dynasty as a defense against the Mongols. J.A.G. ROBERTS, A CONCISE HISTORY OF CHINA 127 (1999). The Ming dynasty lasted from 1368 to 1644. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 128 (enlarged ed. 1998).

Furthermore, the Article makes a more controversial claim that developing the rule of law in China in the normative and political sense may be divorced from a theory of democracy, at least under the present historical circumstances.²⁵ This claim leads to some policy recommendations for both the development of legal institutions within China and foreign policy regarding China. When making foreign aid and other diplomatic decisions regarding China, Western policymakers often conflate arguments in favor of the “rule of law” with other presumed social goods such as “democracy” and “human rights.”²⁶ But it is important to consider carefully the relationship among these social goods. In this respect, the Article takes up William Alford’s challenge to ask “difficult questions” about the relationship between different “goods” that are promoted in foreign policy, including “democracy, the rule of law, fundamental human rights, markets, economic development, and civil society.”²⁷

The Article concludes with an exploration of how several of these different social goods may relate to one another in China. The most fundamental policy conclusion is that Western societies, including the United States, can find common ground and pursue mutual interests in helping China to build the institutional infrastructure needed to support the growth of the rule of law both descriptively and normatively. A corollary is that strong disagreements about the need for “democracy” should not necessarily interfere with constructive work that can be done regarding the “rule of law,” even though disagreements about the need for (and the nature of) democracy in China will continue. At least with respect to the need for the development of the rule of law, the Article therefore argues against an inevitable “clash of civilizations” between China and Western

25. The claim provoked controversy when I first presented the idea at the Law & Society annual meeting in Miami on May 27, 2000. I am not the first, however, to make the argument that principles of “rule of law” may be separated from those of “democracy,” as discussed below in Part III. Most of a panel of well-known legal scholars at the same conference, including Edward Rubin, Frederick Schauer, William Whitford, and Dennis Patterson, made similar arguments that the “rule of law” can and should be considered separately from “democracy.” *The Multiple Meanings of the Rule of Law*, Law & Society Annual Meeting, Miami, Florida (May 27, 2000). See also William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 742 (arguing that “issues of democracy” should be conceptually distinguished from the “rule of law”).

26. *Opening China to Goods and Ideas*, N.Y. TIMES, May 25, 2000, at A28 (editorial arguing that Congressional approval of permanent trade relations with China “must be seen as a first step toward broadening relations with the Chinese and pressing them to open their country to democracy, the rule of law and respect for human rights”); Perlez, *supra* note 17, at 4 (discussing the George W. Bush Administration’s policy toward China as promoting “human rights,” “free enterprise systems,” and “democracy,” as well as the “rule of law”). See also *infra* text accompanying notes 235-38.

27. William P. Alford, *Exporting “The Pursuit of Happiness,”* 113 HARV. L. REV. 1677, 1682 (2000) (book review).

societies that threatens to break out into a new Cold War.²⁸ Mutual agreement about the need to build legal institutions also may lead eventually to productive diplomatic discussions and compromise about more difficult normative questions of democracy, human rights, and economic development.

II. LAW IN CHINA

In Western societies, “the rule of law” is an “essentially contested concept.”²⁹ In China as well, “the rule of law” (*fa zhi*) has been contrasted with “the rule of individuals” (*ren zhi*).³⁰ But what the rule of law actually means in the Chinese context is open for debate.³¹ According to some observers, recent events indicate that the Chinese government is now “serious about the establishment of a genuine legal system based upon the rule of law.”³² At least the last few decades in China have witnessed “the most concerted effort in world history to construct a legal system.”³³ Other commentators doubt “whether a true rule of law exists, or will ever exist, in China” given its “legacy of the past and persistent political intermeddling.”³⁴

28. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 218-38 (1996) (describing “increasingly antagonistic relations” between the U.S. and China in the 1980s and early 1990s and predicting the rise of “Chinese hegemony” in the future as a result of its increasing economic growth and power). See also RICHARD BERNSTEIN & ROSS H. MUNRO, *THE COMING CONFLICT WITH CHINA* 3-21 (rev. ed. 1998) (arguing that political and military conflict between the U.S. and China is likely to characterize “the foreseeable future”); Daniel A. Sharp, *Preface* to *LIVING WITH CHINA: U.S.-CHINA RELATIONS IN THE TWENTY-FIRST CENTURY*, *supra* note 23, at 9, 10 (warning that in the next century the United States “might well find itself in a new and destructive cold war, but this time with China as adversary.”)

29. Richard H. Fallon, Jr., “*The Rule of Law as a Concept in Constitutional Discourse*,” 97 *COLUM. L. REV.* 1, 7 (1997). See also Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *B.U. L. REV.* 781, 791 (1989) (noting that the “rule of law” is “deeply ambiguous, a contested concept”).

30. JAMES M. ZIMMERMAN, *CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES* 12 (1999); Wejen Chang, *Foreword* to *THE LIMITS OF THE RULE OF LAW IN CHINA* vii (Karen G. Turner et al. eds., 2000); Chen, *supra* note 5, at 129.

31. See *supra* note 19. The Chinese concept of the rule of law, or *fa zhi*, has different meanings represented by two different characters in Mandarin. One meaning of *fa zhi* is descriptive, referring to the legal system. A second meaning is normative, referring to the political concept of the rule of law. Chen, *supra* note 5, at 125; Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in *THE LIMITS OF THE RULE OF LAW IN CHINA*, *supra* note 30, at 20, 24.

32. ZIMMERMAN, *supra* note 30, at 44.

33. Alford, *supra* note 27, at 1707. For a more extended description, see Alford, *supra* note 24, at 194-205.

34. ZIMMERMAN, *supra* note 30, at 44. See also JENNER, *supra* note 23, at 151-52 (arguing that under present conditions the prospects for “the development of strong

To assess which of these views of the prospects for the rule of law in China is most likely and what it might mean for the future, it is necessary to consider what is meant by "law" from a Chinese perspective. Some grasp of an answer to this broader question is needed before addressing the different conceptual issue of the rule of law in China.

The meaning of law in China has been disputed in a manner that recalls the debate in Western jurisprudence about the proper relationship between law and morals.³⁵ For the most part, the Western debate pits theories of "natural law" against those of "positive law."³⁶ Natural law theorists tend to deny that a governmental rule or order may properly be called "law" if it offends fundamental morals. Positive legal theorists tend to emphasize the coercive nature of rules adopted and enforced by government regardless of whether these rules are consistent with moral principles.³⁷ In Chinese legal thought, an analogous debate revolves around two competing traditional schools of thought called Confucianism and Legalism.³⁸

legal institutions and a powerful, independent legal profession seem remote"). For a historical account of evidence concerning the concept of the rule of law in China, see Karen Turner, *Rule of Law Ideals in Early China?*, 6 J. CHINESE L. 1 (1992).

35. For a general introduction, see JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 6-108 (rev. ed. 1990).

36. The debate between H.L.A. Hart and Lon Fuller on this topic remains the most famous in the literature. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). For the extended version of the debate, see H.L.A. HART, *THE CONCEPT OF LAW* (1961); LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1973).

37. Most Western theorists who argue for a strongly positivist view of law, however, usually concede that some "minimal" moral principles must be recognized for a system of social coercion to be properly called "legal." *E.g.*, HART, *supra* note 36, at 189-95 (describing a "minimum content" of basic elements shared by any moral or legal system). Similarly, most theorists who emphasize a "moral" quality in law agree that actual laws understood as involving "the enterprise of subjecting human conduct to the governance of rules" may depart from correct moral principles. *E.g.*, FULLER, *supra* note 36, at 106-12, 130-33. The academic literature on the relationship between law and morals is enormous. Some important books on the topic include RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); HART, *supra* note 36; JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); FULLER, *supra* note 36; KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1989); KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996); MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

38. FOLSOM ET AL., *supra* note 23, at 16-17; Chang, *supra* note 30, at vii-x. See also Jacques deLisle, *China's Approach to International Law: A Historical Perspective*,

Confucianism infuses law with moral qualities. The Confucian concept of *li* expresses the view that lawful norms of behavior described in “rites” or “ritual decorum” were essential to good government and preferable to the enforcement of positive laws or *fa*.³⁹ Taking this position to its logical extreme, some Confucian proponents of *li* believe that good morals alone, especially when practiced by the rulers of a political state, are in themselves sufficient to provide social order without relying on the enforcement of positive legal rules and principles at all.⁴⁰ Daoism, another important theoretical influence in Chinese jurisprudence, tends to support this view because, in general terms, it “opposes institutions and organizations, moral laws, and governments as human artifices which obstruct” adherents from following “the Way.”⁴¹ In any event, Confucians at least agree that having “moral men” as rulers is at least as important as having “strict laws.”⁴² “Laws cannot stand alone,” said Xunzi, a leading Confucian theorist, because “superior” persons are required to apply the law and “respond to change.”⁴³

94 AM. SOC'Y INT'L L. PROC. 267, 264-65 (2000) (describing “the classic debate” between Confucian and Legalist views in Chinese law and governance). Reducing traditional Chinese legal theory to Legalism and Confucianism, however, would be too simplistic. Other important influences include Buddhism, Daoism, and Mohism. *E.g.*, FAIRBANK & GOLDMAN, *supra* note 24, at 53-54, 72-76, 79-81 (discussing Buddhist and Daoist influences); ZIMMERMAN, *supra* note 30, at 10-11 (discussing Daoist influence); Alford, *supra* note 23, at 940-41, 948-52 (discussing Daoist and Mohist influences). *See also* Weng Li, *Philosophical Influences on Contemporary Chinese Law*, 6 IND. INT'L & COMP. L. REV. 327, 332 (1996) (describing “Taoism, Confucianism, and Legalism” as “traditionally viewed as main planks in the foundation of the Chinese conception of law”).

39. WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE 30, 90 (1998); ZIMMERMAN, *supra* note 30, at 8; Alford, *supra* note 23, at 930.

40. WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 20-22 (1995); LUBMAN, *supra* note 1, at 14. For example, Zhu Xi was an influential Neo-Confucian who seemed to hold this view. Wm. Theodore de Bary, *The “Constitutional Tradition” in China*, 9 J. CHINESE L. 7, 20 (1995). This utopian position of advocating *li* without *fa*, however, was exceptional. In practice, most Confucians supported the harshly punitive law serving the political state that has been the rule throughout most of Chinese history. BENJAMIN I. SCHWARTZ, CHINA AND OTHER MATTERS 70 (1996); JENNER, *supra* note 23, at 129-39.

41. ZIMMERMAN, *supra* note 30, at 10. At the same time, when Confucian influences became institutionalized, Daoism remained consistent and tended to oppose established Confucian as well as other political and legal authority when it was seen to depart from “the Way.” *See* Burton Watson, *Introduction to HAN FEI T'ZU, BASIC WRITINGS* 9-10 (Burton Watson trans., 1964).

42. Turner, *supra* note 34, at 19 (citing Xunzi).

43. Karen G. Turner, *Introduction to THE LIMITS OF THE RULE OF LAW IN CHINA*, *supra* note 30, at 3.

A competing tradition in Chinese jurisprudence reserves the term law, or *fa*, to mean only positive law.⁴⁴ This tradition, associated most closely with a theoretical school known as Legalism, influenced many Chinese governments, including the Qin dynasty, the first government to unify China in 221 B.C.⁴⁵ Legalism tends to emphasize the punitive aspect of law designed to control a human nature seen as essentially evil and selfish.⁴⁶ Positive law describes the rules for behavior laid down by the sovereign emperor, and violations often resulted in criminal liability, very often the death penalty.⁴⁷ In Legalism, law is “an instrument of state power, imposed on people for their own good.”⁴⁸ In the words of the leading Legalist, Han Fei: “Let the ruler apply the laws, and the greatest tigers will tremble; let him apply punishments, and the greatest tigers will grow docile. If laws and punishments are justly applied,

44. Weng Li, *supra* note 38, at 333 (describing the Legalist view that “social life” must be “strictly governed by positive law”). In other words, Legalism emphasizes an “objective” view of law as the coercive rules, especially including criminal punishment, imposed by the political state. SCHWARTZ, *supra* note 40, at 70; ZIMMERMAN, *supra* note 30, at 11-12.

45. 1 SOURCES OF CHINESE TRADITION 190-92 (Wm. Theodore de Bary & Irene Bloom eds., 2d ed. 1999); FAIRBANK & GOLDMAN, *supra* note 24, at 54-56; FOLSOM ET AL., *supra* note 23, at 16-17; ROBERTS, *supra* note 24, at 19-23.

46. ROBERTS, *supra* note 24, at 20-21; ZIMMERMAN, *supra* note 30, at 11; Alford, *supra* note 23, at 945. This pessimistic view of human nature is similar to that of the European, Thomas Hobbes, who also argued for a strong legal and political system. See *infra* notes 303-07, 312-13, 318 and accompanying text. The low opinion of human nature in Chinese Legalism seems to have originated with Han Fei's Confucian teacher, Xunzi. HAN FEI TZU, *supra* note 41, at 11. See also HSUN TZU, BASIC WRITINGS 157 (Burton Watson trans., 1963) (“Man's nature is evil; goodness is the result of conscious activity.”).

47. ROBERTS, *supra* note 24, at 20-26; FOLSOM ET AL., *supra* note 23, at 16-17. For a recent discussion of the death penalty in China in both historical and contemporary perspective, see Jeremy T. Monthly, Comment, *Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC*, 33 TEX. INT'L L.J. 189 (1998). Public records on the death penalty in China are not available. According to Amnesty International, however, Chinese courts handed out more than 1,700 death sentences in 1999, and there were more than 1,000 executions. In the 1990s in China, there were more than 27,000 death sentences, and around 18,000 executions. AMNESTY INT'L, ANNUAL REPORT 2000 (2000), available at <http://www.web.amnesty.org/web/ar2000web.nsf/ar2000> (China report) (last visited Jan. 9, 2001). By comparison, there were 98 executions in the United States in 1999, which was more than in any year since 1951, and there have been approximately 600 executions since the moratorium on the death penalty was lifted in 1977. *Id.* (U.S. report).

48. DE BARY, *supra* note 39, at 93. Chinese Legalism is therefore not similar or related to the Western idea of “legalism” described by Judith Shklar as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.” JUDITH N. SHKLAR, LEGALISM 1-2 (1964). In this respect, Shklar argues that the Western theories of both legal positivism and natural law share a political and ideological commitment to what she calls a “legalistic politics.” *Id.* at 29-110.

then tigers will be transformed into men again and revert to their true form.”⁴⁹

Although the harsh views of Legalism may well have helped to establish the Qin dynasty, they probably also contributed to its relatively brief life. The Qin emperors did not “rule with humanity and righteousness.”⁵⁰ Thereafter, Confucianism, which predated Legalism by several centuries, reasserted itself in successive dynasties.⁵¹

Given the instrumental orientation of Legalism and the anti-legal bias of Confucianism, it is not surprising that early Chinese social theory expressed “deep skepticism about the corrective function of law.”⁵² Judges were seen as either the emperor’s agents or failed sages.⁵³ Nor were lawyers held in high esteem.⁵⁴ In fact, the only lawyers permitted to practice in imperial China were “the state’s own legal specialists, “ and this bureaucracy endeavored “to stamp out the legal profession” through such methods as the criminal prosecution of “litigation hoodlums” until the late nineteenth century.⁵⁵ Even as late as the Qing dynasty, “to manage a lawsuit” was a crime, and lawyers were derided as “people who write with poisoned pens.”⁵⁶

49. HAN FEI TZU, *supra* note 41, at 39-40.

50. ROBERTS, *supra* note 24, at 26 (describing this as a “fatal flaw” of the Qin dynasty). See also 1 SOURCES OF CHINESE TRADITION, *supra* note 45, at 206-09 (describing the fall of the Qin).

51. Chang, *supra* note 30, at x. Some scholars refer to Neo-Confucianism to describe later versions of these ideas. FAIRBANK & GOLDMAN, *supra* note 24, at 96-101, 140-41, 147, 154-56 (describing the influence of Neo-Confucianism in the Song, Ming, and Qing dynasties). See also 1 SOURCES OF CHINESE TRADITION, *supra* note 45, at 540-41, 587-90, 800-40 (describing the role of Confucianism in the Tang and Song and collecting sources on Neo-Confucian education). Another important school of legal theory known as Huang-Lao arose immediately after the fall of the Qin. Andrew Huxley, *Golden Yohe, Silken Text*, 106 YALE L.J. 1885, 1913-14 (1997) (book review). By one interpretation, Huang-Lao may be understood as a variety of “natural law” theory. See generally RANDALL PEERENBOOM, LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO 27-102 (1993). Together with Daoism, Buddhism, Mohism, and other theories, Huang-Lao complicates the story of law in Chinese thought. Huxley, *supra*, at 1916. See also *supra* note 38. By most accounts, however, Legalism and Confucianism remain the most dominant historical influences. See *supra* note 38.

52. Turner, *supra* note 34, at 21.

53. JENNER, *supra* note 23, at 141-42 (describing the imperial Chinese legal system as administered by “the state’s legal specialists” who served as officers of the emperor).

54. *Id.* at 142 (being a lawyer in imperial China “was not a career that brought much respect or status,” except for “the lucky few” who passed the difficult examinations to enter the bureaucracy as state officials).

55. *Id.*

56. FOLSOM ET AL., *supra* note 23, at 113. See also William P. Alford, *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 CHINA Q. 22, 26 (1995) (describing the disapproval expressed by Confucian scholar-officials for “litigation tricksters” and “evil gods of the knife-pen”).

As in Western societies, however, jurisprudence in early China evolved to an intermediate position with respect to the relationship between law and morals, blending Confucian and Legalist views of law as expressed in various dynastic codes and developing philosophical principles.⁵⁷ For example, the Chinese emphasis on penal law and harsh punishment for the maintenance of the state and social order is arguably “quite as Confucian as it is Legalist.”⁵⁸ Although a Confucian may “dream of a society in which harmonious relations among humans are maintained wholly by the uncoerced obedience of the customary rules of morality (*li*),” most Confucians shared the Legalist notion of a need for legal control by physical force in practice.⁵⁹ Mencius, for example, an influential follower of Confucius, argued that coercive laws, or *fa*, should reflect a proper and correct understanding of rites, or *li*.⁶⁰

Confucian influences also mitigated the absolutism of Legalist thought. As early as the Han dynasty (206 B.C.-220 A.D.), which set the pattern for later developments, the Legalist view of law as an “assertion of state power for its own sake” by harsh and punitive methods began to incorporate Confucian concepts of “true rulership as responding to people’s needs.”⁶¹ Jia Yi gave an early expression of this view, arguing that the “root” of government depends on the “mandate” of its people.⁶² Recently discovered archeological evidence indicates that principles resembling Western normative conceptions of the rule of law preceded the advent of Legalism and began to characterize some strands of Chinese legal thought as early as the Warring States Period (403 to 221 B.C.).⁶³ However, the extent to which Confucian and other indigenous Chinese theories of the rule of law actually affected absolutist imperial government is a matter of historical debate.⁶⁴

57. LASZLO LADANY, LAW AND LEGALITY IN CHINA: THE TESTAMENT OF A CHINA-WATCHER 35 (1992). See also DE BARY, *supra* note 39, at 93-96; LUBMAN, *supra* note 1, at 15-18. The legal code adopted in the Tang dynasty, for example, synthesized Legalist and Confucian traditions. 1 SOURCES OF CHINESE TRADITION, *supra* note 45, at 546.

58. SCHWARTZ, *supra* note 40, at 70.

59. *Id.* See also JENNER, *supra* note 23, at 144 (observing that for “nearly all the history of dynastic regimes” *fa* was “an expression and defence of *li*”).

60. DE BARY, *supra* note 39, at 31-32. See also Alford, *supra* note 23, at 944 (noting that Mencius and Xunzi “viewed the written law with considerably less displeasure” than Confucius). Much later in the 17th century, the famous Neo-Confucian, Huang Zongxi, argued more explicitly that positive law (*fa*) should be used to institutionalize Confucian values. DE BARY, *supra* note 39, at 104.

61. DE BARY, *supra* note 39, at 94.

62. 1 SOURCES OF CHINESE TRADITION, *supra* note 45, at 290-92.

63. Turner, *supra* note 34, at 10-12 (discussing the Mawangdui tracts on law discovered in the mid-1970s).

64. Compare Turner, *supra* note 34, at 1-2, 9-15, 17-44 (making the case on the basis of historical materials for a richer concept of the Chinese “rule of law” than

Contemporary Chinese legal theory has continued to reflect a combination of a Confucian emphasis on ethics and a Legalist emphasis on the importance of positive law.⁶⁵ Other classical Chinese theories of law have enjoyed a recent resurgence of contemporary interest.⁶⁶ Views of the nature of law in China, however, also have been very strongly molded by more recent history.

Western and Japanese colonial incursions into China began in the late nineteenth century and continued until the end of World War II.⁶⁷ A British victory in the Opium War in 1842 began this first "opening" of China in contemporary times.⁶⁸ The weak Qing dynasty agreed to unequal treaties favoring Britain, France, Russia, and the United States.⁶⁹ Japan invaded mainland China twice, first from 1894 to 1895 and then from 1931 to 1945.⁷⁰ China therefore was "not just the colony of one country," but "the colony of many countries."⁷¹ Briefly, Sun Yat-sen led a rebellion that resulted in the declaration of a Chinese republic in 1911; but this experiment dissolved into a dictatorship and "a decade of warlordism" from 1916 to 1927.⁷² The nationalist revolution that coincided with the struggle against Japan in World War II disintegrated into a civil war between nationalist and communist dictatorships.⁷³ Despite strong military support from Western powers, especially the United States, the nationalist government led by Jiang Jieshi (Chiang Kai-shek) lost to Mao Zedong's Communists—except for the nationalists who retreated to the island of Taiwan under the protection of the U.S. Navy.⁷⁴ In summary, the period from the end of the last dynasty in China in 1911 to the Communist revolution in 1949 was marked by political turmoil, including foreign invasions, native uprisings (such as the

traditionally recognized), *with* Chen, *supra* note 5, at 129-30 (expressing the view of most contemporary Chinese legal scholars that "the amalgam of Confucianism and Legalism that survived for almost two millennia was not conducive to the rule of law").

65. *E.g.*, Shen, *supra* note 31, at 27 (describing a "combination theory" of the rule of law in these terms). *See also* XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA 19-32 (1997) (describing the competitive struggle between the traditions of Legalism and Confucianism and arguing that it continues today).

66. *See supra* notes 38, 41, 51 and accompanying text.

67. This period from approximately 1842 to 1942 has been called "the treaty century." FAIRBANK & GOLDMAN, *supra* note 24, at 201.

68. *Id.* at 198-200.

69. *Id.* at 201-04, 216.

70. *Id.* at 205, 220-21.

71. Sun Yat-sen, *The Three People's Principles*, in 2 SOURCES OF CHINESE TRADITION 320, 321 (Wm. Theodore de Bary & Richard Lufrano eds., 2d ed. 2000). For another concise account of this tragic period for China, see BLECHER, *supra* note 10, at 13-16.

72. FAIRBANK & GOLDMAN, *supra* note 24, at 235-38, 241-56.

73. *Id.* at 279-311.

74. *Id.* at 326-41.

Christian-inspired Taiping and anti-Western Boxer rebellions), and the effects of global and internecine warfare.⁷⁵ To say the least, extreme political conditions such as these were not propitious for indigenous legal development in China.

The Communist revolution threw any remaining traditional conceptions of Chinese law into even greater flux.⁷⁶ Chinese jurists followed the Marxist view that law should serve as an ideological instrument of politics. They adopted the recommendations of Stalinist legal theorists who believed that "the Communist Party, as the representative of the ruling proletariat, should enjoy absolute control over the creation of positive law by the organs of the state."⁷⁷ Government was by decree rather than law, and many decrees were not published.⁷⁸ Purges occurred in the 1950s and early 1960s in accordance with the Soviet view of law as an instrument of Communist Party policy.⁷⁹ Between 1949 and 1957, according to one estimate, the number of lawyers in China shrank by seventy percent.⁸⁰

Most disastrous for traditional law was the cataclysm of the Great Proletarian Cultural Revolution of 1966 to 1976, which disrupted any ordinary concept of law in China by eliminating virtually all legal professionals⁸¹ and closing the law schools for ten years.⁸² Described as "the most extraordinary political upheaval in the twentieth century,"⁸³ the Cultural Revolution was "a time of

75. ROBERTS, *supra* note 24, at 206-55. For an account of the Taiping, Boxer, and other internal rebellions during this period, see FAIRBANK & GOLDMAN, *supra* note 24, at 202-32.

76. For brief general accounts of this period of consolidation of Communist government, see FAIRBANK & GOLDMAN, *supra* note 24, at 345-82; ROBERTS, *supra* note 24, at 256-78.

77. Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 720 (1994). See also Walter Gellhorn, *China's Quest for Legal Modernity*, 1 J. CHINESE L. 1, 6 (1987) (observing that "China relied heavily upon Soviet advisers" for "the content of law" in the 1950s); Weng Li, *supra* note 38, at 328 (describing the use of "Soviet legal codes and principles" as "models for codification of Chinese laws" from 1952 to 1957).

78. ALAN LAWRENCE, *CHINA UNDER COMMUNISM* 111 (1998).

79. *E.g.*, LADANY, *supra* note 57, at 66-72.

80. Barshefsky, *supra* note 12, at 364.

81. ZIMMERMAN, *supra* note 30, at 24 (the Cultural Revolution resulted in "the near abolition of the legal profession"); Weng Li, *supra* note 38, at 328 (observing that "the legal profession disappeared" during the Cultural Revolution).

82. *E.g.*, LADANY, *supra* note 57, at 31; ROBERTS, *supra* note 24, at 278-84. See also Weng Li, *supra* note 38, at 328 (noting that "the law schools were closed" and "legal research was halted" during the Cultural Revolution with "no law books or journals published").

83. LAWRENCE, *supra* note 78, at 66.

anarchy.”⁸⁴ Propagandists praised “lawlessness.”⁸⁵ The “most far-reaching consequence” was the interruption of higher education that affected “an entire generation.”⁸⁶ Law faculties were abolished; lawyers were re-educated by relocating them to farms and factories.⁸⁷ China became virtually a lawless nation.⁸⁸ As Judge Jack Weinstein said after a recent visit, “there was really no Chinese legal system” after the Cultural Revolution.⁸⁹ Although China’s legal system has been rebuilt in recent years and perhaps is even “beginning to blossom” again,⁹⁰ it is only very slowly recovering from the devastating legacy of Maoism and the Cultural Revolution.⁹¹

The concept of law, from a Maoist perspective, is emphatically not seen as providing a new constitutional foundation for the revolutionary state.⁹² In this respect (among many others), the Chinese communist revolution contrasts starkly with the overwhelmingly legal nature of the American revolution.⁹³ “The American rule of law,” as Paul Kahn argues, “understands itself as maintaining the truth of the Revolution.”⁹⁴ The American Revolution was fought to assert basic legal and political rights that colonists felt they had as English citizens. Maoist China, however, understood law

84. LADANY, *supra* note 57, at 55. See also Gellhorn, *supra* note 77, at 6 (describing the Cultural Revolution as “dark days” for law); Keller, *supra* note 77, at 714 (describing the “legal nihilism” of the period).

85. Jerome Alan Cohen, *Tiananmen and the Rule of Law*, in *THE BROKEN MIRROR: CHINA AFTER TIANANMEN* 323, 328 (George Hicks ed., 1990) (quoting the expression). See also Chen, *supra* note 5, at 126 (noting that Mao Zedong personally praised “lawlessness” during the Cultural Revolution).

86. LAWRENCE, *supra* note 78, at 79.

87. *E.g.*, Gellhorn, *supra* note 77, at 7.

88. Barshefsky, *supra* note 12, at 364.

89. Jack B. Weinstein, *Some First Impressions of the Legal System in Three Chinese Cities*, 24 *BROOK. J. INT’L L.* 221, 229 (1998).

90. *Id.* at 230.

91. For a general history of the Cultural Revolution, see BLECHER, *supra* note 10, at 77-86; FAIRBANK & GOLDMAN, *supra* note 24, at 383-405. See also CHINA REMEMBERS, *supra* note 10, at 11-71 (collecting personal recollections of experiences during “the crazy era” and “madness” of the Cultural Revolution); *The Cultural Revolution*, in 2 *SOURCES OF CHINESE TRADITION*, *supra* note 71, at 474, 474-81 (collecting literary descriptions).

92. *E.g.*, Cynthia Losure Baraban, Note, *Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers in China*, 73 *IND. L.J.* 1247, 1259 (1998) (noting that Maoist theory subordinates constitutional rights to “state, society, and Party interests”). See also Chen, *supra* note 5, at 165 (describing the contemporary efforts of “rule-of-law theorists in China” as offering a “constitutional” alternative to “imperial and Maoist political cultures which were both dogmatic, authoritarian, and paternalistic”).

93. For an extended discussion of the relationship between law and revolution in the United States, see PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 49-90 (1997).

94. *Id.* at 58.

to be either "oppressive" and "bourgeois" in itself⁹⁵—a view taken with deadly seriousness during the Cultural Revolution—or a "weapon of the dictatorship" to be wielded by the Communist Party.⁹⁶ Mao Zedong "abhorred the notions of law and of a legal system" because he believed they "would dam up the free flow of the revolution."⁹⁷ Law and lawyers were seen to be "counter-revolutionary" virtually by definition.⁹⁸ "We want the rule of the individual," said Mao, "not the rule of law," (*Yao ren zhi, bu yao fa zhi*).⁹⁹ At most, then, and in line with old-fashioned Legalist theory, Maoist communist theory treats law as merely an instrument of politics.¹⁰⁰ To a significant extent, this Maoist view of the unity of law and politics continues to be held by current leaders of the Chinese Communist Party and therefore exerts a strong influence on contemporary legal and judicial practice.¹⁰¹

More recently, however, since the turn toward market socialism inaugurated by Deng Xiaoping in the late 1970s, a more robust variety of "the rule of law" has come back into vogue with "the unprecedented opening-up of Communist China."¹⁰² "With the demise of Mao," writes one observer, the law has again become "respectable."¹⁰³ In 1978, Deng declared that "democracy has to be institutionalized and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes . . ."¹⁰⁴

95. *E.g.*, JOHN BRYAN STARR, *IDEOLOGY AND CULTURE: AN INTRODUCTION TO THE DIALECTIC OF CONTEMPORARY CHINESE POLITICS* 208 (1973) (noting the tendency of Marxists to see "the notion of a legal system" as "merely a convenient fiction perpetrated by the ruling class to make its oppression somewhat more palatable").

96. *E.g.*, LADANY, *supra* note 57, at 545.

97. *Id.* at 1. *See also* Cohen, *supra* note 85, at 325 (describing Mao as "the modern world's foremost proponent of lawlessness"). Mao shared his dislike of law with his fellow twentieth century tyrant, Adolf Hitler. SHKLAR, *supra* note 48, at 208-09.

98. For an account of the infamous use of the ambiguous term "counter-revolutionary" for criminal punishments in Communist China, see REN, *supra* note 65, at 87-113.

99. VAN KEMENADE, *supra* note 10, at 262 (quoting Mao).

100. LUBMAN, *supra* note 1, at 88-89; ZIMMERMAN, *supra* note 30, at 23. *See also supra* notes 77-79 and accompanying text (describing the influence of Stalinist legal theory in China). Not surprisingly, Mao was also an ardent student of Legalism. REN, *supra* note 65, at 11, 63.

101. *E.g.*, REN, *supra* note 65, at 63-64, 141-43. *See also* Alford, *supra* note 24, at 203-05 (describing the forces encouraging an attitude of "instrumental approaches to legality" in China).

102. LAWRENCE, *supra* note 78, at 107.

103. *Id.* at 103. *See also supra* note 19 and accompanying text.

104. LUBMAN, *supra* note 1, at 124 (quoting Deng). *See also* LADANY, *supra* note 57, at 79-80 (quoting other officials). On Deng's reforms for "modernization," see Deng's "Modernization" and Its Critics, in 2 *SOURCES OF CHINESE TRADITION*, *supra* note 71, at 485, 485-87.

Of course, Deng and China's leaders gave the Communist view of "democracy" a harsh interpretation when they ordered a military crackdown on student demonstrators in Tiananmen Square on June 4, 1989.¹⁰⁵ An estimated 800 to 1,300 people died when the army opened fire on its own citizens, and the government thereafter imprisoned 10,000 to 30,000 participants.¹⁰⁶ Scores of people remain in prison today for their roles in this demonstration.¹⁰⁷ Political repression in the Tibet and Xinjiang autonomous regions has also been brutal.¹⁰⁸

A skeptical and even hostile view of democracy continues to characterize the Chinese government's attitude in the late 1990s and at the turn of the millennium.¹⁰⁹ For example, Wei Jingsheng, who famously advocated "democracy" as the "fifth modernization,"¹¹⁰ was sentenced to fifteen years in prison in 1979,¹¹¹ convicted a second time in 1996, released for "health reasons" in 1997, and exiled to the United States in 1998.¹¹² Several activists who attempted to form an

105. For accounts of this tragedy, see LADANY, *supra* note 57, at 153-55; LAWRENCE, *supra* note 78, at 117-21; ROBERTS, *supra* note 24, at 297-99; Cohen, *supra* note 85, at 323, 324-40. For an allegedly accurate inside account, see also *The Tiananmen Papers: The Chinese Leadership's Decision to Use Force Against Their Own People*, in *IN THEIR OWN WORDS* (Andrew J. Nathan & Perry Link eds., 2001).

106. FAIRBANK & GOLDMAN, *supra* note 24, at 410. One account describes the incident as the "Beijing Massacre." W. Gary Vause, *Tibet to Tiananmen: Chinese Human Rights and United States Foreign Policy*, 42 VAND. L. REV. 1575, 1602-06, 1612-13 (1989). For the view that this event remains the most important, defining political moment for contemporary China, see generally JAMES A.R. MILES, *THE LEGACY OF TIANANMEN: CHINA IN DISARRAY* (1996).

107. AMNESTY INT'L, *TIANANMEN: 11 YEARS ON AND STILL NO GOVERNMENT INQUIRY, "FORGOTTEN PRISONERS,"* ASA 17/017/2000 (May 1, 2000), available at <http://www.amnesty.org/ailib/index.html> (last visited Jan. 9, 2001) (reporting that more than 200 people remained imprisoned or on medical parole for their activities in connection with the Tiananmen protests).

108. AMNESTY INT'L, *ANNUAL REPORT 2000*, *supra* note 47 (China report) (describing ongoing political repression in Tibet and Xinjiang); Lawrence Friedman, *On Human Rights, the United States and the People's Republic of China at Century's End*, 4 J. INT'L LEGAL STUD. 241, 249 & n.40 (1998) (recounting the "Chinese repression of the Tibetan people through such practices as torture and wanton murder"); Vause, *supra* note 106, at 1575-80, 1590-96 (describing the history of the Chinese political presence in Tibet).

109. JENNER, *supra* note 23, at 180-92 (discounting the possibility that democratic values or practices have any serious prospect of success with the current Chinese regime).

110. Wei Jingsheng, *The Fifth Modernization—Democracy 1978*, in 2 SOURCES OF CHINESE TRADITION, *supra* note 71, at 497.

111. FAIRBANK & GOLDMAN, *supra* note 24, at 420. LAWRENCE, *supra* note 78, at 103; LUBMAN, *supra* note 1, at 136.

112. LAWRENCE, *supra* note 78, at 136; LUBMAN, *supra* note 1, at 136; 2 SOURCES OF CHINESE TRADITION, *supra* note 71, at 497. Wei's release and subsequent exile to the United States coincided with Jiang Zemin's official visit to the United States in 1997. FAIRBANK & GOLDMAN, *supra* note 24, at 443. See also MILES, *supra*

independent political party for democratic reform were imprisoned in 1998.¹¹³ In 1999, twenty leaders of the movement to establish a democratic party were imprisoned, and Amnesty International characterized the year celebrating the fiftieth anniversary of the People's Republic of China as "the most serious and wide-ranging crack-down on peaceful dissent in China for a decade," including the arbitrary detention of thousands of people who dared to exercise "their rights to freedom of expression, association[,] or religion."¹¹⁴

In contrast to its repression of democratic movements, the government has carried through its commitment to strengthen the legal system.¹¹⁵ The first step in the post-Mao period was to fortify a Soviet-style socialist legal system.¹¹⁶ A new Criminal Code was adopted in 1980,¹¹⁷ followed by a new Civil Code in 1987.¹¹⁸ In 1984, Deng Xiaoping admitted that China's "legal system was not perfect" and declared a need "to formulate a number of laws, decrees[,] and regulations to have our democracy systemized and governed by law."¹¹⁹ The government adopted more than 300 laws on economic regulation by 1986, though it agreed that "non-observance of these laws is quite universal."¹²⁰ As an antidote to the Cultural Revolution, "law popularization" campaigns (*pufa*) were launched in the late 1980s and throughout the 1990s to educate the public about law and legality.¹²¹ But the legal infrastructure and general legal consciousness among citizens that had been destroyed could not easily be replaced.¹²²

note 106, at 206-13, 236-37 (discussing Wei's career and influence on China's democracy movement).

113. Zhang, *supra* note 5, at 679. Twenty members of the fledgling China Democratic Party were sentenced to prison terms for their activities in 1999. AMNESTY INT'L, ANNUAL REPORT 2000, *supra* note 47 (China report).

114. AMNESTY INT'L, ANNUAL REPORT 2000, *supra* note 47 (China report).

115. The nature of the connection between democracy and the rule of law in China and elsewhere is addressed *infra* in Part III.

116. See *supra* notes 77-79 and accompanying text.

117. LADANY, *supra* note 57, at 82-84.

118. *Id.* at 92. The Civil Code, however, was "a collection of general principles" rather than "a complete [civil] code" of a Western kind. *Id.*

119. ZIMMERMAN, *supra* note 30, at 28 (quoting Deng).

120. LADANY, *supra* note 57, at 92 (quoting a joint statement by the State Economic Commission and the Ministry of Justice).

121. *Id.* at 98. See also LUBMAN, *supra* note 1, at 132-33. There have been three of these campaigns for the dissemination of legal knowledge: 1986-1990, 1991-1996, and 1996 to the present. Hao, *supra* note 5, at 413. Two of the stated goals of these campaigns are "to replace the supremacy of persons by the supremacy of law" and "to create a socialist government based on the rule of law with Chinese characteristics." *Id.*

122. Peerenboom, *supra* note 18, at 334 (observing that "the level of legal consciousness remains fairly low in China," even among many lawyers, despite the publicity campaigns). One major reason for the general lack of legal knowledge in China is the shortage of basic human capital needed for legal education. See *supra*

The post-Mao leadership recognizes the need for stable legal rules for a market economy. It is simply impossible—as the collapse of the Soviet Union showed dramatically—to sustain a modern economy on the basis of centralized models of planned development. Markets require basic legal protection of rights to property and contracts, as well as the recognition of the legal personality of business entities and other commercial laws. As Lon Fuller argued presciently, market economies require the establishment of property and contracts as “institutions.”¹²³ At the same time, Fuller recognized also that a legal system must hold “the rigidities of property and contracts” within “proper boundaries” so that the society, acting through government, may “direct its resources toward their most effective use.”¹²⁴ The need for legal protection of property and contract rights for economic development has also been well described by many contemporary economists, such as Douglass North and Mancur Olson.¹²⁵

Since Mao, the Chinese government seems to have strongly embraced the perspective that economic markets require strong laws.¹²⁶ As a result, a huge number of national statutes relating to commercial regulation have been adopted in the last few decades.¹²⁷ For example, the legislature adopted contract laws governing domestic and foreign transactions in the early 1980s.¹²⁸ Patent and

notes 81-87 and accompanying text (describing the effects of the Cultural Revolution on the legal system). The human capital of Chinese legal experts can be replenished only gradually through the education of new generations of students. For example, three universities opened again to train lawyers in 1976; they graduated a total of 120 new lawyers in 1980 to help to represent and administer the bureaucratic apparatus of a society of one billion people! Gellhorn, *supra* note 77, at 9. In Chinese universities today, this educational gap is still reflected in the faculties. Potential professors who would now have been in their mid-forties or fifties are simply absent. There are only a younger generation of professors and a much older generation.

123. LON L. FULLER, *THE MORALITY OF LAW* 28 (rev. ed. 1969).

124. *Id.*

125. *E.g.*, DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 69, 107, 135-37 (1990); DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 7, 17-18, 57, 153, 156-57, 173, 189-90, 203, 206 (1981); MANCUR OLSON, *POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS* 35-36, 62-63, 185-87, 195-98 (2000).

126. Peerenboom, *supra* note 18, at 320 (noting the recognition by Chinese leaders and scholars of the need for law and some form of the rule of law in order “to facilitate and ensure economic development”) (citing sources in Chinese by Jiang Zemin, Wang Jiafu, and Shen Zongling).

127. Hao, *supra* note 5, at 412 (“The past two decades have witnessed a legislative explosion in China.”). One scholar who has followed the explosive recent development of law in China notes that “it is now impossible to specialize in Chinese law as such.” LUBMAN, *supra* note 1, at xvi.

128. Zhao Yuhong, *Law of Contract, in CHINESE LAW* 217, 222-23 (Wang Guiguo & John Mo eds., 1999).

Trademark Laws were also adopted.¹²⁹ A Copyright Law, introduced in 1979, was finally passed in 1990.¹³⁰ A Company Law to govern private, collective, and state enterprises was passed in the 1990s.¹³¹ The national legislature then revised the patent and other intellectual property laws, partly in response to diplomatic pressure from the United States.¹³² In 1998 the first national Securities Law was adopted, as well as a law to allow for the establishment of a bond market.¹³³ In 1999 a unified Contract Law came into effect.¹³⁴ Other national laws passed during this flurry of legislative activity included an Advertising Law, an Arbitration Law, a Law Against Improper Competition, an Insurance Law, an Audit Law, and a Chartered Accountant Law.¹³⁵ Collectively, this mass of statutes represents a concerted effort by the government to adopt a modern legal framework to support a market economy.¹³⁶ The new Contract Law, for example, “represents a further step forward in the attempts of China’s law drafters to establish legal institutions that are more compatible with a market rather than with a planned economy.”¹³⁷ The same may be said about much of the recent economic legislation in China.

129. John Shijian Mo, *Law on Intellectual Property*, in CHINESE LAW, *supra* note 128, at 497, 528, 546.

130. *Id.* at 506.

131. GUTHRIE, *supra* note 8, at 124-28. The law became effective in 1994. VAN KEMENADE, *supra* note 10, at 27; Rajesh Sharma, *Company Law*, in CHINESE LAW, *supra* note 128, at 369, 369 & n.1. For a recent description of current corporate law in China, see also Ruskola, *supra* note 21, at 1686-1702 (emphasizing the continued influence of family structures in Chinese businesses).

132. Mo, *supra* note 129, at 528-29, 549. For a recent review of the law in this area, see generally John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 U. PA. J. INT’L ECON. L. 735 (1999).

133. Zhang, *supra* note 5, at 681-82. For a critical discussion of the new securities law, which formally entered into force in 1999, see Xian Chu Zhang, *The Old Problems, the New Law, and the Developing Market: A Preliminary Examination of the First Securities Law of the People’s Republic of China*, 33 INT’L LAW. 983 (1999). See also Minkang Gu & Robert C. Art, *Securitization of State Ownership: Chinese Securities Law*, 18 MICH. J. INT’L L. 115 (1996) (describing the recent development of securities markets and regulation in China); Richard McGregor, *China Sets Its Sights on Stock Market Efficiency*, FIN. TIMES, Jan. 26, 2001, at 15 (describing the recent development of securities markets and regulation in China).

134. Zhao, *supra* note 128, at 225-27 (describing the draft of this statute). See also LUBMAN, *supra* note 1, at 180-81; Wang Liming & Xu Chuanxi, *Fundamental Principles of China’s Contract Law*, 13 COLUM. J. ASIAN L. 1 (1999).

135. Hao, *supra* note 5, at 412.

136. *E.g.*, *id.* (noting the “broad political purpose” of Deng’s drive for building a legal system, including not only the stabilization of society after the excesses of the Cultural Revolution but also the requirements of a market economy). See also *supra* note 126.

137. LUBMAN, *supra* note 1, at 181.

At present, then, the Chinese legal system as a formal structure of laws and regulations appears quite formidable on paper.¹³⁸ As one commentator has written, “the content of Chinese law has ballooned since 1979 through the issue of thousands of laws and regulations”¹³⁹ In practice, however, these laws are often not followed or enforced for several reasons.

First, there remains a paucity of legally trained professionals to act as lawyers, judges, and bureaucratic officials.¹⁴⁰ In 1992 there were only 50,000 lawyers in China, only one-third of the number of licensed attorneys in the state of California.¹⁴¹ By one current estimate, there are now only 150,000 lawyers in China,¹⁴² though there are at least 50,000 new law students¹⁴³ and plans to increase the number of lawyers to 300,000 in the next decade.¹⁴⁴ By 2015 the number of lawyers in China may reach the number in the United States, though China has more than ten times the population.¹⁴⁵ Lawyers represent clients only 10 to 25 percent of the time in civil and economic cases, and even in criminal prosecutions defendants have lawyers only in about half of the cases.¹⁴⁶ Of approximately five million business enterprises in China, only about four percent currently have regular legal advisers.¹⁴⁷

138. Alford, *supra* note 24, at 194 (“At first glance, the edifice of legality constructed over the 20 years since the post-Cultural Revolution effort at legal construction was launched is, at least in formal terms, a very considerable structure to behold.”).

139. Keller, *supra* note 77, at 729. See also Alford, *supra* note 27, at 1707 (“Thousands of laws and other legal measures have been enacted; the court system has been revamped; [and] a host of new regulatory bodies have been established . . .”).

140. Randall Peerenboom, *Law Enforcement and the Legal Profession in China* 5-6 (2000) (unpublished manuscript, on file with author) (describing the severe “shortage of lawyers” in China).

141. FOLSOM ET AL., *supra* note 23, at 117. See also LAWRENCE, *supra* note 78, at 112 (estimating 50,000 Chinese lawyers in 1993).

142. Barshefsky, *supra* note 12, at 366. See also Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 *NW. J. INT’L L. & BUS.* 383, 387 (2000) (estimating that China “now has well over 150,000 lawyers and 8,000 law firms”).

143. Weinstein, *supra* note 89, at 224 (estimating that there were 45,000 law students in mainland China in 1998).

144. Alford, *supra* note 27, at 1707.

145. Weinstein, *supra* note 89, at 224. See also Alford, *supra* note 24, at 195 (observing that China is likely to have more lawyers than any other nation except the United States by 2010). In 1998, for example, China’s approximately 110,000 lawyers composed a mere 0.008% of the total population. In comparison, the ratio of lawyers to population in the same year in the United States was 0.32%. Peerenboom, *supra* note 140, at 6.

146. Peerenboom, *supra* note 140, at 6 (citing official statistics from the mid to late 1990s). For a description of the difficulties faced by criminal lawyers in China, see Elizabeth Rosenthal, *In China’s Legal Evolution, the Lawyers Are Handcuffed*, *N.Y. TIMES*, Jan. 6, 2000, at A1.

147. Hao, *supra* note 5, at 415.

Judges with professional training or academic backgrounds are similarly scarce. Only about one-fifth of all lawyers in China have law degrees, and an even lower percentage of judges have formally studied law at a university.¹⁴⁸ In the 1980s most judges were recruited from the military or the Communist Party.¹⁴⁹ Some steps have been taken to begin to remedy this situation. The number of judges and legal clerks increased from 137,000 in 1986 to 170,000 in 1990.¹⁵⁰ A new Judges Law passed in 1995 requires minimum judicial qualifications of a university degree and at least some prior legal experience.¹⁵¹ At least 80 percent of judges now possess at least the *da zhuan* certification, which requires at least two years of college-level legal education.¹⁵² An Academy of Judges established in Beijing now provides continuing education for judges and trains future judges.¹⁵³ In 1999 the Supreme Judicial Court directed that judges should be appointed competitively and according to their qualifications rather than through pure politics or favoritism.¹⁵⁴

Recent reforms also have encouraged at least the beginning of professional bar associations.¹⁵⁵ In 1996 legislation repealed the obligation of lawyers to answer directly to the Ministry of Justice.¹⁵⁶ The Communist Party, however, even in the post-Mao era, has tended to oppose "the concept of a lawyer as an independent professional," and it remains unclear whether progress will be sustained in this area.¹⁵⁷ In any event, a great need remains in the foreseeable future for more professionally educated lawyers and judges in China to translate the formal "rule of law" on the books into

148. Alford, *supra* note 56, at 31. See also Donald C. Clarke, *What's Law Got To Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 58 (1991) (noting that many of China's judges and legal officials have "little or no professional training in law").

149. LUBMAN, *supra* note 1, at 253.

150. Shen, *supra* note 31, at 21. These numbers reflect more than a ten-fold increase from the 32,000 judges and legal personnel in 1960. Alford, *supra* note 24, at 195.

151. LUBMAN, *supra* note 1, at 254-55.

152. Peerenboom, *supra* note 140, at 3.

153. ZIMMERMAN, *supra* note 30, at 43.

154. *Id.* at 43 n.70.

155. LUBMAN, *supra* note 1, at 153-59. See also FAIRBANK & GOLDMAN, *supra* note 24, at 432 (noting that professionals, including lawyers, had begun to establish associations; however, "their degree of autonomy was also delineated and policed by officials").

156. *Legal Landmark: How China Can Boost Its Moves Toward the Rule of Law*, ASIA WK., May 24, 1996, at 25.

157. Cole R. Capener, *An American in Beijing: Perspectives on the Rule of Law in China*, 1988 B.Y.U. L. REV. 567, 581. In 1986, for example, Qiao Shi, the Secretary General of the Central Committee for Political and Legal Affairs, warned lawyers that they were "the State's legal workers, not independent professionals" and that representation of clients should not conflict with the interests of the state. *Id.*

actual practice.¹⁵⁸ Without judges and lawyers who know how to read, understand, interpret, and apply laws in real life, the rule of law will be a fiction, and laws themselves mere words on paper.

A second reason that the great number of new laws do not translate easily into practice is that a central conflict remains between the political rhetoric to establish the rule of law and the continuing tendency for parts of the government to act extra-legally through policies of the Communist Party.¹⁵⁹ Formally, the Chinese legal system does not look substantially different from other modern legal systems. The Constitution, which was first adopted in 1954 and then amended in 1982, is said to be the supreme law of the land.¹⁶⁰ National legislation passed by the National People's Congress and its Standing Committee, as well as executive regulations adopted by the State Council, provide the legal form of a democratic national government.¹⁶¹ Local governments at various levels are "permitted to enact laws suitable to local conditions," providing that they do not contravene the Constitution or the central government's laws.¹⁶² But form is not substance. In practice, the formal legal and political structures very often remain subject to the will of the Communist Party leadership.¹⁶³ The Party still rules the roost in China, and judges are not independent of the Party.¹⁶⁴ Especially in highly charged political cases, such as those decided in the wake of the Tiananmen crackdown or the recent persecution of the Falun Gong

158. Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 *IND. J. GLOBAL LEGAL STUD.* 79, 86 (1999) (observing the "profound" difference between "law in the books" and "law in action" in many developing countries).

159. LUBMAN, *supra* note 1, at 130-31; REN, *supra* note 65, at 61-63, 104-05.

160. REN, *supra* note 65, at 55-56; Wang Guiguo, *The Legal System of China*, in *CHINESE LAW*, *supra* note 128, at 8.

161. *Id.* at 6-9. See also ZIMMERMAN, *supra* note 30, at 28-34 (providing an overview of these governmental structures, as well as various federal ministries under the State Council).

162. Wang, *supra* note 160, at 9.

163. For a description of the current policy and lawmaking process in contemporary China, see generally MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS* (1999).

164. REN, *supra* note 65, at 54-55, 58-59, 106. See also FOLSOM ET AL., *supra* note 23, at 90 (observing that the "judiciary is not independent of the Party's influence . . . because the Party is the guardian of socialist legality"). Most judges and lawyers continue to be Party members and, therefore, are subject to its discipline. BLECHER, *supra* note 10, at 120. See also Clarke, *supra* note 148, at 61-64 (describing the power of local Party and government officials to influence the decisions of courts); James Kyngé, *Party Supremacy Remains a Sticking Point*, *FIN. TIMES*, Nov. 13, 2000, China Survey, at iv (observing that "the Communist Party is still supposed to reside above all other authorities in the country, including the law courts"). For an earlier discussion, see Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 *HARV. L. REV.* 967 (1969).

religious sect, the duty of judges is subservient to decisions of the Party.¹⁶⁵ One scholar euphemistically calls this phenomenon “ideological discretion.”¹⁶⁶

Some independent judicial authority appears to be evolving gradually, especially in the area of business law. Jerome Cohen, a leading American lawyer in China and former law professor, remarks on “a genuine leap forward” in the “professional sophistication” of the Chinese judiciary.¹⁶⁷ Sherry Liu, Motorola’s legal director for greater China, agrees that “tremendous progress *has* been made in China’s legal system, though there is a long way to go.”¹⁶⁸ The Communist Party remains the ghost hidden in the legal machine, and as a result there remains significant confusion between the law as written and the law as interpreted in accordance with Party policies. As Yuanyuan Shen observes, “[t]he failure of law to transcend politics has been most evident in instances when the enforcement of law conflicted with the Party’s authority and interests.”¹⁶⁹ Unfortunately, the Party’s “brazen interference” with judicial decisions has continued.¹⁷⁰

This problem of confusion between law, policy, and the Party’s power is exacerbated, perhaps intentionally, by the complexity of various kinds of laws. In addition to legislation (*falü*), there are also regulations (*tiaoli*), sets of rules (*guize*), detailed rules (*xize*), measures (*banfa*), decisions (*jueding*), resolutions (*jueyi*), and orders (*mingling*).¹⁷¹ The complexity of the interaction among these different levels of law and their administration opens the door for political policy decisions to replace legal rules in deciding particular cases. For example, the National People’s Congress has the sole authority to adopt legislation (*falü*), but the Standing Committee

165. Concerning Tiananmen cases, see Cohen, *supra* note 85, at 331-35; Shen, *supra* note 31, at 22-23. Concerning Falun Gong cases, see *China’s Chief Justice Addresses Forum on Banning, Punishing Cults* (BBC Worldwide Monitoring, Feb. 11, 1999), LEXIS, News Library, BBCMIR File (quoting the text of a Xinhua news agency report on a political organization of judges urging courts to “punish cults such as Falun Gong and their crimes . . . in order to safeguard social stability and economic growth . . .”); Cindy Sui, *China Using Asylums to Suppress; Banned Movement’s Followers Reportedly Institutionalized*, WASH. POST, Feb. 12, 2000, at A17 (noting irregularities in dealing with Falun Gong members, including committing a judge and a number of others to psychiatric institutions). Chinese lawyers must get official permission from the Bureau of Justice before agreeing to represent Falun Gong members. Peerenboom, *supra* note 140, at 9.

166. Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS OF THE RULE OF LAW IN CHINA*, *supra* note 30, at 163, 170-71.

167. Cohen, *supra* note 85, at 336.

168. Sherry Liu, *Coming Home*, in *CHINA REMEMBERS*, *supra* note 10, at 286, 290.

169. Shen, *supra* note 31, at 22.

170. *Id.*

171. ZIMMERMAN, *supra* note 30, at 35-36.

acting alone may issue decrees (*faling*), interpretations of laws (*jieshi falu*), and partial or individually focused regulations (*bufenxing* and *danxing fagui*).¹⁷² As a result, the legal system in China amounts to “a bewildering and inconsistent array of laws, regulations, provisions, measures, directives, notices, decisions, explanations, and so forth, all claiming to be normatively binding”¹⁷³

In addition, though the publication of laws and regulation has become standard practice in China since the late 1980s, many laws are still not published until long after they have been adopted.¹⁷⁴ Unpublished rules of administrative agencies (*neibu*) also sometimes determine outcomes.¹⁷⁵ “It’s a constant battle” practicing law in China, observes Sherry Liu, “to discover laws and regulations that are often neither published nor binding nationwide.”¹⁷⁶ Recently, the national legislature adopted a formal practice of publishing drafts of proposed laws for public discussion and comment.¹⁷⁷ But no official system of reporting cases or judicial opinions yet exists.¹⁷⁸

The most fundamental shortcoming of the Chinese legal system is therefore constitutional. It lies in “the ambiguous relationship between the constitutional supremacy of the Communist Party and the authority of the law.”¹⁷⁹ The conflict already discussed between written law and government policy is one major example of this problem. In addition, the Chinese Constitution itself illustrates the conflict between the authority of law and the authority of the Party in two contradictory provisions. On one hand, the Constitution provides that all organizations, including political parties, are subject to the law.¹⁸⁰ On the other hand, the Constitution recites the “four cardinal principles” as the pursuit of socialism, adherence to Maoist-Leninist political theory, the method of proletarian dictatorship, and, not

172. TANNER, *supra* note 163, at 44-45.

173. Peerenboom, *supra* note 18, at 333.

174. ZIMMERMAN, *supra* note 30, at 36.

175. *Id.* at 36-37. In truth, of course, unwritten rules of procedure and decision processes are common in all modern administrative legal systems. *E.g.*, FULLER, *supra* note 123, at 50 (“[E]very experienced attorney knows that to predict the outcome of cases it is often essential to know, not only the formal rules governing them, but the internal procedures of deliberation and consultation by which these rules are in fact applied.”). The point is whether the particular legal system is structured in a manner that allows independent attorneys and other interested parties access to these informal rules. In China, public access to the law-making and judicial processes is not easily available.

176. Liu, *supra* note 168, at 289. *See also* Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIA L. 1, 82 (1996) (discussing the many “unwritten rules” governing judicial decisions that have no basis in any statute, regulation, or policy).

177. Zhang, *supra* note 5, at 677.

178. ZIMMERMAN, *supra* note 30, at 36; Peerenboom, *supra* note 18, at 334.

179. Keller, *supra* note 77, at 729.

180. *Id.* (citing Article 5 of the 1982 Constitution).

least, the leadership of the Communist Party.¹⁸¹ In this manner, the Constitution purports both to subject the Party to the rule of law and to elevate the Party to a privileged constitutional position.¹⁸² Even the new amendment adopting the rule of law explicitly into the Constitution¹⁸³ is counterbalanced by an amendment adding references in the preamble to “Deng Xiaoping theory and development of a socialist market economy.”¹⁸⁴ The result is constitutional contradiction and corresponding potential for continuing legal disorder despite the large number of new written laws and a growing number of judges and lawyers to enforce them.¹⁸⁵

This conflict between the rule of law and the rule of the Communist Party returns to a basic quandary in the Chinese legal tradition indicated previously: a deep ambiguity about the nature of law. The current regime has committed itself to a strong effort to establish a modern legal regime marked by relatively stable rules to allow China’s emerging market economy to flourish.¹⁸⁶ As one commentator says, “the rule of law serves as a means to provide the public with procedurally systematic and substantively fair protection for private property and personal rights,” as well as “to assist people and companies” to develop “reasonable commercial expectations.”¹⁸⁷ Yet the traditional approach to law taken by Chinese governments in the past has been strongly “instrumental” in the sense that the legal system is seen as a tool to serve “merely as a means to achieve state control.”¹⁸⁸ A foremost concern in China about the rule of law is that this view may prevail, with the legal system “enlisted in a highly instrumental fashion as a weapon in intensifying struggles within and between units of government and party, center and region, and various other entities and individuals.”¹⁸⁹ In Chinese jurisprudence,

181. “Uphold the Four Basic Principles,” *Speech by Deng Xiaoping*, in 2 SOURCES OF CHINESE TRADITION, *supra* note 71, at 492; Keller, *supra* note 77, at 729; Wang, *supra* note 160, at 2 n.7. See also LAWRENCE, *supra* note 78, at 30 (arguing that the Chinese constitution is “designed for control from the top”); LUBMAN, *supra* note 1, at 126 (“Law and law reform are bounded, at least formally, by outer limits that were succinctly expressed in the Four Cardinal Principles laid down by Deng Xiaoping.”).

182. As one scholar notes, this constitutional problem might be resolved by interpreting “political parties” to refer to all political organizations *except* the Communist Party given that “there is a distinguishable political difference between the Communist Party and other political parties.” REN, *supra* note 65, at 56. At least, the Communist Party seems to see itself in this manner. *Id.*

183. See *supra* notes 5-10 and accompanying text.

184. Zhang, *supra* note 5, at 693.

185. Keller, *supra* note 77, at 740.

186. Allison & Lin, *supra* note 132, at 782-83.

187. *Id.* at 783.

188. Allison & Lin, *supra* note 132, at 783. See also FOLSOM ET AL., *supra* note 23, at 112.

189. ALFORD, *supra* note 40, at 121. See also Yu Xingzhong, Comment, *Legal Pragmatism in the People’s Republic of China*, 3 J. CHINESE L. 29, 40 (1989)

in other words, there is a danger of a new Communist Party Legalism.

The instrumental, politicized view of law may be mitigated in part by what some observers have called "law-blindness" in China (*fa-mang*).¹⁹⁰ This idea reflects Confucian notions that law should be invoked to resolve disputes only as a last resort.¹⁹¹ For example, it is often said that good relationships (*guanxi*) are more important than negotiating formal contracts when doing business in China, though recent legal reforms appear to be reducing this phenomenon.¹⁹² Yet rather than countering the tendency toward an instrumentalist Communist Party Legalism, it is also possible that Confucian law-blindness may contribute to preserving an ambiguous status quo with respect to law in China. A predictable result would be continuing corruption in government, as well as uncertainty that will threaten continued economic growth.

Corruption of judges and other officials is a well-recognized problem in China, and more strongly establishing the rule of law is invoked often by the government as a remedy.¹⁹³ Formal anti-corruption measures were adopted in the late 1980s, but they have been mostly ineffective.¹⁹⁴ One scholar observes "abundant signs of collusion and rampant corruption between business enterprise and opportunistic officials in a position to profit for themselves."¹⁹⁵ Another scholar describes corruption to include "embezzlement, bribery, extortion, favoritism, nepotism and smuggling" that have "spread into every corner of society."¹⁹⁶ Yet another observer describes corruption in China as "a virus."¹⁹⁷ Corruption charges formally brought in courts increased ninety-six-fold from 1979 to 1989, and citizens filed more than three million allegations of corruption from 1993 to 1995.¹⁹⁸ In one recent case, a \$10 billion

("Instrumentalism is a prominent component of both Marxist dogma and the pragmatic approach to legalization [emphasized more recently].").

190. VAN KEMENADE, *supra* note 10, at 18.

191. This principle has deep historical roots. 1 SOURCES OF CHINESE TRADITION, *supra* note 45, at 547 (describing how law under the Tang code was used "only [as a] last resort after other, more consensual mechanisms failed").

192. GUTHRIE, *supra* note 8, at 20-21, 63-66, 175-97; ZIMMERMAN, *supra* note 30, at 44-45; Clarke, *supra* note 148, at 59.

193. *E.g.*, LUBMAN, *supra* note 1, at 110-14, 127, 158, 170-71, 215, 217, 264, 292; VAN KEMENADE, *supra* note 10, at 272-73.

194. REN, *supra* note 65, at 80-81 (describing the adoption of anti-corruption legislation and the establishment of special anti-corruption bureaus).

195. DE BARY, *supra* note 39, at 148.

196. Hao, *supra* note 5, at 405.

197. MILES, *supra* note 106, at 147-68 (providing details of a number of recent cases of "the virus of corruption" in China).

198. Peter Ferdinand, *Social Change and the Chinese Communist Party: Domestic Problems of Rule*, 49 J. INT'L AFF. 478, 485 (1996). The vast increase in the number of corruption prosecutions and civil cases, however, may also indicate a

smuggling and corruption ring implicated senior officials in Fujian.¹⁹⁹ In another, the vice governor of Jiangxi was sentenced to death.²⁰⁰ Prime Minister Zhu Rongji crusades against corruption in speeches.²⁰¹ Another national campaign against judicial corruption occurred in 1998.²⁰² Yet another massive anti-corruption campaign was launched in 2000.²⁰³ It resulted in a huge corruption trial in China concerning a \$10 billion smuggling ring in Xiamen, which culminated in fourteen death sentences in November 2000.²⁰⁴

Less well recognized in China, however, is that a combination of de facto Communist Party legal authority and customary Confucian law-blindness contributes to the persistence of corruption. Anti-corruption campaigns have not been effective because the legal system lacks independence and the dominance of the Party has meant that “[t]he officials assigned to clean up the corruption were very often the same officials who were engaged in it.”²⁰⁵ More firmly establishing the rule of law is a good answer to the problem of corruption, but this is more easily said than done.²⁰⁶ As Sherry Liu writes, “[t]here is a medicine to cure the disease—an independent and open judicial system—but it is still too strong for the authorities to take.”²⁰⁷

In summary, law in China presents a mosaic of traditional legal conceptions, the strong historical influences of Western colonialism

strengthening of the resolve of the government and the courts to address the problem. As one seasoned observer notes, however, the “corruption problem seems only to worsen” given that corrupt practices are “woven into the fabric of modern Chinese society” in a manner that is “almost invisible.” Lubman, *supra* note 142, at 404.

199. Elisabeth Rosenthal, *Beijing Gets a Scolding for Official Corruption, and Applauds*, N.Y. TIMES, Mar. 6, 2000, at A10.

200. *Id.*

201. *Id.*

202. Zhang, *supra* note 5, at 691-93.

203. Kevin Whitelaw, *Corruption Crackdown: Trials and an Execution*, U.S. NEWS & WORLD REP., Sept. 25, 2000, at 38.

204. James Kynge, *China Condemns 14 to Die in Biggest Corruption Trial for Over 50 Years*, FIN. TIMES, Nov. 9, 2000, at 22.

205. FAIRBANK & GOLDMAN, *supra* note 24, at 424.

206. *See id.* at 424-25. One scholar has gone so far as to suggest that corruption in China may have a silver lining because its very “frequency, scale and variety” will provide a “catalyst” for a social transition toward the establishment of the rule of law. Hao, *supra* note 5, at 405-06. He argues that “corruption is playing an important role in giving birth to a law-based bureaucracy and a law-based culture in public institutions in China.” *Id.* at 417. It is also possible, however, that increasing corruption will raise the stakes for nascent legal institutions in China, and if these relatively weak institutions are not capable of dealing with this problem, then the Party may find itself forced to re-exert its own authority and power—whether through legal instruments or otherwise. “In China,” it is important also to recall, “the general perception is that widespread corruption has traditionally spelled the end of dynasties.” FAIRBANK & GOLDMAN, *supra* note 24, at 425.

207. Liu, *supra* note 168, at 290.

and Marxist theory, and strenuous current efforts to adapt to the legal requirements of a fast-changing global economy. Contemporary China is in "a period of transition" toward "that whole unresolved complexity which we call modernity," and the eventual shape of this future China remains "open and unresolved."²⁰⁸

Law in China continues to be characterized by an absence of an independent judiciary and professional bar. An appellate structure of courts exists,²⁰⁹ but the judges are toothless without Party approval or at least acquiescence—and most often judges are Party members themselves.²¹⁰ Lawyers are too few, and many judges and other administrators remain unskilled and unsophisticated. The historical legacies of Maoism and the Cultural Revolution continue to bedevil attempts to reestablish the rule of law as an institutional reality.

Yet at the same time, strong efforts are underway in China to reverse this situation of relative lawlessness. From 1979 to 1989, Deng Xiaoping inaugurated a "remarkable decade of progress toward creating a credible rule of law."²¹¹ Since the Tiananmen Square massacre (surely not a model of the rule of law), there has been some progress. Many new laws have been enacted.²¹² In addition to those discussed above, a new Administrative Procedure Law makes it possible for citizens to sue the government, and an Arbitration Act may also confer new legal rights to citizens.²¹³ A new Lawmaking Law has been adopted that enables citizens to challenge lower rules

208. SCHWARTZ, *supra* note 40, at 14.

209. Wang, *supra* note 160, at 15-19. In 1994 there were more than 3000 trial level courts in China and almost 400 intermediate appellate courts. *Id.* at 15. Conciliation committees are also important in China. There were about 950,000 of these committees in 1993. *Id.* at 18. *See also* Clarke, *supra* note 176, at 6-15 (describing the structure of China's court system).

210. A recent official report acknowledged that ninety-five percent of judges and other legal administrators are "Party members who are carefully selected for being politically loyal to the Party line . . ." REN, *supra* note 65, at 60.

211. Cohen, *supra* note 85, at 323.

212. *See id.* at 328-31.

213. LAWRENCE, *supra* note 78, at 131. *See also* FAIRBANK & GOLDMAN, *supra* note 24, at 424 (observing that the new Administrative Procedure Law gives "ordinary people the right to bring suit against rapacious, arbitrary officials"); Xixin Wang, *Administrative Procedure Reforms in China's Rule of Law Context*, 12 COLUM. J. ASIAN L. 251 (1998) (describing reforms of administrative law, including provisions for litigation against the government). When considering legal change, however, it is important to remember the very different legal culture that exists in China. As Edward Rubin argues, China may be "the political antipode" to the U.S. with respect to its cultural attitudes toward litigation. EDWARD L. RUBIN, *ADMINISTRATIVE LAW AND THE COMPLEXITY OF CULTURE IN MAKING DEVELOPMENT WORK: LEGISLATIVE REFORM FOR INSTITUTIONAL TRANSFORMATION AND GOOD GOVERNANCE* 103 (Ann Seidman et al. eds., 1999). A Chinese version of the U.S. Administrative Procedure Act would therefore be "a lifeless thing." *Id.* at 105.

and regulations that conflict with higher national law.²¹⁴ From only a few hundred cases allowed to be brought against the government in 1986, more than 50,000 formal legal complaints were filed in 1995.²¹⁵ Steps have been taken to introduce an adversary system of advocacy and to improve the rules of evidence and civil procedure.²¹⁶ The number of cases of private litigation has increased dramatically in recent years, from only about 13,000 in 1990 to approximately 100,000 in 1997²¹⁷ and 150,000 today.²¹⁸ Several new law schools have opened. Tsinghua University in Beijing, for example, reestablished its law school in 1997 and completed an impressive new building in 2000.²¹⁹ Many new Chinese lawyers will be formally trained.²²⁰ Aid programs from the West have also encouraged the development of legal skills and reform.²²¹ The U.S.-China Trade Relations Act of 2000, for example, explicitly contemplates new “rule of law” assistance programs administered by several federal agencies.²²² The expected admission of China into the WTO and establishment of permanent normal trade relations with the United States will, according to one Chinese lawyer, “reformat[] Chinese business and legal culture.”²²³ As a result of all these developments, there is hope for the future of the rule of law in China.²²⁴

214. ZIMMERMAN, *supra* note 30, at 37; Lubman, *supra* note 142, at 393. See also Peter Corne, *Legal System Reforms Promise Substantive—But Limited—Improvement*, CHINA L. & PRAC., June 1997, at 29 (describing the Lawmaking Law, as well as a new Administrative Penalty Law).

215. Barshefsky, *supra* note 12, at 366.

216. Zhang, *supra* note 5, at 688-91.

217. GUTHRIE, *supra* note 8, at 71.

218. Barshefsky, *supra* note 12, at 366.

219. Weinstein, *supra* note 89, at 224. The new law school at Tsinghua is adjacent to the School of Management and Economics where I taught a course in the spring semester of 2000.

220. According to one estimate, the number of lawyers in China increased from only 3,000 in 1980 to 90,000 in 1995. Allison & Lin, *supra* note 132, at 784. The number rose to 110,000 in 1998 and is about 150,000 today. See *supra* notes 142, 145 and accompanying text.

221. For an overview of U.S. aid programs of various kinds, see Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999).

222. People's Republic of China Trade Relations Act, Pub. L. No. 106-286, § 511, 114 Stat. 880, 905-06 (2000) (establishing various collaborative “rule of law programs” in the Departments of Commerce, Labor, and State).

223. Elisabeth Rosenthal & Joseph Kahn, *Chinese Consider Trade Bill in U.S. Vital to Reform*, N.Y. TIMES, May 21, 2000, at A1, A16 (quoting a Chinese lawyer).

224. *E.g.*, Cohen, *supra* note 85, at 340 (arguing that “despite all the disappointments of China’s modern experience” there is “still hope for the establishment of a rule of law there”). Others are more pessimistic. *E.g.*, LUBMAN, *supra* note 1, at xvi (“China may develop something like the rule of law in the future and I perceive fragile harbingers of that possible future in China today, but . . . I remain a cautious pessimist about the future of legality in China.”). Perhaps the best

III. THE RULE OF LAW IN CHINA (AND ELSEWHERE)

Often in both domestic and foreign discussions, unspoken assumptions are made about the meaning of the *rule of law*. The phrase is too often used easily and unthinkingly though its meaning remains vague and uncertain.²²⁵

In Western philosophy, the rule of law has been the topic of "a lively tradition" for centuries.²²⁶ Yet as Michael Oakeshott writes, the rule of law "stands for a mode of human relationship that has been glimpsed, sketched in practice, unreflectively and intermittently enjoyed, half-understood, [and] left indistinct."²²⁷ In Chinese thought as well, some "key concepts generally considered fundamental" to the Western idea of the rule may be found in ancient writings.²²⁸ In the late-1990s, jurisprudential debates about the rule of law in China again became "lively."²²⁹ In these debates, Chinese legal theorists have drawn heavily on Western treatments of the concept.²³⁰ The

prognosis lies somewhere between optimism and pessimism, given some signs of resurgent legal institutions in China, yet recognizing the inherent political and economic risks of the process of building a "rule of law." See, e.g., FAIRBANK & GOLDMAN, *supra* note 24, at 455 ("As it becomes more and more integrated economically into the international community, China is exposed to the rules, standards, laws, pressures, scrutiny, and regulations of international institutions in terms of its legal and human rights practices Yet the development of appropriate political and legal institutions is only at an embryonic stage, and could easily be arrested.").

225. MICHAEL OAKESHOTT, ON HISTORY AND OTHER ESSAYS 129, 131 (1999) (noting that "the rule of law" as "a common expression" is "ambiguous and obscure" and "the mode of human relationship" to which it refers is "vague"); Fred Dallmayr, *Hermeneutics and the Rule of Law*, 11 CARDOZO L. REV. 1449, 1451 (1990) (noting "the unstable meaning of the phrase" given that "rule and law are themselves the targets of continuous interpretation and reinterpretation"); Fallon, *supra* note 29, at 1 (observing that "the precise meaning of the Rule of Law is perhaps less clear than ever before").

226. OAKESHOTT, *supra* note 225, at 164.

227. *Id.* at 131. See also MICHAEL OAKESHOTT, ON HUMAN CONDUCT 120 (1975). For a critical description of Oakeshott's theory, see Guri Ademi, Comment, *Legal Intimations: Michael Oakeshott and the Rule of Law*, 1993 WIS. L. REV. 839.

228. Turner, *supra* note 34, at 2-3. See also Karen Turner, *War, Punishment, and the Law of Nature in Early Chinese Concepts of the State*, 53 HARV. J. ASIATIC STUD. 285, 288-90, 292-93, 305-14 (1993). As discussed above, there is a historical debate about the meaning and influence of early Chinese concepts related to the rule of law. See *supra* notes 30-31, 63-64 and accompanying text.

229. Chen, *supra* note 5, at 128. The movement among Chinese legal scholars to discuss and promote conceptions of the rule of law from 1996 to 1998 was made possible and encouraged by Jiang Zemin's calls for "ruling the country according to law" in 1996 and the proposal of a constitutional amendment to the same effect. *Id.* at 163. See also *supra* notes 5-6 and accompanying text.

230. For a review of this literature, see generally Chen, *supra* note 5; Chih-yu Shih, *Nascent Visions of Rule of Law in Mainland China*, 29 ISSUES & STUD. (Taipei) 38, 41-62 (1993); Peerenboom, *supra* note 18, at 320-24.

extent to which Western conceptions of the rule of law will translate into Chinese theory and practice, however, remains to be seen.

For at least two major reasons, it is important to traverse the well-traveled jurisprudential road "to endow this somewhat vague relationship" expressed by the rule of law with "a coherent character" in connection with the development of law in China.²³¹ First, because Western ideas have punctuated recent discussions among Chinese scholars about the rule of law,²³² it is important to clarify the Western concept of the rule of law itself, especially given the difficulties of translating or transplanting ideas from one culture into the vernacular of another.²³³ Transplanting Western legal concepts to communist or formerly communist societies poses some "peculiar and especially problematic features."²³⁴

Second, recent efforts by Western governments, including the United States, to promote the rule of law in China (and elsewhere) through foreign aid and private assistance lend a renewed prominence to the issue. These efforts are part and parcel of a broader effort of "democracy promotion," which is "a capacious term used to encompass efforts to nurture electoral processes, the rule of law, and civil society, all broadly defined."²³⁵ The U.S. Agency for International Development, for example, which administers much of the government's budget for international aid, defines the promotion of the rule of law as "fostering the legitimacy, accountability, fairness, and effectiveness of laws and legal systems in recipient countries."²³⁶ The U.S. State Department has a rule of law program that aims similarly "to build political and judicial systems that promote democracy, protect human rights, and provide accountable

231. OAKESHOTT, *supra* note 225, at 131.

232. Chen, *supra* note 5, at 146 (observing the "active reception in China in recent years . . . of the vocabulary of the rule of law and related notions in the Western liberal tradition"); Turner, *supra* note 34, at 2 (noting that a survey of Chinese literature "demonstrates that a Western-centered concept of the Rule of Law continues to serve as a benchmark" for Chinese scholars).

233. For a primary source on the historical phenomenon of "legal transplants," see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1994). Watson argues that the "transplanting" of legal rules, concepts, and ideas has been "the most fertile source of development" in European history. *Id.* at 95. For a critical assessment of Watson's theory of legal change, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995).

234. deLisle, *supra* note 221, at 259.

235. Alford, *supra* note 27, at 1678-79. See also deLisle, *supra* note 221, at 181 ("Large or small, successful or embarrassing, such programs and projects almost all have pursued one or more elements of an agenda that has included building multi-party electoral democracy, a generally liberal rule of law supported by an independent judiciary and bar, and a legal framework for a market-oriented economy that is generally receptive to international trade and foreign investment.").

236. deLisle, *supra* note 221, at 185 (citing a government source).

government.”²³⁷ The U.S. Institute of Peace sponsors a legal reform program that focuses on “normative or value-driven rule of law concerns,” including “civil and human rights” and “democratic forms of governance.”²³⁸ The World Bank and the International Monetary Fund promote the rule of law in order to establish “a free, unregulated economic marketplace.”²³⁹ All of these high-level programs to promote the rule of law may sound good, but they hide a fundamental conceptual vagueness.²⁴⁰ What does the rule of law really mean? What should it mean?

Scholars who have studied the history of the idea of the rule of law warn that the term has often been misused “for purely hortatory purposes”²⁴¹ or as “an ideological slogan.”²⁴² As Judith Shklar observes, the rule of law may be employed as “another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.”²⁴³ By the same token, the recent use of the phrase by Chinese politicians threatens to dilute its meaning when, for example, Communist Party leaders hail their adherence to the rule of law when cracking down on political or religious dissidents.²⁴⁴ Regardless of the political motivations of the propagandists, the “ideological abuse” of the concept raises the danger that the idea will become “meaningless” and, as a consequence, less influential in promoting positive social change.²⁴⁵

This Part of the Article contributes to the broader theoretical debate about the meaning of the rule of law in general in order to apply it more narrowly to the context of contemporary China. It first explores and sharpens the meaning of the rule of law as the concept has been understood by influential scholars in the Western legal tradition. Drawing on this literature, including a basic theory of the state, a distinction between two general conceptions is recommended: an instrumental theory of *rule by law* and a normative and political

237. *Id.* at 186.

238. Charles Duryea Smith, *The Rule of Law Initiative at the United States Institute of Peace*, 4 ILSA J. INT'L & COMP. L. 355, 356 (1998).

239. Whitford, *supra* note 25, at 735.

240. deLisle, *supra* note 221, at 225 (describing the idea of exporting the rule of law as including “vague but fundamental values”). *See also supra* note 225 and accompanying text.

241. John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT'L L. & COM. REG. 71, 74 (1998). *See also* Fallon, *supra* note 29, at 2 (noting that “many invocations of the rule of law are smug or hortatory”).

242. OAKESHOTT, *supra* note 225, at 129. *See also* GRANT GILMORE, *THE AGES OF AMERICAN LAW* 106 (1977) (dismissing the idea of the rule of law as one of several “cheerfully meaningless slogans” in American jurisprudence during debates in the 1950s).

243. Judith N. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

244. Alford, *supra* note 27, at 1707.

245. Shklar, *supra* note 243, at 1.

theory of the *rule of law*. This Part then discusses the conceptual relationship between the ideas of the rule of law and democracy. This analytical clarification allows a consideration of what the instrumental and normative conceptions of the relationship between law and the state may mean in the historical and political context of contemporary China. Part IV concludes the Article with a few policy recommendations for building the institutions needed to support the practice and ideal of the rule of law in China in the future.

A. *The Rule of Law as a Western Concept*

As with many philosophical ideas in the West, the concept of the rule of law began in ancient Greece.²⁴⁶ In *The Laws*, Plato argues that even a properly functioning legal system is a poor substitute for the ideal of constraining human behavior through philosophical knowledge of “the good” by the political rulers or philosopher kings.²⁴⁷ This conception shares similarities with the traditional Confucian concept of *li*.²⁴⁸ In *The Politics*, Aristotle describes law as “reason without passion.”²⁴⁹ The rule of law is “nothing less than the rule of reason,”²⁵⁰ though legal rules should also be balanced by rational considerations of “equity” to achieve just results in particular cases.²⁵¹ “Rightly constituted laws should be the final sovereign,” in Aristotle’s words, and “personal rule, whether it be exercised by a single person or body of persons,” should be exercised only when the “law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.”²⁵² Whoever instead wants to “have men govern” (such as Plato or Confucius) “adds a wild animal also; for appetite is like a wild animal, and also passion warps

246. See *infra* text accompanying notes 247, 249-52, 255.

247. Richard Flathman, *Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law*, in *THE RULE OF LAW* 297, 302 (Ian Shapiro ed., 1994) (discussing Plato’s philosophy of law). See also Ernest J. Weinrib, *The Intelligibility of the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY*, *supra* note 243, at 59, 62-63 (arguing that for Plato law was “a matter of convention” and “the rationality of law” depended entirely on the philosophical wisdom and knowledge of the rulers).

248. See *supra* notes 39-40, 59-60 and accompanying text.

249. Flathman, *supra* note 247, at 302 (quoting Aristotle).

250. Shklar, *supra* note 243, at 1 (describing Aristotle’s view).

251. Flathman, *supra* note 247, at 303. For contemporary Aristotelian views of the relationship between equity and law, see generally Lawrence B. Solum, *Equity and the Rule of Law*, in *THE RULE OF LAW*, *supra* note 247, at 120; Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 *LAW & CONTEMP. PROBS.* 263 (1996).

252. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175, 1176 (1989) (quoting Book III, Chapter XI of Aristotle’s *Politics*).

the rule even of the best men.”²⁵³ Therefore the rule of law is “preferable to that of any individual.”²⁵⁴

Plato and Aristotle began a long Western tradition of thinking about the rule of law. As one scholar summarizes this extensive literature:

From Plato and Aristotle through the Roman jurists, the medieval natural law thinkers, the neo-Stoics and modern natural law theorists, Montesquieu and the American founders, the nineteenth-century advocates of the *rechtsstaat*, and up to contemporary enthusiasts such as Friedrich Hayek and John Rawls, Lon Fuller and Theodore Lowi, champions of the rule of law have assumed the desirability or at least the ineliminable reality of extensive political rule of human conduct.²⁵⁵

The list of luminaries may be expanded to include Althusius, Bodin, Grotius, Hobbes, Locke, Kant, Rousseau, Spinoza, and Hegel.²⁵⁶ In Western society, this philosophical development culminated in the liberal theories informing the establishment of democratic political states asserting the rule of law.²⁵⁷

In the nineteenth century, the English legal theorist, A.V. Dicey, gave one of the most influential accounts of the rule of law as a concept in the Anglo-American literature.²⁵⁸ He clarified Aristotle’s argument against rule by *any individual* to include *any government*.²⁵⁹ For Dicey, the “predominance of regular law” was opposed to “the influence of arbitrary power” or “wide discretionary

253. ARISTOTLE, *POLITICS* 265 (H. Rackham trans., Harvard Univ. Press 1944). Aristotle’s conception of the rule of law, therefore, contrasts with Plato’s argument for the rule of philosophers. See Weinrib, *supra* note 247, at 62-63 (discussing the difference between Plato’s and Aristotle’s views about law).

254. Solum, *supra* note 251, at 120 (quoting Aristotle’s *Politics*). Aristotle’s rationalist view of the rule of law remains one of the major models in the Western tradition. See Shklar, *supra* note 243, at 1-5. See also *supra* notes 247, 251-52. Aristotle’s view of the rule of law has begun to influence a number of Chinese theorists as well. Chen, *supra* note 5, at 131.

255. Flathman, *supra* note 247, at 302.

256. See FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* 77-172 (1986) (providing an extensive critical review of these various classical theories of the rule of law). See also Dallmayr, *supra* note 225, at 1450-59 (reviewing various historical theories of the rule of law).

257. For a critical description, see NEUMANN, *supra* note 256, at 179-86 (comparing and contrasting the German *rechtsstaat* and the English “rule of law”). Neumann’s social theory also usefully frames modern theories of the rule of law within the structure of modern states. *Id.* at 3-5, 11-12, 23-38, 45-46.

258. Solum, *supra* note 251, at 122; Orth, *supra* note 241, at 72. See also Shklar, *supra* note 243, at 5 (observing that Dicey provided “the most influential restatement of the Rule of Law since the 18th century,” though it was flawed with “an unfortunate outburst of Anglo-Saxon parochialism”).

259. See Shklar, *supra* note 243, at 5-6.

authority on the part of the government.”²⁶⁰ In general terms, Dicey understood the rule of law to comprise three “kindred conceptions”:

(1) no one can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law; (2) everyone's legal rights and liabilities are determined by the ordinary courts of the realm; and (3) everyone's individual rights are derived from the ordinary law of the land, not from a written constitution²⁶¹

Of course, the United States with its written constitution and judicial review does not satisfy the last of Dicey's three criteria of the rule of law,²⁶² and some contemporary theorists continue to maintain that the American tradition of “a so-called Bill of Rights” and a judiciary “authorized to declare a law to be inauthentic” through constitutional interpretation violates the ideal of the rule of law.²⁶³ It is also disputed on ideological grounds whether Dicey's version of the rule of law exists or ever existed in the United Kingdom.²⁶⁴ Despite “persistent lapses” and vagueness about its meaning, however, the rule of law as “an ideal” in the general terms provided in Dicey's account has become broadly accepted in Western societies.²⁶⁵ The ideal has “commanded near universal support,”²⁶⁶

260. Steven J. Burton, *Particularism, Discretion, and the Rule of Law*, in *THE RULE OF LAW*, *supra* note 247, at 178, 196 (quoting Dicey).

261. Orth, *supra* note 241, at 72-73 (citing Dicey). See also Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY*, *supra* note 243, at 97, 105 (giving a similar account of Dicey's theory). For the original version, see A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 188-203 (E.C.S. Wade ed., 1965) (1885).

262. Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 *GEO. WASH. L. REV.* 149, 151 (1987) (observing that “Dicey was quite suspicious of written constitutions”).

263. OAKESHOTT, *supra* note 225, at 156. Briefly, the argument is that the notion of judges empowered to obviate the democratic popular will expressed through legislation is contrary to the rule of law. I will leave this large topic known as the “counter-majoritarian difficulty” in U.S. law outside the scope of this Article. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *COLUM. L. REV.* 857, 932 (1999) (“Constitutionalism is at odds with democracy, or rather with the most common theory of democracy among constitutional scholars and lawyers, majoritarianism. Worries about the legitimacy of less-democratically-accountable judges trumping the political preferences of more-democratically-accountable legislators (and executive officials) in shorthand, the ‘counter-majoritarian difficulty’ have haunted modern constitutional law.”). For an introduction to the topic, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-6, at 61-66 (2d ed. 1988) (discussing what he calls “the antimajoritarian difficulty”).

264. Orth, *supra* note 241, at 74.

265. *Id.* at 74-75.

266. *Id.* at 77. See also Richard P. Cole, *Orthodoxy and Heresy: The Nineteenth Century History of the Rule of Law Reconsidered*, 32 *IND. L. REV.* 1335, 1337 (1999) (book review essay) (describing the rule of law as “the bedrock of modern American legal culture”).

even though it may continue also to be invoked in an "ideological" and "hortatory" manner.²⁶⁷

Even the Marxist historian, E.P. Thompson, describes the development of the ideal of the rule of law in Western societies as "an unqualified human good."²⁶⁸ Thompson argues that some Marxist theorists who object to the concept overlook the important difference between "arbitrary power and the rule of law."²⁶⁹ Although invocation of the rule of law may conceal "shams and inequities" that should be exposed, to "deny or belittle" the ideal of the rule of law in a dangerous time when "the resources and pretensions of power continue to enlarge" is "a desperate error of intellectual abstraction."²⁷⁰

Nevertheless, there remain skeptics of the idea of the rule of law. As discussed above in Part II, some hardline Marxists view the rule of law as inevitably an instrument of oppression²⁷¹ or, as one American Marxist historian writes, "an instrument by which the advanced section of the ruling class imposes its viewpoint upon the class as a whole and the wider society."²⁷² Perhaps most notably in American jurisprudence, critical legal studies scholars have attacked the ideal of the rule of law.²⁷³ Morton Horwitz, for example, argues that Thompson's claim about the rule of law is correct only "if Hitler, Stalin, and all the other horrors of this century have finally forced us to accept the Hobbesian vision of the state and human nature on

267. See *supra* notes 241-45 and accompanying text. The rule of law as an ideal, however, does not deserve support unless one understands what it means. This topic is discussed further in the text above, but a puzzle in Dicey's definition lies in his emphasis on "ordinary" courts and law. See *supra* text accompanying note 261. One interpretation might be that the rule of law requires that every person have access to a court for the protection of his or her legal rights. Another interpretation, however, might emphasize an ideal of "equality"—that all citizens have rights to an "ordinary court" and the same law, which may implicate political principles of democracy as well as law.

268. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975).

269. *Id.* Marxist theories remain influential, of course, in contemporary Chinese debates about the rule of law. See Chen, *supra* note 5, at 154 (discussing contemporary Marxist-Leninist attacks on the concept of the rule of law in China); Edward J. Epstein, *Law and Legitimation in Post-Mao China*, in *DOMESTIC LAW REFORMS IN POST-MAO CHINA* 19, 20-24 (Pitman B. Potter ed., 1994) (describing the influence of Leninist-Maoist theory on contemporary Chinese conceptions of law).

270. THOMPSON, *supra* note 268, at 266.

271. See *supra* notes 92-101 and accompanying text.

272. EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 27 (1974).

273. *E.g.*, Laurence H. Tribe, *Revisiting the Rule of Law*, 64 N.Y.U. L. REV. 726, 726 (1989) ("To some on the left, especially in critical legal studies, the Rule of Law is little more than a mask that hides the legal system's tendency to protect the rich and powerful at the expense of the poor and the working class.").

which our present conceptions of the rule of law ultimately rest."²⁷⁴ The rule of law may create a useful "formal equality," but it also promotes "substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes."²⁷⁵ Echoing a Marxist perspective at least in some respects, Horwitz maintains that the "procedural justice" promoted by the ideal of the rule of law "enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage."²⁷⁶ Similarly, Roberto Unger, also in a Marxist spirit, denounces the rule of law as "an ideological cloak" that hides underlying social inequality and unfairness.²⁷⁷ In other words, "law is politics, all the way down."²⁷⁸ The liberal idea of the rule of law is simply "a myth."²⁷⁹

For the most part, however, Marxist and other criticisms have not persuaded legal scholars in China, the United States, or elsewhere to abandon the idea of the rule of law. The Chinese legal scholar, Yuanyuan Shen, for example, writes that she is aware of jurisprudential debates "in some Western legal circles of the notion of the rule of law," but she finds the concept "still useful for today's China."²⁸⁰ By analogy, she argues that one "should not delay the introduction of nutritious and high-protein food to a starving land" simply because "Americans have come to disregard such items for fear that they contain high cholesterol."²⁸¹ Even in the United States, it is probably fair to say that critical legal studies, the primary source of criticism of the idea of the rule of law, has been marginalized.²⁸²

274. Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (book review).

275. *Id.*

276. *Id.*

277. Shklar, *supra* note 243, at 9-11 (giving an account of Unger's view and observing that he adopts an "indignant tone in denouncing the Rule of Law"). For the original arguments, see ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 52-57, 66-76, 166-81, 192-216, 238-242 (1976). See also generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983).

278. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1526 (1991).

279. For an example of this sort of argument, see John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199 (1995).

280. Shen, *supra* note 28, at 31. See also Chen, *supra* note 5, at 164 (arguing that "Chinese theorists of the rule of law" should "put aside postmodern concerns").

281. Shen, *supra* note 28, at 31. See also Chen, *supra* note 5, at 164 (arguing that applying "the insights of neo-Marxism, critical legal studies and various strands of postmodernism in the West" to China would "miss the point" because the Western debate takes for granted certain basic attributes of the rule of law principles inherited from the Enlightenment).

282. Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1137 (1999) (describing the critical legal studies movement as "quieted or marginalized" in the 1990s). For a similar view suggesting that critical legal studies has been

What accounts for the continuing popularity and even “positive emotive” force of this idea of the rule of law?²⁸³ Even though there appears to be relatively broad agreement about the intrinsic value of the rule of law, it remains a difficult and complex concept. At least, analytical improvements have been made on Dicey’s confused account of the three “kindred expressions” of the rule of law.²⁸⁴ To begin with, his idea of the rule of law must be unpacked and repackaged to be useful in the Chinese context.

The first two of Dicey’s expressions of the rule of law quoted above refer to a system of governance in which legal rules are publicly known, consistently enforced, and, at least in general terms, applied fairly and even-handedly by judges or other decision makers to particular cases.²⁸⁵ In other words, the idea is that law should be “general, knowable, and performable.”²⁸⁶

These basic characteristics are consistent with an instrumental view of law—that is, the use of legal rules by a government to achieve particular substantive ends, whatever the ends chosen by the government may be. For example, an instrumental use of law in the Chinese context (and elsewhere) may aim to enhance the political power of the ruling party or to increase economic productivity. To achieve either end, a government may use legal rules as an “instrument.”²⁸⁷ The use of law as an instrument of government also requires, virtually by definition, that the “legal rules” are expressed in general terms to govern a specified category of action and that those expected to obey the rules know about and are capable of complying with them.²⁸⁸ There are disputes in legal theory about whether “generality” is a requirement for the existence of a legal system, even if exceptions are made for “particular or occasional commands.”²⁸⁹ But this debate, as Lon Fuller argues, “is without intelligible content unless one starts with the obvious truth that the citizen cannot orient his [or her] conduct by if what is called law

“marginalized” but also providing a political explanation for the motives, see Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829, 1858-62 (1986) (book review). See also MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 250 (1996) (noting a shift to a “postideological mood” in law schools in the 1990s).

283. Frederick Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENT. 69, 70 (1989).

284. See *supra* note 261 and accompanying text.

285. Schauer, *supra* note 283, at 70-71.

286. William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in THE RULE OF LAW, *supra* note 247, at 265, 265. See also Radin, *supra* note 29, at 786 (listing similar characteristics).

287. For a description of “instrumentalism” in the use of law in China toward both of these ends, see Epstein, *supra* note 269, at 19-20, 22-24.

288. *Id.*

289. FULLER, *supra* note 123, at 110.

confronts him [or her] merely with a series of sporadic and patternless exercises of state power."²⁹⁰

As discussed below, idealized versions of these requirements may lead to a normative elaboration of the rule of law, but at least a minimum of "general, knowable, and performable" rules are needed even for an instrumental use of law to govern.²⁹¹ This description is consistent with Fuller's view that law is "the enterprise of subjecting human conduct to the governance of rules."²⁹²

The third of Dicey's "expressions," however, unavoidably infers a normative and political idea that the legal "rights" of citizens recognized by the government must be protected from infringement by a legal system that is at least to some extent independent of government.²⁹³ Some theorists of the rule of law go further and claim that certain fundamental natural and moral rights give a justification for either disobeying a law or, in extreme cases, a right to overthrow a state that has become a lawless tyranny or an evil despotism.²⁹⁴ Such normative political theories of the rule of law are less clear and more controversial. In order to understand them, at least a basic theory of the modern political state and the place of law in it is needed.

1. A Political Theory of the State as a Prerequisite for the Rule of Law

During earlier periods of Western history, law was associated closely with the claims to moral authority and legitimacy through religion (especially Christianity), but modern law cannot be understood other than in the political context of secular nation-states. Except for international law governing the relationship among nation-states (and other entities recognized as having assertable rights in international law), the political state is the primary source for positive law and the constitutional structure of law in modern society. Law is distinguished from other norms, social rules, and institutions that govern human behavior by the empirical fact that legal judgments are backed and at least provisionally enforced by the state. As Franz Neumann makes the point, law is

290. *Id.*

291. *See infra* text accompanying notes 359-68, 381-402.

292. FULLER, *supra* note 123, at 96.

293. The nature and importance of legal and moral "rights," of course, involves a huge literature. For an introductory collection of essays on the topic, see READINGS IN THE PHILOSOPHY OF LAW 164-293 (Jules L. Coleman ed., 1999) (reprinting essays by Hohfeld, Hart, Feinberg, Lyons, and Waldron).

294. *See infra* text accompanying notes 315-26.

distinguished from general custom and morality by "its coercive character."²⁹⁵

Political theorists have disagreed about the need for a centrally organized state with the power to coerce human behavior—whether through law or otherwise. Anarchists, for example, claim that political states have no legitimate moral authority to declare and enforce legal rules or take other actions that impinge on the natural liberty of human beings.²⁹⁶ Some Marxists also adopt the view that "after the revolution" the state will "wither away" with the realization of a communist and egalitarian society.²⁹⁷ Libertarians advance the more moderate view that some "natural rights" exist that should be off limits to state intervention, though they usually agree that at least a "minimal state" is necessary both to achieve some basic common objectives (such as mutual security) and, paradoxically, to preserve the natural rights of citizens (such as property) through legal institutions.²⁹⁸

The classical liberal theory of the state governed by the rule of law opposes the anarchist and communist views.²⁹⁹ It is also less ideological about the political content of state-enforced laws than libertarianism. Most fundamentally, classical liberal theory argues that a political state with coercive authority to enact and enforce law is rationally justified by the need to deliver humanity from the

295. NEUMANN, *supra* note 256, at 11. In other words, "the legal norm grants an expectancy which is in fact realised by the coercive machinery of the state." *Id.* at 12. Some legal theories disagree with this assertion, for example FULLER, *supra* note 123, at 108, but they are mistaken.

296. For influential examples of this view, see EMMA GOLDMAN, ANARCHISM AND OTHER ESSAYS (Dover Publications 1969) (1917); THE ESSENTIAL KROPOTKIN (Emile Capouya & Keitha Tompkins eds., 1975).

297. H.L.A. Hart, *The Communist Theory of Law*, 69 HARV. L. REV. 772, 773 (1956) (book review). See also E.B. Pashukanis, *The General Theory of Law and Marxism*, in RUSSIAN LEGAL THEORY 229, 279 (W.E. Butler ed., 1996) (setting forth the classical Marxist argument that the end of the revolution will result in "the withering away of . . . the legal superstructure").

298. For one leading protagonist of the general libertarian view favoring a "minimal state," see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Hayek also falls into this category. See generally F.A. HAYEK, LAW, LEGISLATION AND LIBERTY (1973). But see Richard A. Epstein, *Hayekian Socialism*, 58 MD. L. REV. 271, 273 (1999) (detecting "strands of socialist thought" even in Hayek's work). Epstein presents a jurisprudential version of Nozick's brand of libertarianism in RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

The fact that libertarians appeal to judicial institutions to preserve legal rights against governmental intrusion is paradoxical because it implies at least a partial acceptance of the coercive state authority required to enforce such judicial decisions. In other words, the power of judicial review of constitutional rights as practiced in the United States, Germany, and elsewhere requires both a theory of the state and a legal system that has become relatively independent of the political state.

299. See *infra* text accompanying notes 303-07, 327-31.

economic and social harmfulness of anarchy.³⁰⁰ For liberalism, in other words, the primary end of the state is “liberty” understood as mutual “security.”³⁰¹ “[P]olitical liberty,” says Montesquieu, “is that tranquillity of spirit which comes from the opinion each citizen has of his [or her] security and[,] in order . . . to have this liberty[,] the government must be such that one citizen cannot fear another citizen.”³⁰²

The most powerful proponent in the Western tradition of the need for a political state for mutual security is Thomas Hobbes.³⁰³ A sovereign state or “Leviathan” is needed for humanity to climb out of “the state of nature” characterized by a “war of every one against every one” that renders life “solitary, poor, nasty, brutish[,] and short.”³⁰⁴ “The rule of law,” for Hobbes, requires first and foremost “a known and authentic legislator” who is “endowed with authority to create obligations.”³⁰⁵ Under this theory of the state, the rule of law

300. *E.g.*, Fallon, *supra* note 29, at 7, 43 (arguing that “protection against anarchy and the Hobbesian war of all against all” is one of the main purposes of a liberal theory of the rule of law). Hobbes’ political theory is discussed *infra* in the text accompanying notes 303-13.

301. A good review of this basic argument in political and legal theory is given in Steven Kautz, *Liberty, Justice, and the Rule of Law*, 11 *YALE J. L. & HUMAN.* 435, 438-49 (1999).

302. *Id.* at 439 (quoting Montesquieu).

303. OAKESHOTT, *supra* note 225, at 162 (“Among theorists of association in terms of the rule of law, Thomas Hobbes is, I think, one of the few who addressed himself exactly to this question [why a political state should be established under the rule of law that would obligate citizens to obey it] . . .”). See also NEUMANN, *supra* note 256, at 100 (observing in a broad-ranging review of various theories of the rule of law that “there is hardly another political theory which is formulated with such clarity and accuracy as that of Hobbes”).

304. THOMAS HOBBS, *LEVIATHAN* 100 (Michael Oakeshott ed., 1973) (1651).

305. OAKESHOTT, *supra* note 225, at 162-63 (interpreting Hobbes). As Hobbes himself makes this point:

The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort, as that by their own industry, and by the fruits of the earth, they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: which is as much as to say, to appoint one man, or assembly of men, to bear their person; and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgments to his judgment. This is more than consent, or concord; it is a real unity of them all in one and the same person, made by covenant of every man with every man This done, the multitude so united in one person is called a Commonwealth; in Latin, *Civitas*. This is the generation of that great Leviathan, or rather, to speak more reverently, of that mortal god to which we owe . . . our peace and defence.

HOBBS, *supra* note 304, at 132.

“stands as a moral (not a prudential) relationship.”³⁰⁶ For Hobbes, duly authorized law is by definition morally binding.³⁰⁷

In making this rational argument for a coercive state with legal authority that is morally binding on its citizens, Hobbes shares much in common with the long tradition in Chinese theory and practice in favor of a very strong state. In this respect, Legalism, Confucianism, and even Chinese Communism follow in the same tradition.³⁰⁸ Deng Xiaoping’s slogan to promote legality gives a sense of this tradition: “There must be laws for people to follow, these laws must be observed, their enforcement must be strict, and lawbreakers must be dealt with.”³⁰⁹ Hobbes’ theory of the political state and the need for the rule of law transplants easily to Chinese soil.³¹⁰

The next and very important question, however, concerns the limits, if any, on the power of this “mortal god” of the secular state.³¹¹ For Hobbes (as well as in classical Chinese Legalism), there is no limit; the political authority of the state is absolute.³¹² For Hobbes

306. OAKESHOTT, *supra* note 225, at 163.

307. *Id.* at 170-71.

308. *See supra* Part II. *See also* Chen, *supra* note 5, at 130 (describing the traditional very strong view of the state in China).

309. *Id.* at 126 (quoting this “battle cry for legality” coined in 1978).

310. Note that the Hobbes’ method of “possessive individualism” may strike many Chinese theorists as odd, as would most Western views that begin with the interests of the individual rather than the collective. For the classic critique of this approach within the Western tradition, see C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962). At the same time, the Chinese Legalists would probably agree with much of Hobbes’ pessimistic description of the passions of human nature and their social consequences. *E.g.*, HOBBS, *supra* note 304, at 99 (concluding that “men have no pleasure, but on the contrary a great deal of grief, in keeping company, where there is no power able to over-awe them all”). *See also supra* notes 44-49 and accompanying text (describing Legalist views).

311. Leviathan, of course, is this “mortal god.” *See supra* note 305.

312. *E.g.*, HOBBS, *supra* note 304, 134-41. *See also* OAKESHOTT, *supra* note 225, at 171 (observing that for Hobbes “*lex* cannot be *injus*”). Hobbes allows for an important exception, namely, that an individual citizen has a moral right to resist the state when it threatens him or her with criminal punishment such as the death penalty or imprisonment. HOBBS, *supra* note 304, at 105 (arguing that “there are some rights, which no man can be understood . . . to have abandoned, or transferred . . . [including the right] to take away his life” or wound, chain, or imprison him). This does not mean, however, that the state itself does not have the “right” to impose these kinds of criminal punishments. For Hobbes, the personal right to resist the state does not extend to a right of rebellion or revolution against the state. *Id.* at 134-35 (arguing that once a government is established, citizens have no right to change or replace it). *See also* Anita L. Allen, *Social Contract Theory in American Case Law*, 51 *FLA. L. REV.* 1, 8 (1999) (observing that notwithstanding rights to resist the state, “Hobbes argued for a near absolute form of sovereign government over the individual”). The Hobbesian right to resist and the related moral rights of “self-defense” or freedom from compulsory “self-incrimination” have important normative implications for law, especially criminal law. HOBBS, *supra* note 304, at 105, 110-11 (describing the inalienability of the rights to self-defense and freedom from self-accusation). For a recent exploration of moral and legal rights of self-defense drawing in part on Hobbes’ arguments, see Claire Oakes

(and most Chinese Legalists), the view of human nature is too dark without the state to constrain it, and no deformity of the sovereign authority as judged by moral standards can justify rebellion.³¹³ Other political theorists in the Western tradition, however, developed the theme of limited government, and legal institutions and the concept of the rule of law play an important role in these theories.³¹⁴

Liberal arguments for limited government elaborate at least three analytically distinct ideas: (1) tyranny and the right to revolt against it, (2) democracy as an internal constitutional check on political rulers, and (3) the rule of law as an institutional structural limit on government.³¹⁵ This Article's primary interest is with the rule of law, but it will also sketch briefly the other two major theoretical limitations to the power of the secular state in the Western tradition.

First, tyranny and the moral right to kill tyrants and replace them is an old concept in Western political theory tracing to the ancient Greeks.³¹⁶ The general view is that a political state that becomes arbitrary and despotic forfeits its sovereign right to government by departing from the original primary rational reasons for its existence, namely, in Hobbesian terms, the general peace and

Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361 (1999). On the moral basis for a legal right against self-incrimination, see R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981); George C. Thomas III, Book Review, 85 J. CRIM. L. & CRIMINOLOGY 807, 815-16 (1995). A few courts have also cited Hobbes in constitutional cases involving the right against self-incrimination. Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 676 (1999) (citing Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 180 (1961) (Douglas, J., dissenting); Phelps v. Duckworth, 772 F.2d 1410, 1418 (7th Cir. 1985) (Posner, J., concurring)).

313. See *supra* notes 310-12. See also LIN MOUSHENG, MEN AND IDEAS: AN INFORMAL HISTORY OF CHINESE POLITICAL THOUGHT 49 (1942) (observing that Hobbes' negative view of the human nature as evil parallels Xnzi's view); Gail L. Heriot, *The Symposium on Law, Human Behavior, and Evolution: An Introduction*, 8 J. CONTEMP. LEGAL ISSUES 1, 1-2 (1997) (noting that Hobbes' view of human nature of "[i]ndividuals . . . driven by relentless, unquenchable self-interest" is a "distinctly unpretty picture"). For both Hobbes and the Chinese Legalists, these pessimistic views of human nature seem to relate to the historical conditions of civil war that these theorists personally experienced.

314. See *infra* notes 316-35 and accompanying text.

315. *Id.*

316. For discussion of this idea, see ROGER BOESCHE, THEORIES OF TYRANNY FROM PLATO TO ARENDT (1996); JAMES S. FISHKIN, TYRANNY AND LEGITIMACY: A CRITIQUE OF POLITICAL THEORIES (1979); OSCAR JÁSZI & JOHN D. LEWIS, AGAINST THE TYRANT: THE TRADITION AND THEORY OF TYRANNICIDE (1957). See also LEO STRAUSS, ON TYRANNY (1963) (reprinting with commentary Xenophon's *Hiero or Tyrannicus* and Alexandre Kojève's *Tyranny and Wisdom*).

security of human society.³¹⁷ Hobbes himself did not allow for the possibility that a state, once established, could forfeit its right to rule in this fashion, and neither did he admit that citizens may claim a moral right “to change the form of government.”³¹⁸ John Locke, among others, disagreed strongly with Hobbes on this issue.³¹⁹ For Locke, when the state exercised its powers “beyond right” it became a “tyranny,” and citizens had a right to dissolve the government and establish a new one.³²⁰ There is a danger, feared also by Hobbes, that citizens will begin to see “tyrants everywhere,” a recipe for anarchy.³²¹ For Locke, however, “revolutions” are not triggered by “every little mismanagement of public affairs.”³²² Citizens will bear even “great mistakes” without “mutiny or murmur.”³²³ But when “a long train of abuses, prevarications, and artifices” make it clear that a government that has gone terribly wrong, then the people may properly and morally “rouse themselves and endeavor to put the rule into such hands which may secure to them the ends for which government was at first erected.”³²⁴ Not accidentally, of course, Locke’s words are echoed in the political rhetoric of the “founding fathers” of the United States. The American Revolution was driven significantly by a political theory of limited government that held tyrannical misrule to authorize rebellion.³²⁵ When the state becomes a “Great Robber” of the people, said Locke, revolution is justified.³²⁶

Second, modern democracy is conceived in liberal political theory as a constitutional check on state authority.³²⁷ Subjecting rulers to

317. See *supra* note 305 (quoting Hobbes on the primary purposes for establishing a state).

318. HOBBS, *supra* note 304, at 134-36. See also *supra* note 312.

319. Locke, in fact, responded directly to Hobbes on this point. See Catherine Valcke, *Civil Disobedience and the Rule of Law—A Lockean Insight*, in *THE RULE OF LAW*, *supra* note 247, at 45, 45-47 (noting Locke’s disagreement with Hobbes about unlimited government).

320. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 112-15, 119-30 (Thomas P. Peardon ed., 1952) (1690).

321. See JÁSZI & LEWIS, *supra* note 316, at 133-47. In Hobbes’ words, “tyranny” was merely monarchy or some other form of government “misliked.” HOBBS, *supra* note 304, at 142. He referred to “the fear of being strongly governed” as “tyrannophobia.” *Id.* at 242.

322. LOCKE, *supra* note 320, at 126.

323. *Id.*

324. *Id.*

325. For accounts of the strong theoretical influences of Locke as well as Montesquieu and others on the American founders, see Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 212-16 (1989); Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 456-62 (1991).

326. Kautz, *supra* note 301, at 439 (quoting Locke).

327. In other words, a principal purpose of democratic government is address “one of the most fundamental and persistent problems in politics,” namely, “to avoid

elections helps to monitor them.³²⁸ If democratic elections do not assure good rulers, they at least provide a mechanism for throwing bad ones out of office.³²⁹ In particular, democratic elections provide a hedge against officials who enrich themselves at the public expense or allow corruption to thrive.³³⁰ Admittedly, this is rather a minimal concept of democratic government, but it is nevertheless one that is most directly associated with the concept of a limited state.³³¹

Third, and perhaps most importantly for purposes of this Article, the liberal theory of the state in the Western political tradition contemplates that legal institutions will develop as a counterweight to the authority and power of the central state or, more precisely, that legal institutions including a judiciary will develop in a manner that results in a "limited" state with differentiated institutional powers rather than an "absolutist" state with all governmental

tyranny." ROBERT A. DAHL, *ON DEMOCRACY* 45-46 (1998). Of course, "democracy" as an idea refers to the promotion of many more values than the prevention of autocratic government, including respect for "essential rights," "general freedom," "self-determination," "political equality," "protection of personal interests," and even "prosperity." *Id.* at 45, 48-61. Not all aspects of democratic theory are discussed here. A general tension in democratic theory should be noted, however. "Liberal" theories that emphasize "the dread of government" and fear of public power are balanced against "republican" theories that express a "democratic wish" for full participation in self-government. *E.g.*, JAMES A. MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* 1-9, 15-19, 24-25, 322-23, 332-37 (1990).

328. *E.g.*, Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *AM. POL. SCI. REV.* 245, 245 (1997) (arguing that "democracy is a form of limited government" because it "requires that political officials observe limits on their behavior" including "abiding by election results").

329. As one scholar has written, "the primary function of the electorate" in a democracy is not only creating "a government (directly or through an intermediate body)" but also "evicting it." JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 272 (3d ed. 1975). Put less delicately, democracy allows citizens to "throw the bums out."

330. *E.g.*, Philip B. Heymann, *Democracy and Corruption*, 20 *FORDHAM INT'L L.J.* 323, 328-29 (1996) (arguing that it is "easier to attack corruption in a democracy" because "people of every country hate corruption" and a democratic government is usually more "responsive to its citizens' wishes" than an autocratic government).

331. For an account consistent with this "minimalist" description of democratic government, see SCHUMPETER, *supra* note 329, at 269-83. See also Francis Fukuyama, *Capitalism, Socialism and Democracy*, 76 *FOREIGN AFF.*, Sept.-Oct. 1997, at 214-15 (book review) (describing Schumpeter's book as offering "what is probably the most realistic, albeit minimalist, definition of democracy as a competition among elites for the allegiance of people").

This Article does not endeavor to canvass the huge literature concerning broader theories of democracy. See *supra* note 327. But it should be noted that some other democratic theories emphasize the beneficial attributes of participation in self-government and rational public deliberation among citizens and their leaders. For recent examples of thinking along these lines, see *DELIBERATIVE DEMOCRACY* (Jon Elster ed., 1998); *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman & William Rehg eds., 1997); *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* (Stephen Macedo ed., 1999).

powers under the command of one person or body of persons.³³² The idea of "mixed government" designed to limit the power of the state had origins in ancient Greek and Roman political theory, and it referred to the balancing of different classes and interests within society and "mixing" elements of monarchy, aristocracy, and democracy in a unified political state.³³³ In its modern form, however, "mixed government" has developed into different ideas of separation of powers that have been elaborated by Western political theorists such as Locke and Montesquieu.³³⁴ The political principle of separation of powers or, perhaps more accurately, "shared powers," is an institutional prerequisite for some ideas associated with the rule of law, such as the maxims that no person should act as a judge in his or her own cause and no person in a society should be exempt from the application of its laws.³³⁵

The version of separation of powers adopted in the U.S. Constitution, which divides the central governmental power of the state into executive, legislative, and judicial branches, presents one possible institutional interpretation of the basic idea of the separation of powers required for the rule of law to provide a limit to the exercise of state power.³³⁶ The constitutional creation of an independent judiciary, as well as divided political authority between the President and Congress, provides for legal checks and balances on state power.³³⁷ In the early nineteenth century, Chief Justice Marshall entrenched the basic separation of powers principle of the rule of law when he wrote in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."³³⁸ This principle of the rule of law as a function of an independent judiciary continues to be invoked regularly by the U.S. Supreme Court. "The principle that our Government shall be of

332. See *infra* notes 333-50 and accompanying text.

333. Casper, *supra* note 325, at 214-15; Redish & Cisar, *supra* note 324, at 458.

334. See Casper, *supra* note 325, at 215-16 (describing the evolution of the ideas of mixed government and separation of powers in early American political thought); Redish & Cisar, *supra* note 325, at 458-62 (describing "[t]he transition from mixed government to separation of powers" that began in the 17th century especially in the thought of Lawson, Locke, and Montesquieu). See also Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 400 (1996) (observing that "the idea that governmental power should be divided and that different people should exercise the major governmental functions" was developed in the 17th century, "became a major tenet for Locke," and "underwent continual refinement that culminated in Montesquieu's work").

335. Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305 (1989).

336. See Redish & Cisar, *supra* note 325, at 451.

337. See *id.*

338. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). For an extended commentary on Marshall's opinion and the establishment of the rule of law in the United States, see KAHN, *supra* note 93, at 1-24, 93-100, 103-74.

laws and not of men,” as Justice William Brennan wrote in one opinion, is “strongly woven into our constitutional fabric”³³⁹ Law is “more than mere will exerted as an act of power;” it is not “a special rule for a particular person or a particular case” but expresses “general law.”³⁴⁰

It is important to emphasize that the institutional and constitutional innovation adopted in the United States for dividing state power is not the only possible approach. This point would go without saying except for the tendency of some American policymakers to believe, or act as if they believe, that the American method of government is the “best” or the “self-evidently” only good form of government.³⁴¹ Like democracy, there are a number of possible formulations about how the doctrine of separation of powers should work in practice in different societies.³⁴² Again, this Article does not canvass all of these different arguments here. The main point is that a normative theory of the rule of law within a political theory of limited government usually involves a constitutional method that must somehow provide for the establishment and enforcement of legal institutional limits on the exercise of state power.³⁴³

At a minimum, then, the idea of the rule of law as a political theory of limited government requires the development of some legal institutional differentiation. This social evolution includes the

339. *McGautha v. California*, 402 U.S. 183, 252 (1971) (Brennan, J., dissenting).

340. *Id.* at 254 (quoting *Hurtado v. California*, 110 U.S. 516, 535-36 (1884)).

341. See *supra* notes 235-43 and accompanying text. The particular form of separation of powers as it has developed in the United States is complex, and a detailed examination of the topic is outside the scope of this Article. For an account of what have been called “formalist” and “functionalist” theories of separation of powers, see Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988). The American constitutional version of separation of powers presents “an intricate and innovative political theory” that draws on the theories of Locke and Montesquieu (as well as the less well-known English political theorist, George Lawson), and it is also very much the independent product of the rational arguments and assessments of historical experience by the American founders. Redish & Cisar, *supra* note 325, at 450-51, 457-58. In particular, the practice of judicial review of legislation for its constitutional validity sets the U.S. legal system apart from many versions of democratic and limited government in other parts of the world. In fact, only about half of all democratic countries in the world have adopted the principle of constitutional judicial review, and the United States is “exceptional” in the “sometimes extraordinary powers” exercised by its Supreme Court. DAHL, *supra* note 327, at 121.

342. In the United States, for example, political and legal debates that continue about the doctrine of separation of powers do not only discuss the role that this constitutional structure has traditionally played as a limit to state power, but also considerations such as efficiency of public administration and the nature of modern democracy. For an argument against the U.S. model of separation of powers and the claim that European parliamentary systems are superior, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

343. See *supra* text accompanying notes 336-40.

gradual development of formal legislation and specialized judicial institutions, as well as a specialized class of legal professionals—namely, judges, lawyers, and academic institutions to educate them. In order for the rule of law to limit the power of the state, this development must take on the character of a “legal system” that is to a significant extent independent of the central state authority.³⁴⁴ In particular, the development of a relatively independent judiciary is required.³⁴⁵ Montesquieu’s principle of separation of powers must apply between legislative and executive authority, on one hand, and judicial power, on the other.³⁴⁶ In more modern terms, the rule of law requires that the sovereign powers of the state must be divided at least between legislative (law-making) and judicial (law-applying) powers.³⁴⁷ The distinction between the two requires by implication that some constitutional or other institutionalized method must assure that the boundaries between “law-making” and “law-applying” are generally observed.

This does not mean that the separation between law-making and law-applying powers must somehow be hermetically sealed. In practice, such a formal conceptual distinction would be impossible to maintain. In the real world of modern states, the line between law-making and law-applying becomes fuzzy. In the United States, for example, the judicial power of constitutional review means that courts at least sometimes “make law” rather than simply apply it, especially when important precedents are decided that are then to be interpreted and applied in later related cases.³⁴⁸ Common law

344. Legal theorists as different in other respects as H.L.A. Hart and Jürgen Habermas agree with an overall account of the development of modern law in terms of the differentiation of a “legal system” that to some extent functions independently of other social institutions. See Eric W. Orts, *Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas*, 6 *RATIO JURIS* 245, 247-49, 261-65 (1993) (discussing the views of Hart and Habermas).

345. *Id.*

346. MONTESQUIEU, *supra* note 1, at 163. “[T]here is no liberty,” in Montesquieu’s words,

if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Id. See also Shklar, *supra* note 243, at 4-5 (describing Montesquieu’s political theory of the rule of law emphasizing the need for an independent judicial authority to check executive and legislative power). Note that for Montesquieu, this principal did not mean democratic government. He instead advocated a separation of powers scheme in which the legislative power would be exercised by an aristocratic nobility and the executive power would lie with a monarch. MONTESQUIEU, *supra* note 1, bk. XI, ch. 6.

347. Habermas, among others, employs this distinction between *law-making* and *law-applying*. See Orts, *supra* note 344, at 268.

348. For a jurisprudential examination of the topic, see, for example, Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571 (1987).

systems also follow an approach of judicial law-making by deciding cases and setting precedents in areas in which legislation is silent or absent.³⁴⁹ Neither the constitutional power of judicial review nor a common law system is required for a rule of law.³⁵⁰ In institutional terms, however, the rule of law as a political theory of limited government does require a relatively independent judiciary that has the general authority and power to apply law—even and most especially to officials of the state who exercise executive and legislative power.³⁵¹

2. The Difference between Rule by Law and the Rule of Law

Given the modern development of an institutional legal system, including an independent judiciary differentiated from the administrative bureaucracy of the political state, two conceptual relationships between law and the state can be distinguished: (1) a descriptive, positive, and instrumental view of the relationship, and (2) a prescriptive, normative, and political view of what the

349. For classic treatments of this topic, see MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (reprint ed. 1994); OLIVER WENDELL HOLMES, *THE COMMON LAW* (Harvard Univ. Press 1963) (1881).

350. Again, constitutional judicial review is practiced in only about half of the countries with democratic governments in the world. See *supra* note 341. Many countries have civil law rather than common law systems. Civil law is based primarily on statutes rather than judge-made precedents. This tradition is associated most closely with nation-states in continental Europe—including France, Germany, and Italy—though many other countries have civil law systems. Common law systems combine statutory law with judge-made precedents. This tradition is primarily Anglo-American, though it has influenced other legal systems. For a description of the two basic “families” of the civil and common law systems and their “hybrids,” see Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331, 335-43 (1998). But see John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C. L. REV. 1635 (1999) (arguing that the historical origins of at least some common law principles may be traced to Islamic as well as Roman law). The distinction between civil and common law systems, however, is to some extent “Eurocentric,” and some legal systems, including China’s, cannot easily be reduced to these models. E.g., Huxley, *supra* note 51, at 1886; Schadbach, *supra*, at 339.

351. E.g., Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16 CARDOZO L. REV. 2107 (1995) (arguing that “an independent judiciary is the best means for protecting the rule of law” and depends on “relative institutional capacities”); Calvin R. Massey, *Rule of Law and the Age of Aquarius*, 41 HASTINGS L.J. 757, 760 (1990) (book review) (quoting Geoffrey de Q. Walker for the proposition that “[a]n independent judiciary is an indispensable requirement of the rule of law”); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 631 (1999) (arguing that “an independent judiciary” is a “necessity” for the rule of law). Cf. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 234 (1993) (arguing in the context of international law that “the liberal institution of an independent judiciary charged with administering the rule of law permits the maintenance of a meaningful distinction between law and politics, even in tandem with widespread recognition of how political beliefs and values can influence legal choices”).

relationship should be.³⁵² *Rule by law* is the term that this Article will use to refer to the instrumental use of law by the state to govern. The *rule of law* refers to a normative and political theory of the relationship of legal institutions and the political state that includes, but is not limited to, a theory of limited government through some form of constitutional separation between the judiciary and other state powers.³⁵³

First, the state may use the institutions of law and the method of adopting and enforcing legal rules as an instrument of policy. Rule by law in this sense does not require any separation or differentiation at all between the legal system and the state. To the extent that a legal system develops, however, the state may then use the formal bureaucratic apparatus of the legal system to achieve its public policy objectives. Rule by law refers to the use of generally stated, public, and enforceable rules by the political state to govern human conduct.³⁵⁴

Rule by law refers, then, to the use of legal rules in order to assure the uniformity and regularity of an existing legal system, regardless of its more general political or moral properties. In this sense, even a grossly authoritarian legal system may qualify as ruling by law. The only requirement is for a regime to use and enforce legal rules routinely through the use of officials and some form of a judiciary. Even if the regime broadly departs from substantive justice or abuses the human rights of its own citizens, rule by law exists in a strictly descriptive and positivist sense. It is, as Jules Coleman argues, "a social fact."³⁵⁵

Some minimal requirements must be observed for a state accurately or sensibly to be said to rule by law. Key features of rule by law are a relative certainty and uniformity in the application of legal rules.³⁵⁶ John Rawls describes rule by law in this formal sense as requiring "the regular and impartial administration of public

352. Other legal theorists have drawn a similar distinction. Radin, *supra* note 29, at 783-91 ("instrumental" and "substantive" concepts of law); Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 *RATIO JURIS* 127, 135 (1993) ("formal" and "substantive" concepts).

353. Other theorists have also made this distinction between *rule by law* and the *rule of law*, particularly in the context of China. Chen, *supra* note 5, at 135; Shih, *supra* note 230, at 40.

354. See *supra* notes 286-92 and accompanying text.

355. Jules L. Coleman, *The Practice of Corrective Justice*, 37 *ARIZ. L. REV.* 15, 24 (1995) (describing "the well-known positivist view" that "law is a matter of convention or social fact").

356. *E.g.*, GREENAWALT, *LAW AND OBJECTIVITY*, *supra* note 37, at 34-56, 141-44 (describing the relative "determinacy" and "generality" of application of legal rules); HART, *supra* note 36, at 113-14, 119 (describing the conceptual prerequisites for the existence of a legal system and rules with "a core of certainty" as well as "a penumbra of doubt").

rules.”³⁵⁷ Even an instrumental use of law requires that there are, in fact, some “rules.”³⁵⁸ Any theory of law is “without intelligible content,” as Lon Fuller argues, “unless it starts with the obvious truth that the citizen cannot orient his [or her] conduct by law if what is called law confronts him [or her] merely with a series of sporadic and patternless exercises of state power.”³⁵⁹

Fuller also recites eight fundamental characteristics of a descriptive rule by law. First and most essentially, there is a need for the adoption of some sort of *legal rules*.³⁶⁰ If “every issue must be decided on an ad hoc basis,” law cannot exist.³⁶¹ This requirement is more important than it may initially appear. It is possible to imagine a government that does not use any legal rules to govern and decides every issue of importance arbitrarily or personally. The tyranny of Caligula’s Rome, where many important decisions were made personally and extra-legally, and citizens were prevented from knowing the “laws,” may serve as one historical example.³⁶² In the twentieth century, instances of rule by arbitrary and unpredictable terror that replaced even a minimal description of ruling by law may arguably include Pol Pot’s Cambodia, Idi Amin’s Uganda, and Mao’s China during the Cultural Revolution.³⁶³ As Fuller writes, the “semblance” of public order that results from “lawless terror” cannot be described coherently as being governed essentially through the rule by law.³⁶⁴ Completely arbitrary or disorderly government does

357. JOHN RAWLS, *A THEORY OF JUSTICE* 235 (1971).

358. *E.g.*, GREENAWALT, *LAW AND OBJECTIVITY*, *supra* note 37, at 141-43; HART, *supra* note 36, at 8-11.

359. FULLER, *supra* note 123, at 110. Fuller therefore argues that classical theories that describe law as primarily a complex set of “commands” backed by governmental force or coercion are not adequate. *Id.* at 108-10.

360. *Id.* at 39.

361. *Id.*

362. *See* *Huddleston v. United States*, 415 U.S. 814, 834 (1974) (Douglas, J., dissenting) (describing “Caligula’s practice of printing the laws in small print and placing them so high on a wall that the ordinary man did not receive fair warning”). *See also* Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 108 n.239 (1991) (describing Caligula’s arbitrary practices such as appointing “his horse as consul”) (quoting Fuller).

363. On Pol Pot’s regime, *see* DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945* (1993); BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79* (1998). On Idi Amin in Uganda, *see* HENRY KYEMBA, *A STATE OF BLOOD: THE INSIDE STORY OF IDI AMIN* (1977). In Cambodia, Pol Pot’s regime is estimated to have killed more than one million people (at least fourteen percent of the population), and Idi Amin’s government in Uganda is estimated to have killed at least 300,000 (more than two percent of the population). David B. Kopel, *Book Review*, 15 N.Y.L. SCH. J. INT’L & COMP. L. 355, 369-74 (1995). *See also supra* notes 81-91 and accompanying text (describing the legal disorder of the Cultural Revolution).

364. FULLER, *supra* note 123, at 107. At least in this sense, then, Locke is right to say: “Wherever law ends, tyranny begins.” LOCKE, *supra* note 320, at 114. There is,

not rule by law. Arbitrary tyranny and chaotic anarchy thus set the outer limits of a rule by law.

From the initial requirement of the use of legal rules to govern, a number of other basic attributes of rule by law follow. Again according to Fuller, these include an additional seven characteristics: (1) *publicity*, at least to the extent necessary to “make available to the affected party the rules that he [or she] is expected to observe;” (2) *prospectivity*, given that the idea of rules necessarily implies a general principle of guiding future action; (3) *clarity* of the rules at least sufficient for them to be “understandable” to those expected to follow them; (4) *consistency* of the rules, at least to some extent, given that completely “contradictory rules” are equivalent to no rule or at least an arbitrary decision between two rules; (5) *performability* of the rules, that is, the parties affected by particular rules must be capable of following those rules; (6) some degree of *stability* of rules, because affected parties cannot follow or orient their actions toward rules that are constantly changing; and (7) *congruity* or at least a general correlation between the rules that are announced and the enforcement of them in actual practice.³⁶⁵

Formal theories of law share this general approach to the nature of using legal rules to govern.³⁶⁶ “At the heart of the word ‘formalism,’” as Frederick Schauer writes, “lies the concept of decisionmaking according to *rule*.”³⁶⁷ Schauer also clarifies an important point that leads many theorists astray, namely, “the

of course, a major debate between Fuller and Hart, among others, concerning whether Hitler’s Nazi regime and other modern tyrannies may properly be described as having “law.” See Orts, *supra* note 344, at 255-56, 270-72 (discussing differing views of the legality of the Nazi regime). Similarly, one may argue about whether the Cultural Revolution resulted in a complete or only partial breakdown of rule by law. From my point of view, this debate should be more empirical and historical than conceptual. A regime may rule by law in some areas of life and yet still employ other irregular methods for decisions in a wide array of other important fields. The essential empirical and historical question is to ask about the extent to which rule by law institutions had broken down or were overturned in the most important government decisions, such as the criminal law and the use of lethal force by government officials.

365. FULLER, *supra* note 123, at 39. See also Radin, *supra* note 29, at 784-87 (following Fuller in an elaboration of an “instrumental” view of the rule of law). As Fuller notes, a number of other legal theorists, including positivists, have agreed with his “principles of legality.” FULLER, *supra* note 123, at 197-98.

366. Robert Summers, for example, draws a distinction between “formal” and “substantive” theories of the rule of law. Summers, *supra* note 352, at 135. A formal theory of law emphasizes “rules that display formal attributes to a high degree” and focuses on “securing governance by antecedent rule.” *Id.* See also Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1693-95 (1999) (elucidating a list of sixteen “leading second order principles of law” in developed Western legal systems, including most, if not all, of the eight characteristics that Fuller identifies).

367. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

conflation of the rule of law with decision according to rule."³⁶⁸ This is the reason for making the distinction between *rule by law* and the *rule of law*. The source of confusion, as Schauer points out, lies not in uncertainty about the meaning of "law" (though this topic of course is also controversial) but rather in the meaning of the word "rule."³⁶⁹ Schauer writes:

The phrase "the rule of law" . . . trades on an ambiguity in the meaning of the word "rule." In the sense that we have *rulers* who *rule* their subjects, "rule" bears its closest affinity with "reign" or "control," and has only the remotest relationship with a form of decision-making characterized either by generality or by the entrenchment of generalizations.³⁷⁰

Rule by law refers to this sense of rule: using the promulgation and enforcement of law as a method of ruling.

Rule by law, then, refers to the method of using legal rules and some institutional method of enforcing them (or "entrenched generalizations") in the practice of government. A minimal set of qualifications along the lines suggested by Fuller may be required for a particular regime to be described accurately as using rule by law to govern. Contrary to Fuller's view, however, these characteristics of rule by law do not imply any necessary virtues in the legal rules themselves or in the state using a system of legal rules to govern. In other words, the "internal morality" of using rules to govern is an empty set or at least close to it.³⁷¹ For example, if a state says that all people with genetic or ethnic characteristic X may be enslaved, harshly discriminated against, or even killed, then the rule may still be validly included in a positive legal system and enforced through legal institutions that exist to some extent independently of the state that made the law. But for those people who have characteristic X, the rule by law and the state employing it certainly cannot claim moral authority simply because legal rules are used. Moreover, though less essentially, the use of legal rules to govern without allowing for exceptions or discretion to do justice, as some circumstances are bound to require, may also violate rather than uphold moral principles—as Aristotle's conception of equity as an exception to the application of rules recognized.³⁷²

368. Schauer, *supra* note 283, at 69.

369. SCHAUER, *supra* note 37, at 167.

370. *Id.*

371. On the "internal morality of law," see FULLER, *supra* note 123, at 42-44, 96-97, 200-06. More charitably, one can read Fuller's jurisprudence as concerned primarily with the aspirations of a rule of law as a normative and political theory described below. But he at least fails to make a clear distinction similar to the one here between *rule by law* and a *rule of law*.

372. See *supra* note 251 and accompanying text. For discussion of this central concept in the application of legal rules, see Frederick Schauer, *Exceptions*, 58 U. CHI.

Moral and legal assessments about how legal rules are used to govern—and how they should be used—refer instead to the idea of the rule of law. In contrast to *rule by law*, the *rule of law* involves a normative and political theory of the relationship between the state and a legal system. The common statement sometimes made by prominent jurists that “the rule of law is a law of rules” therefore gets it wrong.³⁷³ The rule of law instead refers primarily to a political theory of limited government, especially regarding the development of an independent judiciary and supporting legal infrastructure that enables political officials of the state to be held responsible legally for their actions.³⁷⁴

The rule of law, then, is “a political ideal.”³⁷⁵ It refers to a constitutional structure in which the government itself is subject to legal constraints. In other words, a legal system must exist that exercises some significant institutional power to review and, if necessary, police the actions of the government.³⁷⁶ In a society with the rule of law, government officials as well as citizens answer to the legal system. “Powerful people and people in government, just like anybody else,” as Joseph Raz argues, “should obey the law.”³⁷⁷ The rule of law means not rule by law in an instrumental, descriptive sense, though of course systems characterized as following the rule of law also make use of legal rules.³⁷⁸ The otherwise puzzling phrase, “a government of laws and not men,” makes sense only if one understands the rule of law to mean a political structure in which political and governmental officials (including their leaders) are not

L. REV. 871 (1991). For the argument that discretion is really a disguise for bureaucratic supervision and policymaking, see Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997). Discretion in a legal system, however, does not mean that legal rules cannot have meaning and “determinacy.” GREENAWALT, LAW AND OBJECTIVITY, *supra* note 37, at 48-56.

373. *E.g.*, Scalia, *supra* note 252. Justice Scalia is not entirely clear on this topic, however. In fairness, I should also point out that he invokes the authority of Aristotle and Thomas Paine, both of whom advance a political theory of what I have called “the rule of law” rather than “the law of rules.” *Id.* at 1176. Scalia also cites the exception that Aristotle makes for discretion in law-applying when a rule is silent or vague. *Id.* at 1182.

374. See *supra* text accompanying notes 332-35, 343-47, 351. For other more recent theories emphasizing an independent judiciary and separation of powers as an essential ingredient for the rule of law, see RAZ, *supra* note 37, at 216-17; Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 313-18 (1985); Summers, *supra* note 352, at 135.

375. Burton, *supra* note 260, at 179.

376. *Id.* at 180.

377. RAZ, *supra* note 37, at 212.

378. Note that the distinction between *rule by law* and the *rule of law* is conceptual. There is no necessary separation of the two in practice. All legal systems rule by law to the extent they use general governmental rules to achieve particular ends. In other words, systems characterized by the *rule of law* also *rule by law*. Empirical *rule by law*, however, does not necessarily entail a normative *rule of law*.

themselves “above the law,” even though they may occupy privileged positions to affect the substance of the general law or are responsible for its general enforcement.

As a feature of a political and legal system, the rule of law therefore means that important government officials may become targets of independent legal processes against their will. In the United States, the most prominent examples of the rule of law in practice are President Nixon’s legal violations (and those of his close aids) in the Watergate scandal, which resulted in the President’s resignation, and President Clinton’s perjury in testimony about his sexual behavior in an employment discrimination case, which resulted in his Congressional impeachment (though he won the trial in the Senate).³⁷⁹ The normative and political theory of the rule of law thus requires the development of a judicial system that is relatively autonomous of the executive and legislative powers of government. At least, the legal system—including its judges, lawyers, and legal scholars—cannot be subservient to arbitrary interference or intermeddling by the political system.

In addition, once the relative institutional independence of a legal system may be taken for granted, then other normative “aspirations” for the rule of law may be specified.³⁸⁰ Again, Lon Fuller is a reliable guide. He can be read to expand the same eight criteria described above in terms of the requirements of a *rule by law* to argue for a normative conception of the *rule of law*.

With respect to the first characteristic—the use of rules, legal systems must apply rules fairly and uniformly and yet also provide for making appropriate “exceptions” to them to obtain results in the interests of justice and “equity.”³⁸¹ In other words, some degree of judicial discretion is a desirable feature of a modern legal system. The normative value of the use of legal rules to govern, however, refers to the use of generality or uniformity in how rules are applied.³⁸² Rules, when properly used, attempt to assure *general fairness*: for example, the treatment of like cases alike and the

379. See Whitford, *supra* note 25, at 736. See also Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 306 (1999) (noting that both Nixon and Clinton illustrate how even Presidents are not above the law in the United States, though arguing also that Nixon’s actions posed “a threat to our basic constitutional system” unlike Clinton’s lies about his sexual activities).

380. FULLER, *supra* note 123, at 41 (referring to “the aspiration toward perfection in legality”). For Fuller’s treatment of the “morality of aspiration” as distinguished from the more basic “morality of duty” and his understanding of law in terms of the former, see *id.* at 5-19, 41-44.

381. See *supra* note 372 and accompanying text.

382. FULLER, *supra* note 36, at 46-49 (discussing desirable features of “the generality of law”). *But cf.* Frederick Schauer, *Generality and Equality*, 16 LAW & PHIL. 279 (1997) (arguing that generalizations about people in everyday life also contribute to racial and other inequality).

treatment of people similarly situated according to the same rules and principles, regardless of their class, race, ethnicity, or other personal characteristics.³⁸³

In addition, Fuller's other criteria may also be expanded to express normative legal ideals. First, *publicity* means not only the minimal amount of notice to affected parties of what rules have been made, but also the broader notion of a right for citizens to be informed of legal rules they are expected to follow.³⁸⁴ Laws known only to a few, such as Chinese *neibu*, violate a normative theory of the rule of law that values publicity.³⁸⁵ Similarly, citizens have a right to notice and clearly promulgated procedures when they are subject to the legal process.³⁸⁶ Second, *prospectivity* means not only the future-oriented aspect of any rule designed to govern human behavior, but also translates into a general presumption against the use of retroactive legal rules.³⁸⁷ The constitutional prohibition of criminal *ex post facto* laws is one example.³⁸⁸ Although there may be exceptions, retrospective laws are generally unfair because they do not provide sufficient notice to citizens of the law they are expected to follow.³⁸⁹ Third, *clarity* refers not only to a minimum communication of rules, but also expresses an ideal that legal rules should not be vague or unclear, especially when criminal or other harsh penalties may result.³⁹⁰ Legal rules should be in "plain English" (or Chinese). Fourth, *consistency* refers to the idea that policies and principles in a legal system, as well as the letter of legal rules, are complementary and not "incompatible."³⁹¹ This desideratum may become more important and difficult to accomplish as modern legal systems grow increasingly complex. Fifth, *performability* refers to a review of legal rules to assure that individuals will be able to comply with them.³⁹² It recognizes that individuals should have the freedom to conform their behavior to legal rules. Involuntariness and other defenses based on incapacities should sometimes be taken into account.³⁹³ Sixth, *stability* of legal rules becomes an ideal of the rule of law because people are better able to plan and comply with law when it does not change too quickly.³⁹⁴ This characteristic is especially

383. See generally Schauer, *supra* note 382.

384. FULLER, *supra* note 123, at 39.

385. See *supra* note 175 and accompanying text.

386. FULLER, *supra* note 123, at 49-51 (discussing some of these characteristics of the need for "promulgation").

387. *Id.* at 39.

388. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

389. FULLER, *supra* note 123, at 51-62 (discussing some problems with "Retroactive Laws").

390. *Id.* at 63-65 (discussing the need for "The Clarity of Laws").

391. *Id.* at 65-70 (discussing "Contradictions in the Laws").

392. *Id.*

393. *Id.* at 70-79 (discussing "Laws Requiring the Impossible").

394. *Id.* at 79-81 (discussing the "Constancy of the Law through Time").

important for business planning.³⁹⁵ As Madison argued, “sudden changes and legislative interferences” should not become “snares to the more-industrious and less-informed part of the community.”³⁹⁶ Finally, *congruity* between the legal rules and their actual enforcement becomes an important ideal as well. Rights of “procedural due process” are important in this connection, such as rights to an impartial hearing and the cross-examination of witnesses.³⁹⁷ Trials and other legal proceedings should be open to the public. Rights of appeal to higher tribunals help to assure that the law is applied correctly and even-handedly. Standing for citizens to bring lawsuits against the government for failing to follow through on its duty to enforce or comply with the law also falls into this general category.³⁹⁸

Fuller’s aspirational list of characteristics for the rule of law is not exhaustive. Other criteria might be included.³⁹⁹ Joseph Raz, for example, adds that “courts should be easily accessible” and that “discretion of the crime-preventing agencies should not be allowed to pervert the law.”⁴⁰⁰ Lawrence Solum argues that the rule of law must mean that “no extralegal commands” issued by the state should be “obligatory” and that “actions by government and officials should be subject to regulation by general and public rules.”⁴⁰¹

The bottom line is that any normative theory of the rule of law requires the differentiation of a legal and judicial system that is to a significant extent independent of the political authority of the state. Otherwise the ideals of the rule of law cannot be meaningfully disentangled from politically determined policy decisions whether implemented through rule by law or otherwise.

3. The Rule of Law and Democracy

In principle, none of the various elements of normative and political theory of the rule of law outlined above requires democracy. In the discussion above, it is important to distinguish analytically between the rule of law and other political theories of limited

395. See Bruce A. Markell, *A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law*, 6 *IND. J. GLOBAL LEGAL STUD.* 497, 502-05 (1999) (arguing for the importance of “certainty” and stability especially in commercial law).

396. *Id.* at 80 (quoting Madison).

397. *Id.* at 81.

398. *Id.* at 81-91 (discussing “Congruence between Official Action and Declared Rule”).

399. See RAZ, *supra* note 37, at 217-18 (noting that his and other lists of criteria deemed to be “essential for the preservation of the rule of law” tend to be “very incomplete”).

400. *Id.*

401. Solum, *supra* note 251, at 122. Like Fuller, Solum also lists the elements of generality, publicity, regularity or congruence, and general fairness of application. *Id.*

government, including democracy.⁴⁰² Conceptually, the rule of law requires some form of separation of powers in the state that results in the differentiation of a relatively independent judiciary and the creation of legal institutions that are not directly subservient to the supervision of the political apparatus of the state—that is, its legislative and executive powers. In this sense, Montesquieu remains the preeminent modern political theorist of the rule of law. Montesquieu, who is perhaps second only to Aristotle in terms of his influence on contemporary Western conceptions of the rule of law, advocates the need for institutional structures “to protect the ruled against the aggression of those who rule.”⁴⁰³ But nothing in Montesquieu’s theory requires democracy. In fact, he preferred a limited monarchy combined with a legislative assembly of aristocrats.⁴⁰⁴ Locke also did not declare a democratic or republican form of government to be necessary.⁴⁰⁵ Locke’s concern, as discussed above, was primarily to justify revolution against tyrannical governments,⁴⁰⁶ though the Glorious Revolution in Britain and the American Revolution brought with them the beginning of modern democratic government as well.⁴⁰⁷

From a historical rather than a conceptual perspective, it is true that the rule of law and democracy developed roughly together in modern Western societies.⁴⁰⁸ Today, both the rule of law and democracy are revered as normative political principles in the West. Therefore, any political and legal theory intended for Western societies should include an account of the appropriate relationship between the rule of law and democracy.⁴⁰⁹ The major claim is that the rulers or sovereign governments that make laws must be representative legislatures or a mix, as in the United States, between an elected legislature and an elected executive.⁴¹⁰ The rule of law is legitimate in these societies only if it is the product of democratic government, which is understood to represent the people as a whole.⁴¹¹

402. See *supra* text accompanying notes 343-51.

403. Shklar, *supra* note 243, at 4.

404. See *supra* note 346.

405. According to Locke, the people of a “commonwealth” could choose different forms of government and mixtures of them, including “democracy,” “oligarchy,” or “monarchy.” LOCKE, *supra* note 320, at 73-74.

406. See *supra* notes 319-26 and accompanying text.

407. E.g., DAHL, *supra* note 327, at 21, 88-89.

408. See generally HAYEK, *supra* note 298.

409. For an example of such a political and legal theory, see Jean Hampton, *Democracy and the Rule of Law*, in THE RULE OF LAW, *supra* note 247, at 13.

410. *Id.* at 32-38.

411. I have previously expressed this argument concerning the relationship between law and democracy, following Habermas, as the moral requirement of “systemic legitimacy” for positive legal systems. Orts, *supra* note 344, at 263-70. For

In the context of contemporary China, however, which for the most part lacks a similar historical tradition and experience with democratic government, it is important to distinguish between the rule of law and democracy because the future prospects for one and the other seem very different. As discussed above in Part II, there is both a strong initiative to establish what is at least called the rule of law in China and, at the same time, a strong antipathy toward making a transition to Western-style democratic government.⁴¹² Therefore, if a normative and analytical difference between the two concepts of the rule of law and democracy can be identified, it may be politically pragmatic as well as conceptually helpful to do so.

On the basis of the above discussion, an analytical distinction between a political theory of the rule in law and a theory of democracy makes sense. Both the rule of law and democracy are theories that seek to limit the power of absolute government. The rule of law, as a political theory, requires an independent judiciary and legal system that has the constitutional authority and power to apply the legal rules of the state to its own officials.⁴¹³ Democracy as a theory of limited government refers to the constitutional structure of the legislative and executive powers of the state.⁴¹⁴

It is possible, of course, to argue against this claim. The idea of conceptually separating the rule of law and democracy is likely to generate controversy, especially in a Western society where belief in the moral correctness of our own political system approaches the intensity of an "American civil religion."⁴¹⁵ Ian Shapiro, for example, may at least implicitly refer to a theory of democracy when he argues that the rule of law "promises predictability in social life by placing

an argument that "American-style" separation of powers, especially a strong President, "erodes the rule of law," see Ackerman, *supra* note 342, at 712-14.

412. See *supra* notes 32-33, 102-04, 109-22 and accompanying text.

413. Once a relatively independent legal system is established, then it makes sense to think of other rational attributes of the rule of law as a normative and political theory as well. See *supra* notes 380-401 and accompanying text (discussing Fuller's various normative characteristics).

414. See *supra* notes 315, 327-31 and accompanying text. Again, this minimal political theory of democracy does not mean that other more robust theories are not desirable. See *supra* notes 327, 331.

415. E.g., AMERICAN CIVIL RELIGION (Russell E. Richey & Donald G. Jones eds., 1974) (collecting essays on the topic); Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967) (providing the original expression of the idea). For a recent example of political rhetoric that combines these principles with respect to foreign policy, see Kay Bailey Hutchison, *America's Engagement in the World at a New Century's Dawn: Legal and Ethical Implications for the Use of Force*, 53 SMU L. REV. 377, 378 (2000) ("America's place in the world is unmatched in all of history. What is our role? It has three elements: First, and foremost, is the protection of our way of life—democracy, freedom of speech and religion, the rule of law, and free enterprise. Second, to support and defend our allies. Third, to encourage other nations to free their people and economies.").

constitutional limits on the kinds of powers that governments may legitimately exercise, as well as on the extent of those governmental powers.”⁴¹⁶ This description of the rule of law at least arguably requires democracy to give the law “legitimacy.”⁴¹⁷ At least, a political theorist who wants to argue in favor of the rule of law without democracy—such as one who may live in contemporary China—would need to come up with an alternative theory of political legitimacy. The topic of political legitimacy lies outside the scope of this Article, but it is enough to point out that alternatives may exist to Western-style democratic government. For example, a radical reform of the Chinese Communist Party along the lines of encouraging democratic participation within it, though not going so far as to adopt a Western-style pluralistic democratic regime, might provide such an alternative. As one Chinese legal scholar argues, “the central legal issue in this regard is the extent to which the organization, structure, functions, powers, responsibilities and operations of the Party should come under the purview of the law”⁴¹⁸ Yet it is also true that there are “no historical precedents for the successful, self-induced institutional transformation of a Leninist system under Communist Party auspices”⁴¹⁹

Shapiro recognizes also that social theorists have detected “tensions between the two ideals” of the rule of law and democracy.⁴²⁰ Positive theories of law in the tradition of H.L.A. Hart, for example, do not require a political regime to be a democracy for a legal system to exist.⁴²¹ Hart argues that “the concept of law” requires only that “a rule of recognition” is followed by the legal officials of a political regime.⁴²² A democratic definition of this “rule of recognition” is not necessary in order for a legal system to exist according to legally defined rules and principles.⁴²³

416. Ian Shapiro, *Introduction to THE RULE OF LAW*, *supra* note 247, at 1.

417. Again, I have previously made a similar argument, following Habermas. *See Orts, supra* note 344, at 265-70.

418. Chen, *supra* note 5, at 160.

419. Richard Baum & Alexei Shevchenko, *The “State of the State,” in THE PARADOX OF CHINA’S POST-MAO REFORMS* 333, 360 (Merle Goldman & Roderick MacFarquhar eds., 1999).

420. Shapiro, *supra* note 416, at 2.

421. *See id.*

422. Hampton, *supra* note 409, at 24 (describing Hart’s approach). *See also HART, supra* note 36, at 97-114.

423. I concede that my view may require taking a position in the continuing debate between positive legal theorists and natural lawyers. *See supra* notes 36-37 and accompanying text. To some extent, conceiving law as involving both a description of instrumental, positivist *rule by law* and a normative and political theory of the *rule of law* gives scope for both views. But a die-hard natural lawyer will, of course, deny that even this modified instrumental, positive view of law can be sustained.

From another quarter, some public choice theorists argue that the ideal of democracy may actually conflict with some elements of the rule of law.⁴²⁴ They claim that the requirements in the ideal of the rule of law of regularity, uniformity, and "coherence" contradict certain assumptions about democracy.⁴²⁵ In their words, the rule of law "requires that conduct be regulated by a system of impartial public rules whose consequences can be foreseen and anticipated."⁴²⁶ Such a system of rules can be "coherent" and yield "predictable consequences for individuals" only if legal rules are "understood as rational requirements imposed by the state for some comprehensible purpose, a purpose of a sort that could actually be held by a single individual" and not a collection of many individuals.⁴²⁷ These theorists maintain that the "coherence" of legal rules is therefore "in principle, unobtainable in a democratic state."⁴²⁸ For purposes here, it is not necessary to agree with the strong form of this argument that the rule of law and democracy are contradictory. But the general argument supports the idea that the two concepts may be separated analytically.

Let me be clear that this Article does *not* say that democratic governments are not good for those modern societies that already have them or intend to adopt them. Democracy, as argued above, is an important political theory of limited government, as well as an expansive and evolving idea concerning political issues of participation in government, equality of rights, and methods of representation.⁴²⁹ There is also recent evidence that countries with democratic governments may provide more economic benefits to their citizens than countries without democratic governments. For example, democratic countries appear to be less likely to experience famine,⁴³⁰ though the empirical evidence that may link economic growth and democracy remains mixed.⁴³¹ In addition, this Article does not say that the rule of law is more or less important than democracy in the abstract. Instead, it argues only that there is no necessary conceptual connection between the rule of law and

424. See Jack Knight & James Johnson, *Public Choice and the Rule of Law: Rational Choice Theories of Statutory Interpretation*, in *THE RULE OF LAW*, *supra* note 247, at 244.

425. *Id.* at 247.

426. John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 *GEO. L.J.* 565, 568 (1992), *quoted* in Knight & Johnson, *supra* note 424, at 247.

427. *Id.*

428. *Id.*

429. See *supra* notes 315, 327-31, 408-11 and accompanying text.

430. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 178-86 (1999).

431. See Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, *J. ECON. PERSP.*, Summer 1993, at 51 (reviewing empirical studies and finding them inconclusive).

democracy, and the establishment of a political state characterized by the rule of law may possibly proceed in some historical circumstances without at the same time trying to create a democratic form of government.

In addition, it may be true that democratic government may improve the odds that a normative theory of the law of rule will be achieved in practice. For example, a democratic process of legislation is more likely to result in public pronouncements of legal rules. Democracy may also aid in establishing and preserving the limited government needed for a rule of law to develop. Different theories of limited government may reinforce each other empirically. But because there does not appear to be a necessary conceptual connection between the rule of law and democracy, it is at least theoretically possible to pursue the two ideals separately.

B. *Future Prospects for the Rule of Law in China*

The difference between *rule by law* understood instrumentally and the *rule of law* as a political and normative theory has profound implications for the future of law in China. The Chinese government seems to be moving strongly toward adopting rule by law in the instrumental, positivist sense of creating consistent and uniform "rules of the game" needed for a modern market economy.⁴³² Contracts are becoming more reliable, and corporations can be established on firmer ground than previously.⁴³³ The open question is whether *rule by law* in this sense will lead also to institutional reform to build a normative *rule of law*.⁴³⁴

Given recent Chinese history, one obvious danger is that some basic principles consistent with a normative theory of the rule of law, such as promoting a uniform legal system to apply rules evenhandedly, may prove to be consistent with the authoritarian political structure of the current one-party state. In other words, the strengthening of an effective legal system, even with some virtues of the rule of law, may go hand-in-hand with the continuation of Communist Party Legalism in China.⁴³⁵ In other words, the threat

432. See *supra* text accompanying notes 3-10, 126-37, 211-23.

433. See *supra* notes 128, 131, 133-34, 137 and accompanying text.

434. Li Cheng, *Jiang Zemin's Successors: The Rise of the Fourth Generation of Leaders in the PRC*, 161 CHINA Q. 1, 40 (2000) (noting that "it remains to be seen" whether the presence of a new group of lawyers in the next generation of Party leadership will "contribute to the rule of law").

435. See *supra* text accompanying notes 186-89.

remains of a Chinese "dictatorship of law"⁴³⁶ or "new authoritarianism."⁴³⁷

The rule of law as a political theory of limited government requires a gradual and definite institutional change in the structure of Chinese government. The rule of law in this political and normative sense presumes a corresponding development of a relatively autonomous legal and judicial system—that is, judges and lawyers who function independently of the government and, in particular, of the Chinese Communist Party.

At the same time, the conceptual analysis provided here suggests that the political reform required in China to support the establishment and growth of the rule of law in a limited state may not require a full transition to a Western-style democratic government. As noted above, Western policymakers tend to understand the rule of law as necessarily including democracy.⁴³⁸ In this fashion, the rule of law is employed as a kind of shorthand that really means "our system of law and government." The tendency among policymakers in contemporary China, however, is to reject the idea of democracy as "a foreign concept,"⁴³⁹ even though some scholars have advanced impressive arguments that an idea of democracy or "power of the people" (*minzhu*) has roots in Chinese thought as well.⁴⁴⁰ Famous dissidents such as Wei Jingsheng and Fang Lizhi have argued passionately and courageously in favor of democratic reform in China.⁴⁴¹ But as discussed above, political reform along these lines has met stiff and sustained resistance from the Communist Party state.⁴⁴² The recent strife over democratic elections in Taiwan and the future of the economic, political, and legal relationship of Taiwan with (or within) China confirms the current Communist Party leadership's position on this issue.⁴⁴³ An

436. Cf. Michael Wines, *Russian Puzzle: What Does War on Tycoons Mean?*, N.Y. TIMES, July 15, 2000, at A3 (raising the possibility of this development in Putin's Russia).

437. A "new authoritarianism" in China was explicitly advocated in the late 1980s. *The New Authoritarianism*, in 2 SOURCES OF CHINESE TRADITION, *supra* note 71, at 520, 520-23 (collecting examples). For an argument that authoritarian regimes often attempt to misuse law to legitimate themselves, see Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379 (1991).

438. See *supra* notes 235-38, 415 and accompanying text.

439. LAWRENCE, *supra* note 78, at 135.

440. Li Cunshan, *The Development of Democratic Concepts in China*, SOC. SCI. IN CHINA, Summer 1998, at 68. See also *supra* note 62 and accompanying text.

441. E.g., Fang Lizhi, *Democracy, Reform, and Modernization*, in 2 SOURCES OF CHINESE TRADITION, *supra* note 71, at 512; Wei, *supra* note 110.

442. See *supra* notes 109-14 and accompanying text.

443. See *China's Scare Tactics*, BOSTON GLOBE, Mar. 17, 2000, at A26 (discussing threats made by Zhu Rongji priori to Taiwan's national election); *Survey of China*, ECONOMIST, Apr. 8, 2000, at 59 (providing an analysis of tensions between China and Taiwan concerning democratic elections). More recently, the tension

important question for both domestic policymakers within China and those concerned with foreign policy toward China concerns the twin issues of the rule of law and democracy.

If indeed the concepts of the rule of law and democracy can be rationally thought about separately, then pragmatic benefits may follow in the specific context of the rule of law in China. Given the historical antipathy toward Western-style democracy in China, it may make sense for Western policymakers, as well as the Chinese themselves, to focus instead on the rule of law as an orienting ideal. Democracy might remain a long-term objective. At the moment, however, the consensus in China, the United States, and other countries that the rule of law should be strengthened in practice may provide a significant opportunity for cooperation and social progress. This approach is especially recommended if a realistic assessment of current conditions in China suggests that major reform toward a representative democratic government at the national level is not likely in the near future.⁴⁴⁴ Of course, this prediction could well prove to be wrong. The dramatic shift toward democratic government in Russia occurred swiftly and without warning.⁴⁴⁵ Recent economic turmoil in Russia suggests, however, that Chinese leaders and the Chinese people at large may not view the example of this particular transition to capitalism very favorably.⁴⁴⁶

In addition, the argument that many Western policymakers favor when thinking about how China may gradually move toward adopting a more democratic form of government is flawed. This version of the policy argument in favor of the rule of law in China runs roughly as follows: Economic change enabled in part by the establishment of a reliable positive legal system will lead to cultural

between China and Taiwan appears to have abated to some extent. Richard McGregor & Mure Dickie, *China Presents a Fresh Face to Taiwan*, FIN. TIMES (London), July 13, 2000, at 12. *But see* Damon Bristow, *Diplomacy in Desperate Straits*, FIN. TIMES, Oct. 20, 2000, at 17 (arguing that relations between China and Taiwan are again deteriorating).

444. *E.g.*, DAHL, *supra* note 327, at 146 (observing that after 4,000 years of "an illustrious civilization" that "had never once experienced democracy" the "prospects that China would soon become democratic were highly dubious"). *But cf.* Andrew J. Nathan & Tianjian Shi, *Cultural Requisites for Democracy in China: Findings from a Survey*, 122 DAEDALUS 95 (1993) (arguing that empirical data suggests difficulties for the prospect of democracy in China but does not indicate that Chinese political culture makes a transition to democracy impossible).

445. Melvin A. Goodman, *At Cold War's End*, HARPER'S MAG., Nov. 1, 2000, at 74 (book review) (observing that the U.S. Central Intelligence Agency as well as "[v]irtually every member of the media and the academy" failed to predict the collapse of the Soviet Union).

446. *E.g.*, David Hoffman, *Lawless Capitalism Grips Russian Business*, WASH. POST, Nov. 7, 2000, at A1 (describing the continuing economic insecurity and nervousness of foreign investors in Russia despite recent improvements in the macroeconomic situation due to increased oil prices).

change, through the international exchange of goods, services, and ideas.⁴⁴⁷ Cultural change will then increase internal pressure for political change.⁴⁴⁸ A new "democracy movement" will therefore arise and prove more durable than such movements in the past.

The first part of this argument seems right. There is no doubt that China is "getting richer at an impressive rate."⁴⁴⁹ The Chinese economy grew rapidly in the 1980s and 1990s at the rate of approximately nine percent annually.⁴⁵⁰ Deng Xiaoping's opening of China to the world and accompanying legal reforms helped this economic growth to occur. Given the economic success of this policy, it is likely that current trends toward establishing an instrumental, positive rule by law will continue. Greater trade and contact with the outside world will also encourage cultural change. More American movies and telecommunications services allowed into China under the recent agreement to expand trade relations with the United States provide only one example.⁴⁵¹

The second part of the argument, however, is much more doubtful. Economic and cultural change will not necessarily lead to political pressure for democratic reform. Instead, it is probably more likely that economic and cultural change will lead to cultural disruptions in Chinese society that may encourage a greater exertion of central governmental authority. If so, does this mean that the development of the rule of law in the political and constitutional sense is doomed, at least in the near future?

Perhaps middle ground is possible. Democratic government is an important component of the rule of law in Western societies.⁴⁵² It is important to remember, however, that the development of this political and legal culture occurred over a number of centuries and "came at a great cost, involving wars and revolutions . . ."⁴⁵³ It may not be feasible or even reasonable to expect a country as large as China with a much different history to embrace democracy as a primary goal. Western policymakers who insist on taking this position should also contemplate the likely human and

447. See *supra* text accompanying notes 12-14.

448. LAWRENCE, *supra* note 78, at 132.

449. *Id.*

450. Merle Goldman & Roderick MacFarquhar, *Dynamic Economy, Declining Party-State*, in THE PARADOX OF CHINA'S POST-MAO REFORMS, *supra* note 419, at 3, 4 (noting that this rate made China "the fastest-growing economy in the world" at the end of the 20th century). *But cf.* Li, *supra* note 434, at 38 (noting that the pace of growth has slowed in the past few years after "over a decade of double-digit growth").

451. Koszczuk, *supra* note 14, at A12. The most popular topic during my question-and-answer sessions while teaching in China referred to legal themes that arose in American movies.

452. See *supra* notes 409-11 and accompanying text.

453. Orth, *supra* note 241, at 71.

environmental costs of a revolutionary upheaval among more than one billion people in China.

On the contrary, a consideration of some of the major social problems facing the Chinese leadership suggests that there may well be larger fish to fry. These problems include “the overwhelmingly agrarian nature of China’s economy, the crushing weight of its population, the persistence of cultural patterns inherited from the past, [and] the contingencies of China’s relations with the outside world”⁴⁵⁴ Another huge problem is the effect that China’s recent economic growth has had on the natural environment. Five of the ten worst air polluted cities in the world are in China.⁴⁵⁵ Acid rain is a serious problem, affecting a huge part of China itself and causing half of the acid rain in Japan and most of the acid rain in Korea.⁴⁵⁶ An estimated eighty percent of China’s rivers are too polluted to support any fish.⁴⁵⁷ The World Bank estimates that two million Chinese people die annually from air and water pollution.⁴⁵⁸ China is also the second largest contributor of greenhouse gases that affect global climate change.⁴⁵⁹ In summary, China’s “exceptionally rapid economic growth has rendered its environment an utter mess.”⁴⁶⁰

Given the scale of its social and ecological problems, it is worth considering whether democracy should take its place at the top of the list that Chinese leaders, including intellectuals and reformers, should put on their agenda. If not, then it may be reasonable to focus on how the rule of law in a political and constitutional sense may develop in China independent of democracy.

IV. POLICY RECOMMENDATIONS FOR BUILDING THE RULE OF LAW IN CHINA

Given the argument that it is at least possible to separate the ideal of the rule of law from the ideal of democratic government, what might a non-democratic ideal of the rule of law look like for China? Drawing from the discussion and sources above, this Article suggests the following recommendations for building the rule of law in China. It seems that both domestic Chinese and foreign policymakers could agree to cooperate in adopting these recommendations.

454. SCHWARTZ, *supra* note 40, at 32.

455. MARK HERTSGAARD, *EARTH ODYSSEY: AROUND THE WORLD IN SEARCH OF OUR ENVIRONMENTAL FUTURE* 5 (1998).

456. *Id.* at 169.

457. *Id.* at 249.

458. *Id.* at 5.

459. The United States is first.

460. Allison & Lin, *supra* note 132, at 778.

1. *Institutional independence of the legal system.* To establish the rule of law in China requires the development of a relatively autonomous institutional legal and judicial structure to counterbalance the political power of the Communist Party state. There are indications that this process of transformation toward independent legal institutions is beginning.⁴⁶¹ But the rule of law in a normative sense is impossible without judges who can act independently, lawyers who have the freedom to represent their clients vigorously, and legal academics who may conduct research and educate students without political interference.

Some scholars express skepticism that the development of this kind of legal system is possible in China without radical political change in the structure of government. According to one, no "single institution within the Chinese system of government," including the courts, the state bureaucracy, or the Party itself, "has either the authority or desire to impose order on the legal system."⁴⁶² Another expresses "cautious pessimism," though he recognizes "fragile harbingers" that "China may develop something like the rule of law in the future."⁴⁶³ Other scholars, however, remain more hopeful. Minxin Pei, for example, argues that "the rule of law is gradually emerging and acquiring constraining power, although not without difficulty."⁴⁶⁴ Li Cheng argues that the rise of a "fourth generation" of Party leaders that includes a relatively high percentage of lawyers may bode well.⁴⁶⁵

Taking an optimistic perspective, the recent opening of China and the commitment to strengthen the rule of law expressed by President Jiang Zemin and Prime Minister Zhu Rongji may present a significant historical opportunity for East and West to work together.⁴⁶⁶ If so, then a domestic and international effort to construct an independent legal infrastructure, including courts and judges, lawyers and professional bar associations, and law schools and legal academics, would be in order. Steps are already being taken in this direction in China.⁴⁶⁷ But more remains to be done to establish the "interpretive regimes" necessary for the rule of law.⁴⁶⁸ Law schools need further support, the political system must be reformed to allow judges and lawyers to act independently, and a

461. See *supra* notes 127-37 and accompanying text.

462. Keller, *supra* note 77, at 740.

463. LUBMAN, *supra* note 1, at xvi.

464. Minxin Pei, "Creeping Democratization" in China, 6 J. DEMOCRACY 65, 66 (1995).

465. Li, *supra* note 434, at 22-23, 39-40.

466. See *supra* notes 5-8 and accompanying text.

467. See *supra* notes 144, 150-55, 167-68, 219-21 and accompanying text.

468. William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in THE RULE OF LAW, *supra* note 247, at 265, 267-68, 289.

general "legal culture" must be allowed to develop independently of the political state and the Communist Party.⁴⁶⁹ Democracy at the national level may not be required to advance the rule of law in China, but since Montesquieu, some significant constitutional separation of powers for a limited government has been recognized as essential for the rule of law.⁴⁷⁰ Also, in contrast to lack of democratic change at the national level, the development of "rice roots" democracy in China may lend some support to the growth of independent legal institutions.⁴⁷¹

2. *Legal rationality and justification.* Another fundamental normative value of the rule of law is that it is "rational" and provides "justifications" for judicial decisions. Since Aristotle, some theorists have argued that law must have "intelligence" and "its own rationality or *logos*."⁴⁷² The rule of law requires that "official decisions be justified in law, and therefore be reasoned and nonarbitrary with respect to general legal standards . . ."⁴⁷³ This feature of the rule of law requires that judges, lawyers, and officials should be trained in legal reasoning and the "legal virtues."⁴⁷⁴ Under this heading, several of the other features listed above by various theorists as involved in the rule of law may be included: assuring procedural regularity of the legal process, uniform application of legal rules and "treating like cases alike," principled appellate review and oversight, rational consistency in law-making and law-applying, and empirical congruence between "law in the books" and "law in practice."⁴⁷⁵

3. *Transparency.* Public disclosure and the availability of legal decisions promotes the rationality as well as the legitimacy of the rule of law.⁴⁷⁶ It is also important in order for citizens to be informed

469. For a discussion of the importance of legal culture, though not in a comparative mode, see Lynn M. Lopucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498 (1996).

470. See *supra* notes 344-47, 403-04 and accompanying text.

471. Lianjiang Li & Kevin J. O'Brien, *The Struggle over Village Elections, in THE PARADOX OF CHINA'S POST-MAO REFORMS*, *supra* note 419, at 129 (describing the development of local democracy, which has been encouraged by the Communist Party in part as a hedge against political backlash from peasants and others who have been left behind by economic growth in the last few decades). See also Pei, *supra* note 464, at 74 (describing "some encouraging signs of grassroots democratization" in recent village elections). For a personal account, see Yang Yonghe, *The Election Campaign, in CHINA REMEMBERS*, *supra* note 10, at 279.

472. Solum, *supra* note 251, at 135 (quoting Aristotle). For a contemporary example of this argument drawing on Aristotle and elaborating on "the intelligibility of law," see generally Weinrib, *supra* note 247.

473. Burton, *supra* note 260, at 187.

474. Cf. RAZ, *supra* note 37, at 210-29 (discussing "the rule of law and its virtue"); Solum, *supra* note 251, at 145 (describing "the virtue of judicial integrity").

475. See *supra* notes 381-83, 390-93, 397-98 and accompanying text.

476. See *supra* notes 384-85, 394-95, 401 and accompanying text.

of the “rules of the game” and to enable lawyers to provide reliable advice to clients. In the past, the Chinese state has sometimes relied on unpublished laws and resorted to “secret trials.”⁴⁷⁷ Unpublished laws and nonpublic legal processes are antithetical to the normative principles of the rule of law. “Public accountability,” as one scholar has argued, “is a key aspect of the rule of law,”⁴⁷⁸ and it is not possible without public disclosure of important legal materials and information. Features of the rule of law discussed above that fit under this general heading of “transparency” include fair notice and hearing provisions, public promulgation of legislation, and the availability of the legal information necessary to meet reasonable expectations for a person to find out what the law is and to behave in accordance with it.⁴⁷⁹

4. *Human rights.* Perhaps no other issue raises greater passion in political and legal discussions about China than the question of respect for basic human rights.⁴⁸⁰ The relationship between the idea of fundamental human rights, as expressed in the United Nations Declaration of Human Rights or the national constitutions of both the United States and China, and the rule of law is complex.⁴⁸¹

Two perspectives may help to make sense of this relationship between human rights and law. On one hand, the serious and continuing violation of basic human rights by the state has been recognized as grounds for revolt or revolution in classical liberal political theory and, at least arguably, Marxist theory.⁴⁸² Respect for

477. See *supra* notes 174-78 and accompanying text. For example, the post-Tiananmen Square trial of Wang Dan, the political activist, was held in secret. Baraban, *supra* note 92, at 1267.

478. Burton, *supra* note 260, at 195.

479. See *supra* notes 384-98 and accompanying text.

480. See generally DANIEL A. BELL, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA* (2000); DE BARY, *supra* note 39; *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer & Daniel A. Bell eds., 1999); *HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES* (Michael C. Davis ed., 1995); ANN E. KENT, *CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE* (1999); ANDREW J. NATHAN, *CHINA'S TRANSITION* (1999); MICHAEL A. SANTORO, *PROFITS AND PRINCIPLES: GLOBAL CAPITALISM AND HUMAN RIGHTS IN CHINA* (2000); ROBERT WEATHERLEY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA: HISTORICAL AND IDEOLOGICAL PERSPECTIVES* (1999); Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291 (2000); Friedman, *supra* note 108, at 241; Jonathan Hecht, *The Challenge of China and Human Rights*, 9 HARV. HUM. RTS. J. 315 (1996) (book review).

481. The concept of “rights” is not indigenous in Chinese thought, whether ancient or Marxist. It is an idea transplanted from the West. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 313-14 (2000). As a result, “the debate about human rights in China” is “very deeply rooted” and “multi-faceted.” *Id.* at 314.

482. The classical liberal argument can be understood as part of the more general argument against “tyranny.” See *supra* text accompanying notes 316-26. Marxist theory is somewhat difficult to classify with respect to its view of the state. Its

fundamental human rights thus connects with theories of limited government that justify revolution.⁴⁸³ On the other hand, when a political and social situation is short of revolutionary, then the protection of fundamental human rights within a society is ordinarily thought to be a primary concern of the legal and judicial system.⁴⁸⁴ In the United States, for example, fundamental human rights are protected by the judiciary's interpretation of the U.S. Constitution (and various state constitutions).⁴⁸⁵ In China, working toward establishing the rule of law should include a discussion about how the legal and judicial system should act—or should be made to act—to recognize and protect the fundamental human rights of its citizens. The present Chinese Constitution includes many provisions that express respect for human rights, but the legal procedures and infrastructure needed for these provisions to be enforced or, in Fuller's terms, be made "congruent" with everyday experience are absent.⁴⁸⁶

Other normative qualities of the rule of law discussed above are also important. In the current Chinese context, however, it seems to me that these four features—institutional independence of the legal system, rationality and justification of legal decisions, transparency of the legislative and judicial process, and the establishment of legal mechanisms to protect basic human rights—would provide a helpful focus for policymakers interested in transforming China toward a system marked by the rule of law. Law is a concept that has had a

view of the state as the instrument of the ruling capitalist class justifies social revolution to establish "the dictatorship of the proletariat." See *supra* text accompanying notes 92-96. Marxist states, however, are quite a bit more problematic for Marxist theory.

483. See *supra* notes 315-26 and accompanying text.

484. The Universal Declaration of Human Rights of 1948 expresses the tension between these two perspectives in the following language: "[I]t is essential if man is not to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law." Solum, *supra* note 251, at 121 (quoting the Declaration).

485. E.g., Malvina Halberstam, *International Human Rights and Domestic Law Focusing on U.S. Law, With Some Reference to Israeli Law*, 8 CARDOZO J. INT'L & COMP. L. 225, 226-27 (2000) (observing that most of the rights recognized by the U.N. Declaration of Human Rights are protected in the United States by courts interpreting the Constitution). For a collection of essays on the influence of the American view of constitutional rights on human rights elsewhere, see CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990). See also Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979) (arguing that international human rights, including the Universal Declaration of Human Rights, are "in their essence American constitutional rights projected around the world").

486. Chen, *supra* note 5, at 149 (observing that in China "the doctrine still prevails that the provisions of the Constitution are not justiciable and directly enforceable in the courts"). Fuller's discussion of "congruence" is discussed *supra* in the text accompanying note 365.

long history in Chinese as well as Western civilization.⁴⁸⁷ Indigenous theoretical precedents exist on which China may build its own brand of the rule of law.⁴⁸⁸ This process may also generate the recovery of ideas that may in turn influence discussions of the rule of law in Western societies. For as Amartya Sen argues, "confining one's reading only to the books of one civilization reduces one's freedom to learn about and choose ideas from different cultures in the world."⁴⁸⁹

For policymakers in the West, perhaps especially in the United States (given the overall economic and military context), it is important to recognize the important cultural and historical differences in China. Remaining open to the possibility of cross-fertilization of ideas from this rich and ancient civilization is one reason. In addition and more immediately important, given the shadow of potential conflict, Western policymakers must appreciate China's very different history regarding democracy.⁴⁹⁰ An appreciation of this difference may recommend a commitment for East and West to work together on promoting the rule of law rather than to concentrate dangerously on an ideological conflict over democracy.

"Democracies have ever been spectacles of turbulence and contention," Madison warned, and "have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."⁴⁹¹ Machiavelli observed that "there are two ways of fighting: by law and by force."⁴⁹² Law is as "natural to men" as force is "to beasts."⁴⁹³ Perhaps building the rule of law in China will pave the road toward a peaceful, if not entirely democratic future.

487. See *supra* Parts II & III.

488. One example is Huang Zongxi who favored conceptions compatible with the establishment of the rule of law. DE BARY, *supra* note 39, at 100-01. Another example appears in the writings of the contemporary scholar, Yan Jiaqi, who argues in favor of transition from "personal rule" to "legal rule" in China. Yan Jiaqi, *How China Can Become Prosperous*, in 2 SOURCES OF CHINESE TRADITION, *supra* note 71, at 523.

489. Amartya Sen, *East and West: The Reach of Reason*, N.Y. REV. OF BOOKS, July 20, 2000, at 33, 37. See also GLENN, *supra* note 481, at 313-14 (discussing the potential "Easternization" through the study of Asian legal principles).

490. See *supra* notes 28, 109-14, 439-43 and accompanying text.

491. THE FEDERALIST No. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961).

492. NICCOLO MACHIAVELLI, THE PRINCE, ch. 18, quoted in DANIEL KRYDER, DIVIDED ARSENAL: RACE AND THE AMERICAN STATE DURING WORLD WAR II 1 (2000).

493. *Id.*

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