

CHINA'S AMENDED CONSTITUTION: QUEST FOR LIBERTY AND INDEPENDENT JUDICIAL REVIEW

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ABSTRACT

Whether China's model of judicial review will evolve into a more discursive, independent model is a pressing issue in international law and politics. This issue has gained even greater prominence after China's accession to the World Trade Organization (WTO). Rule of law, and its attendant judicial review, facilitates economic growth because it affords stability, transparency, and fairness to the entire economy. The directional growth and development of Chinese constitutionalism has national, interregional, and international implications that affect the growth and prosperity of both China and the world's economy.

On March 14th, 2004, China amended its 1982 Constitution. Past amendments to the 1982 Constitution had mostly addressed economic reform. Conversely, the March 14, 2004 amendments to the 1982 Constitution addressed liberty and human rights, including property rights. These new amendments inadvertently provide a gauge for measuring the "constitutionalism" of China's 1982 Constitution against modern constitutions.¹ For instance, the constitutionalism of the 1982 Constitution may be assessed by whether, under its current constitutional regime, China can give efficacy to a constitutional amendment that supposedly safeguards human rights and rights over private property. Forces that influence China's constitutionalism include China's ontological base in tradition (Confucianism), political ideology, constitutional history, and constitutional and governmental structure. The newest amendments also incorporate the ideology of Jiang Zemin's "Theory of the Three Represents" into the preamble as an additional guiding ideology. These circumstances illustrate how Chinese political ideology and culture affect

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1. "Constitutionalism" is defined as "Government in which power is distributed and limited by a system of laws that must be obeyed by the rulers." WEBSTER'S II NEW COLLEGE DICTIONARY 242 (3d ed. 2001). For the purposes of this Article, China's relative "constitutionalism" is the *degree* to which power is distributed and limited by a system of laws that must be obeyed by the rulers.

constitutionalism, the safeguarding of liberty, and the development of a positive and discursive model of judicial review.

TABLE OF CONTENTS

I. INTRODUCTION 44

II. HISTORICITY OF CHINA CONSTITUTIONS 49

 A. *Sino-British Post-Opium Wars Constitutions*..... 49

 B. *Political Economy of the 1982 Constitution*..... 54

III. WESTERN JUDICIAL REVIEW AND LIBERTY 58

 A. *History of Western Judicial Review* 58

 B. *The Dilemma of Rousseau’s Liberty* 60

IV. CHINESE JURISPRUDENCE AND RULE OF LAW (FAZHI) 62

 A. *Confucianism and Legalism* 62

 B. *China’s Ontological Base in Tradition* 65

V. CHINA’S *MARBURY VS. MADISON*..... 68

 A. *Chinese Judicial Independence* 68

 B. *Progeny of China’s Marbury vs. Madison*..... 69

VI. ECONOMIC AND NON-ECONOMIC LIBERTY 72

 A. *Economic Equality Norms and Judicial Review* 72

 B. *Liberty and Independent Judicial Review* 75

VII. CONCLUSION 77

I. INTRODUCTION

Is Chinese ziyou (liberty), “[S]omething we do, not something I do?”²

The People’s Republic of China (China) was formed in 1949,³ and in 1954 adopted its first constitution.⁴ Constitutional government in China originally began in the aftermath of the Sino-British Opium Wars (1839–1842 and 1856–1860)⁵ as a result of China’s realization that it needed to modernize in order to defend itself against Western invading powers.⁶

2. J.S. McCLELLAND, A HISTORY OF WESTERN POLITICAL THOUGHT 265 (1996).

3. Cent. Intel. Agency, *China*, in *The World Factbook*, at <http://www.cia.gov/cia/publications/factbook/geos/ch.html> (last visited Oct. 2, 2004).

4. ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONST.] (1954).

5. For a thorough account of the Opium Wars and their impact on China’s constitution, see WILLIAM TRAVIS HANES & FRANK SANELLO, THE OPIUM WARS: THE ADDICTION OF ONE EMPIRE AND THE CORRUPTION OF ANOTHER (2002).

6. Suiseheng Zhao, *Chinese Nationalism and Its International Orientations*, 115 POL. SCI. Q. 1,

Constant strife plagued the historical periods of China's transition from the pre-modern period (*jindai*) (1840), through the modern period (*xiandai*) (1911), to the contemporary period (*dangdai*) (1949).⁷ This is equally true in terms of China's development of constitutionalism. Moreover, China's transition from the pre-modern to the contemporary period corresponds with its transition to constitutional government. Generally, early constitutional modernization occurred during the following periods: from the 1860s to 1880s; during the 1890s; and from 1895 to 1911.⁸

Historically, China's constitutional government has experienced a seemingly endless succession of constitutions, revisions, and amendments. The 1982 Constitution of the People's Republic of China (*Zhonghua renmin gongheguo xianfa*) (1982 Constitution)⁹ was amended in 1988, 1993 and 1999.¹⁰ In comparison, the March 14, 2004 amendments (2004 Amendments) covered thirteen articles, including the preamble.¹¹

This raises the issue of whether Chinese political ideology and culture have been the primary forces in creating these successive constitutions and amendments. Party ideology may take over or supplant a constitution or, similarly, a constitution may emerge that affirms or demands compliance to party ideology.¹² Modern Chinese constitutionalism is shrouded and obscured by the ideology of the governing Chinese Communist Party (CCP). Indeed, there is an inherent danger that the CCP will write its entire ideology into the constitution.

Another pressing issue is how the CCP's ideological and cultural influences affect the development of a discursive model of judicial review. "[C]onstitutions are value-oriented documents . . . and [societal] values and the political culture of a given society, play important roles in the formulation and application of all constitutions."¹³

2 (2000).

7. Neil Renwick & Cao Qing, *China's Political Discourse Towards The 21st Century: 'Victimhood', Identity and Political Power* 21 n.1, at <http://www.psa.ac.uk/cps/1999/renwick.pdf> (last visited Nov. 7, 2004).

8. JIANG JINSONG, *THE NATIONAL PEOPLE'S CONGRESS OF CHINA 18-19* (2002).

9. ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONST.] (1982) [hereinafter 1982 CONSTITUTION].

10. *Constitution to be Amended a Fourth Time*, CHINA DAILY, Mar. 3, 2004, at http://www.chinadaily.com.cn/english/doc/2004-03/03/content_311346.htm (last visited Oct. 2, 2004) [hereinafter *Constitution to be Amended Fourth Time*].

11. ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONST.] (2004) [hereinafter 2004 AMENDMENTS].

12. Suna Kili, *Problems of the Application of Contemporary Constitutions*, in MODERN CONSTITUTION 117, 131-32 (Thomas Fleiner-Gerster ed., 1988).

13. *Id.* at 118.

The 2004 Amendments addressed human rights, private property, and the incorporation of Jiang Zemin's "Theory of the Three Represents" ("Three Represents").¹⁴ But in terms of gauging the development of independent judicial review, it is the fourth amendment that is important. The 1982 Constitution stands apart from earlier constitutions because it focused primarily on economic reform. In contrast, the newly adopted fourth amendment, while adopting official party ideology and the "Three Represents," also addresses an issue unrelated to economic reform:¹⁵ China's attempt to safeguard liberty through normative, as opposed to semantic, constitutional government. As manifested in the 1982 Constitution, CCP ideology expressed in the "Three Represents" conflicts with the conceptions of liberty expressed by the concepts of human rights and private property.¹⁶ In terms of the Hegelian dialectic (thesis, antithesis, and synthesis), the conflict between CCP ideology and liberty should be resolved through synthesis, through sublimation and self-improvement, and through becoming a more Western-oriented model of constitutional government.¹⁷ However, this result shall never be realized, because it ignores the fact that the Chinese concept of liberty (*ziyou*) is defined in terms of socialist democracy.¹⁸

Another issue is the role of judicial review in the development of Chinese constitutionalism. The issue is two-part. First, it is uncertain whether Chinese constitutionalism can safeguard liberty without independent judicial review or some other form of constitutional review, for instance, a constitutional court.¹⁹ Second, assuming China's present form of constitutional government fails to safeguard liberty, the prospects of China's judiciary developing a positive, discursive model of judicial review that will safeguard liberty also remain unclear.

In general, Chinese constitutional provisions that address liberty provide only conceptual rights because the government's structure lacks both popular sovereignty and a genuine separation of powers, and because

14. *Human Rights, Private Property Fixed as Pillars*, CHINA DAILY, Dec. 23, 2003, at http://www1.chinadaily.com.cn/en/doc/2003-12/23/content_292557.htm (last visited Oct. 3, 2004) [hereinafter *Human Rights, Private Property Fixed as Pillars*].

15. 2004 AMENDMENTS, *supra* note 11.

16. *Id.* arts. 10, 13, 15.

17. For an explanation of Hegel's theory of history and the dialectic, see for example, J. BRONOWSKI & BRUCE MAZLISH, *THE WESTERN INTELLECTUAL TRADITION FROM LEONARDO TO HEGEL* 481-90 (1975).

18. *See infra* Part IV.B.

19. Susan Newman, *Comparing Courts*, 2001 WASH. U. INST. GLOB. LEG. STUD. 8, at http://law.wustl.edu/Geninfo/Magazine/Sp2002/03_comparing_courts.pdf (last visited Sept. 28, 2004).

the judiciary lacks the power of independent judicial review.²⁰ Unfortunately, given the current state of Chinese constitutionalism, a conceptual right of liberty cannot be safeguarded by mere constitutional provisions, and the development of a positive, discursive model of independent judicial review is, arguably, improbable and unconstitutional.²¹

A tangential issue is whether the 2004 Amendments truly manifest liberty, rather than just social rights. If they only manifest social rights, then the analysis necessarily becomes whether China's constitutional structure possesses the ability to safeguard social rights, instead of liberty, in terms of a normative-semantic dichotomy.²² Assuming China's judiciary lacks the power of independent judicial review, the determinative issue is whether the Chinese model of constitutional government, influenced by democratic centralism and socialist democracy, represents a normative, rather than a merely semantic, constitutionalism.²³

That China's constitutional government lacks popular sovereignty, separation of powers, and independent judicial review presents a problem. Many factors may be relied upon as illustrations, including: U.S. condemnations of China's human rights record at the U.N. Human Rights Commission (UNHRC),²⁴ China's accession to the World Trade Organization (WTO),²⁵ global inter-legality, and other external forces. Notwithstanding its evolution toward a more Western taxonomy (Western constitutionalism), China's model of constitutional government still lacks the institutional capacity to comprehend Western notions of liberty and the capability to safeguard either liberty or social rights.

Few disagree that Marxist-Leninism is a foregone conclusion.²⁶ Twenty-five years ago, China began initiating legal reform, economic

20. See, e.g., M. Ulric Killion, *Quest For Legal Safeguards for Foreign Exporters Under China's Anti-Dumping Regime*, 29 N.C. J. INT'L L. & COM. REG. 417, 454 (2004) (discussing weaknesses in China's constitutional and governmental structure).

21. *Id.*

22. KILLI, *supra* note 12, at 125.

23. *Id.*

24. *EU Sends Human Rights Warning to China*, EUR. REP., Mar. 25, 2000, 2000 WL 8841237.

25. See Protocol on the Accession of the People's Republic of China, WT/1/432, (Nov. 10, 2001), available at <http://unpan.1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002123.pdf> (last visited Nov. 14, 2004) [hereinafter Protocol on Accession]. The Protocol on Accession was accepted by the Government of the People's Republic of China on November 11, 2001, and came into effect on December 11, 2001. *Id.* See also Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *Uruguay Round of Multilateral Trade Negotiations* 33 I.L.M.1144 (1994), reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999).

26. Barbara Foley, *From Situational Dialectics to Pseudo-Dialectics: Mao, Jiang, and Capitalist*

development, and an open door policy. And since then, the Chinese economy has presented itself as a socialist-political polity with a capitalist-economic policy. One source predicted,

Given continuing peace and stability, China will ultimately realize its major economic development objectives, certainly by the first quarter of the 21st century, if not by 2015. By then China will clearly be a middle-income economy in terms of its per-capita income but its total GDP will make it the world's largest economy.²⁷

In terms of legal and economic reform, a potential problem for China is that the “engines that have driven China’s growth in the past are losing their dynamism.”²⁸ For China, continuing economic development and prosperity²⁹ depend upon a continued growth and evolution of Chinese constitutionalism, rule of law, and, in particular, independent judicial review. “[T]he way in which the modern formal legal order that evolved in some Western countries was transplanted into other countries is a much more important determinant of legality and economic development today than the supply of a particular legal code.”³⁰

This Article addresses the aforementioned issues by reviewing the historicity of Chinese constitutionalism, and the forces of ideology and culture that influence social values. These forces include: China’s ontological base in tradition (Confucianism); its relevant laws; decisions, replies, and resolutions of the Supreme People’s Court and the Standing Committee of the National People’s Congress (SCNPC); and the political and constitutional relationship of the SCNPC to the National People’s Congress (NPC). A review of the resolutions, decisions, and powers of the SCNPC is especially important because the 1982 Constitution grants to the

Transition, 5 CULTURAL LOGIC (2002), at <http://eserver.org/clogic/2002/Foley.html> (last visited Oct. 15, 2004) (describing the consensus).

27. John Wong, *China’s Post-Deng Xiaoping Economy: Problems and Prospects*, International University of Japan Research Institute, Working paper No. 1 (1997), at <http://www.iuj.ac.jp/research/wpap001.cfm> (last visited Sept. 28, 2004).

28. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, CHINA IN THE WORLD ECONOMY: THE DOMESTIC POLICY CHALLENGES 10 (2002).

29. See *8% GDP Growth Forecast for 2004*, CHINA DAILY, Nov. 6, 2003, available at http://www1.chinadaily.com.cn/en/doc/2003-11/06/content_278919.htm (last visited Sept. 28, 2004) [hereinafter *8% GDP Growth Forecast for 2004*].

30. Katherine Pistor et al., *Economic Development, Legality, and the Transplant Effect* (1999), at <http://ssrn.com/abstract=183269> (last visited Nov. 14, 2004).

SCNPC, and not to the Supreme People's Court, the power to interpret the Constitution and laws of China (*lifa jieshi quanli*).³¹

II. HISTORICITY OF CHINA CONSTITUTIONS

A. Sino-British Post-Opium Wars Constitutions

China's turn toward representative democracy dates to the period between 1860 and 1911.³² The transition from dynastic government to constitutional government is divided into three periods: from the 1860s to the 1880s; the 1890s; and from 1895 to 1911.³³ These periods parallel the end of dynastic China (the end of Qing Dynasty (*Qing Chao*) (1636–1911)),³⁴ and the aftermath of the Opium Wars (1839–1842 and 1856–1860), respectively.³⁵

Following the Opium Wars, China had to redefine itself in terms of Western conceptions of sovereignty and nationalism. At the turn of the nineteenth century, sovereignty and nationalism were defined in terms of Western international law and politics.³⁶ Despite controversies concerning the origin of international law, a problem for China at the turn of the nineteenth century was that “the international legal system [was] a white man's club, to which non-European states would be admitted only if they produced evidence that they were ‘civilized.’”³⁷

China after the Opium Wars was described as being in a state of transition from a traditional culture to a political entity.³⁸ These changes were intended to restore Chinese power. Indeed, “[t]he determination to restore China's national grandeur is the crux of Chinese nationalism.”³⁹ China's defeat in the first Opium War catalyzed the borrowing of a European notion of nationalism.⁴⁰ This European nationalism was fueled

31. 1982 CONSTITUTION, *supra* note 9, arts. 67(1), 67(4). *See also infra* Part V.B.

32. JIANG, *supra* note 8, at 18.

33. *Id.* at 18–19.

34. *See* J.A.G. ROBERTS, A CONCISE HISTORY OF CHINA (1999). The Qing Dynasty followed the Ming Dynasty (1368–1644) and preceded the Republic of China (ROC) (1911–1949). *Id.* at 118–255.

35. HANES, *supra* note 5, at 3.

36. *See infra* Part III.

37. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 8–10 (7th rev. ed. (1997)).

38. *See, e.g.*, HANES & SANELLO, *supra* note 5, at 10–14 (describing the post-Opium War transition).

39. JOHN W. GARVER, FOREIGN RELATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 20 (1993), *quoted in* Zhao, *supra* note 6, at 4.

40. Zhao, *supra* note 6, at 4.

by the flames of xenophobia, and fostered by proto-nationalism.⁴¹ The combined forces of modernization caused a shift from dynastic to constitutional government, eventually culminating in the fall of the Qing dynasty in 1911.⁴²

The first period of transition toward constitutional government is attributed to Chinese officials introducing “Western style politics” to China.⁴³ The second period, the 1890s, is attributed to the emergence of an entrepreneurial class that urged a constitutional monarchy.⁴⁴ And the third period is attributed to “revolutionaries of the business class who turned away from a constitutional monarchy pursuing instead a democratic republic.”⁴⁵

The introduction of Western constitutionalism in China is couched in several themes, including Western parliament, political parties, elections, comparative Western constitutional models, and the relationship between a constitution and power.⁴⁶ Of these, the most important theme has been the comparison of Western constitutional models. In considering differing constitutional models, the models of Britain and Germany, rather than those of the United States, France, or Japan, were deemed to have “most nearly achieved the golden mean.”⁴⁷

During the first period of transition, proponents of modernization generally ascribed the prosperity and power of Western parliaments to their constitutional governments, especially parliamentary government.⁴⁸ However, neither Western constitutional government nor parliamentary government truly took root in post-Qing China. The problem may have been tradition which, along with the Paris Peace Conference of 1918,⁴⁹

41. ROBERTS, *supra* note 34, at 197.

42. JIANG, *supra* note 8, at 18–19.

43. *Id.*

44. *Id.* at 19. Kang Youwei, Liang Qichao, and Yan Fu were pioneers of this stage. They were “intellectuals educated in feudal tradition,” who later became “advocates for a constitutional monarchy.” *Id.*

45. *Id.* “The most influential leaders of the third stage were Sun Yatsen, Song Jiaoren and Huang Xing.” *Id.*

46. *Id.* at 19–20.

47. *Id.* at 20. See also Cushi Ying Fa Yi Bi Si Guo Riji, Juan Sen, Guang Xu Chao, Shiliu nian Qi Yue Ersher Riji (TRAVELING DIARY OF FOUR COUNTRIES: ENGLAND, FRANCE, ITALY, AND BELGIUM) 197 (1985).

48. JIANG, *supra* note 8, at 20.

49. ZHAOWU HE et al., AN INTELLECTUAL HISTORY OF CHINA 548 (Zhaowu He trans.) (1991). The 1918 Peace Conference, at the end of World War I, was dominated by Western powers and “flagrantly delivered the former German privileges in China to Japan . . . On May 4, 1919, students in Beijing “rose in a patriotic demonstration to which people all over the country, especially the young intellectuals, responded vehemently. Thus began the May Fourth Movement.” *Id.*

were sources of support for the continuing influence of the Qing dynasty,⁵⁰ as witnessed by the May Fourth Movement.⁵¹ During this turbulent period, China had difficulty assimilating into itself the institutions associated with Western constitutionalism (democracy and liberty) because the underlying theories of democracy and liberty, espoused by such Enlightenment thinkers as John Locke and Jacques Rousseau—"that government was held in trust instead of by ordained right and that the monarch was a mere agent of society with 'no will, no power but that of law'—were conceptions 'alien' in the traditional Chinese social structure of hierarchical relationships and patriarchal values" and the Chinese vestiture of authority not in the people, but in the state.⁵²

The traditional vestiture of authority in the state contributed to China's transition to communism, the 1921 birth of the CCP, and the CCP's views on constitutional theory and practice.⁵³ A society in which monarchy was considered part of the "natural" political order,⁵⁴ poses a strong barrier to Western constitutionalism and parliamentary government. Those seeking to modernize (to Westernize) China at the turn of the nineteenth century faced "the strongest tradition of absolute monarchy and the scantiest belief in representative government."⁵⁵ This series of events led China to become a communist state and to select democratic centralism, rather than separation of powers, as an underlying principle of governance.⁵⁶ Moreover, during this period, communist leaders considered parliamentary government to be both infeasible and a tool of the capitalist.⁵⁷

In the past century, China has had twelve constitutions,⁵⁸ eight of which were enacted between 1908 and 1954.⁵⁹ And following the 1949

50. S.A.M. ADSHEAD, *CHINA IN WORLD HISTORY* 386 (3d ed. 2000).

51. VERA SCHWARCZ, *THE CHINESE ENLIGHTENMENT: INTELLECTUALS AND THE LEGACY OF THE MAY FOURTH MOVEMENT OF 1919* 12–27 (1990).

52. Lawrence R. Sullivan, *Intellectual and Political Controversies Over Authority in China: 1898–1922* 21, at http://www2.eastwestcenter.org/education/culauthasia/olc/papers/p_Sullivan.pdf (last visited Sept. 28, 2004).

53. JIANG, *supra* note 8, at 38–39.

54. Sullivan, *supra* note 52, at 21.

55. JIANG, *supra* note 8, at 38.

56. *Id.* at 40.

57. *Id.* at 38–39 (quoting *ZHOU ENLAI TONG YIZHAN XIAN WEN XUAN* (SELECTED WORKS OF ZHOU ENLAI UNITED FRONT) 141 (1984), and citing *MAO ZEDONG XUANJI* (SELECTED WORKS OF MAO ZEDONG) 628–29 (1966)).

58. Hong Shihong, *No Difference Whether Constitutional or Not—The Conflict Between the System of Democratic Centralization and Constitutional Review and its Solution*, *ADVANCES IN SOCIAL SCIENCE* 2002, at [http://notesweb.uni-wh.de/wg/wiwi/wgwiwi.nsf/vwFiles/scc_constitutionalreview/\\$FILE/constitutional+review.pdf](http://notesweb.uni-wh.de/wg/wiwi/wgwiwi.nsf/vwFiles/scc_constitutionalreview/$FILE/constitutional+review.pdf) (last visited Sept. 28, 2004).

59. *Id.* at 1 n.2 (citing WILLIAM L. TUNG, *THE POLITICAL INSTITUTIONS OF MODERN CHINA* 318–79 (1964)).

founding of the People's Republic of China, four more constitutions were enacted (in 1954, 1975, 1978, and 1982, respectively).⁶⁰

Of the pre-Mao (pre-1949) constitutions, the 1923 and 1946 constitutions were viewed positively by legal scholars. This praise, however, is limited in consequence: the 1923 Constitution was never fully implemented because the promulgating government was immediately overthrown; and the 1946 Constitution expressed its strengths only in Taiwan, rather than in China.⁶¹

In 1954, the first plenary session of the First Chinese People's Political Consultative Conference adopted the Common Programme of the Chinese People's Political Consultative Conference, which served as a temporary constitution.⁶² In September 1954, following the establishment of the Congress, China's first constitution was adopted.⁶³ In 1975, the second constitution was adopted but was poorly drafted because it was promulgated during the ninth year of the Cultural Revolution (*Wenhua Da Geming*) (1966–1976).⁶⁴ This 1975 Constitution is a legacy of the chaos ensuing from the Cultural Revolution. In 1978, when attempting to recover from the chaos of Cultural Revolution, China adopted its third constitution. This constitution is described by one source as being “ultra-leftist”⁶⁵ because it incorporated the political rhetoric associated with the Cultural Revolution.⁶⁶

Conversely, the 1982 Constitution, supposedly antithetical to the Cultural Revolution's relative constitutionalism, expunges the political rhetoric that had been incorporated in the 1978 Constitution.⁶⁷ The 1982 Constitution contains no references to the Cultural Revolution,⁶⁸ however, the 1982 Constitution restates Mao Zedong's contributions in accordance with a major historical reassessment produced in June 1981 at the Sixth Plenum of the Eleventh Central Committee, the “Resolution on Some Historical Issues of the Party since the Founding of the People's Republic”

60. *China in Brief, Political System and State Structure*, CHINA INTERNET INFORMATION CENTER, at <http://www1.china.org.cn/e-china/politicalsystem/constitution.htm> (last visited Sept. 28, 2004).

61. ANDREW J. NATHAN, *CHINA'S TRANSITION* 73 (1997).

62. *Constitution to be Amended a Fourth Time*, *supra* note 10.

63. *Id.*

64. *Id.*

65. *Balance Between Consistency, Adaptability*, CHINA DAILY, Oct. 30, 2003, available at http://www1.chinadaily.com.cn/en/doc/2003-10/30/content_276763.htm (last visited Sept. 28, 2004) [hereinafter *Balance Between Consistency*].

66. CHINA: A COUNTRY STUDY 422 (Robert L. Worden et al. eds., 4th ed. 1988).

67. *Id.*

68. *Id.*

(“Resolutions on Some Historical Issues”).⁶⁹ Deng Xiaoping made the following recommendation regarding the drafting of the Resolution on Some Historical Issues:

In drafting the “Resolution on Certain Questions in the History of Our Party Since the Founding of the People’s Republic of China,” we should seek truth from facts and conscientiously draw lessons from the “Left” mistakes. As regards the anti-Rightist struggle of 1957, I have said more than once that there really were some persons then who made vicious attacks, but that we for our part over-reacted and unduly broadened the scope of the struggle. Of course, it cannot be said that all those who were criticized were completely correct, or that they had made no mistakes. We should sum up historical experience and draw the necessary lessons in accordance with the principle of seeking truth from facts.⁷⁰

The theme of the Cultural Revolution went from dominant at the CCP’s Ninth National Congress, to disastrous at the Sixth Plenary Session of the Eleventh National Congress, and was absent during discussions at the Fifteenth National Congress.⁷¹ However, some party ideologies survived the onslaught of the Resolutions on Some Historical Issues.

The 1982 Constitution has Chinese characteristics and is “well suited for the betterment of the nation politically, economically and culturally during the new era of socialist modernization.”⁷² Moreover, the 1982 Constitution supposedly uses the 1954 model as a framework.⁷³ One source describes the constitution as “a workable set of institutions [capable of] moving China toward democracy: a series of four levels of people’s congresses from the local to national level exercising popular sovereignty.”⁷⁴

For a long time China has had difficulty defining the concept of social democracy.⁷⁵ This creates a quandary, because liberty or social rights

69. *Id.*

70. Deng Xiaoping, *On Opposing Wrong Ideological Tendencies* (Mar. 27, 1981), in *SELECTED WORKS OF DENG XIAOPING* 356, 357 (Cent. Comm. of the Communist Party of China ed., 1983) [hereinafter *SELECTED WORKS OF DENG XIAOPING*].

71. *Id.* See also Renwick, *supra* note 7, at 22 (discussing 1980 speech).

72. AsianInfo.org, *Chinese Politics 2000*, at <http://www.asianinfo.org/asianinfo/china/politics.htm> (last visited Sept. 28, 2004).

73. *Balance Between Consistency*, *supra* note 65.

74. NATHAN, *supra* note 61, at 73.

75. Barrett L. McCormick, *Political Change in China and Vietnam: Coping with Consequences of Economic Reform*, in *TRANSFORMING ASIAN SOCIALISM* § 153.166 (Anita Chan et al. eds., 1999) (providing a defense of social democracy).

must, in China, be definable in terms of socialist democracy, not just in terms of traditional Western democracy. An earlier reform movement resulted in China's version of parliamentary government, the NPC,⁷⁶ and legislative supremacy.⁷⁷ The local elections may also have been intended to replicate Western parliamentary elections.⁷⁸ However, when one gauges how well the Chinese constitutional government safeguards liberty, one witnesses "old tactics in new conditions."⁷⁹ Socialist democracy is neither a reflection of Western liberal democracy, nor of a British style of Western parliamentary supremacy.⁸⁰ The 1982 Constitution and socialist democracy are merely vestiges of Marxist-Leninism and Mao Zedong's socialism.⁸¹

B. Political Economy of the 1982 Constitution

In 1978, an ideological debate occurred between pragmatism and Mao's orthodox version of Marxist-Leninism.⁸² In 1978, at the Third Plenary Session of the Eleventh Party Central Committee, "Deng Xiaoping established his position at the core of the second-generation leadership of the CCP."⁸³ Afterward, in 1992, Deng Xiaoping visited Shenzhen in Guangdong Province and officially declared, "China would adopt a 'socialist market economy,'" thereby commencing modernization.⁸⁴ Core aspects of Deng Xiaoping's policy included economic development, maintaining political stability, and the ideology of the Four Cardinal Principles (*Si Xiang Jiben Yuanze*).⁸⁵

In 1992, in the aftermath of the Tiananmen Square tragedy, the Fifth Session of the Fifth NPC affirmed Deng Xiaoping's Four Cardinal Principles,⁸⁶ and China instituted a socialist market economy (*shehuizhuyi*

76. *Id.* at 166.

77. 1982 CONSTITUTION, *supra* note 9, arts. 57–58.

78. See generally *Zhonghua renmin gongheguo cunmin weiyuanhui zuzhi fa* (Organic Law of the Villagers Committees of the People's Republic of China), NPC, Nov. 4, 1998, <http://www.lawinfochina.com/dispecontent.asp?ID=988&DB=1> (last visited Sept. 3, 2004).

79. McCormick, *supra* note 75, at 165–66.

80. Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 16 (2001).

81. McCormick, *supra* note 75, at 166.

82. Yingyi Qian, *The Process of China's Market Transition (1978–98): The Evolutionary, Historical, and Comparative Perspectives*, 156 J. INST. & THEOR. ECON. 151, 153 (2000), available at <http://www-econ.stanford.edu/faculty/workp/swp99012.pdf> (last visited Sept. 28, 2004).

83. Wang Yanzhong, *Chinese Values, Governance, and International Relations: Historical Development and Present Situation*, in *CHANGING VALUES IN ASIA* 13, 29 (Han Sung-Joo ed., 1999).

84. ROBERTS, *supra* note 34, at 299.

85. Wang, *supra* note 83, at 29.

86. See ROBERTS, *supra* note 34, at 298–99 (discussing the government's actions after the

shichang jingji), which signaled the end of price controls and encouraged development of private enterprise.⁸⁷ The NPC added the words, “develop a socialist market economy” to the Preamble of the 1982 Constitution, thereby granting these words constitutional status.⁸⁸ Many hailed the amendment as a formula for the social ills facing the country that, if implemented at the time, could have avoided the tragedy of June 4, 1989.⁸⁹

On November 16, 2003, there was a changing of the guard, and China's new leadership, in ranking order, became: Hu Jintao, Wu Bangguo, Wen Jiabao, Jia Qinglin, Zeng Qinghong, Huang Ju, Wu Guanzheng, Li Changchun, and Luo Gan.⁹⁰ It was of primary concern to the new leadership, as they headed toward the January and March 2003 elections of the Tenth NPC,⁹¹ to avoid the power struggle that led to the Tiananmen Movement.⁹² This concern evidences a transition in ideology and, arguably, a new culture⁹³ that gives priority to socio-economic rights over civil-political rights.⁹⁴

Earlier post-1949 constitutions and the original and un-amended 1982 Constitution strongly contrast with the post-1992 version of the 1982 Constitution and its prescriptions for modernization and economic reform. From 1949 to 1989, there existed a more dynamic relationship between the International Bill of Rights⁹⁵ and those rights afforded by these constitutions.⁹⁶ However, despite Western constitutional language, civil rights that would conform to international norms were rendered nugatory

tragedy).

87. *Id.* at 299.

88. ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONST.] pmb. (1999) [hereinafter 1999 AMENDMENTS].

89. ROBERTS, *supra* note 34, at 298–99 (discussing what possible mitigating effects earlier economic reform may have had).

90. Francesco Sisci, *Hu Steps up but Jiang Stays on Top*, ASIA TIMES ONLINE, Nov. 16, 2002, at <http://www.atimes.com/atimes/China/DK16Ad03.html> (last visited Sept. 28, 2004).

91. China Internet Information Center, *National People's Congress: Chinese People's Political Consultative Conference*, Mar. 9, 2002, at <http://www.china.org.cn/english/archiveen/28406.htm> (last visited Sept. 28, 2004).

92. Sisci, *supra* note 90.

93. SHI HU, *ZHONGGUO DE WENYI FUXING (THE CHINESE RENAISSANCE)* (Paragon Book Reprint Corp. 1963) (1934) 501. As an outgrowth of the May Fourth Movement, “beginning in 1915, a strong intellectual movement was well under way, known as the New Culture Movement.” *Id.*

94. Alice Erh-Soon Tay, *Asian Values' and the Rule of Law*, § III(8) (2000), available at <http://dex1.tsd.unifi.it/jg/en/index.htm?surveys/rol/tay.htm> (last visited Sept. 28, 2004).

95. Universal Declaration of Human Rights, 6.A.Res.217A. (III), U.N. GAOR, 3d. Sess., at 71 U.N. Doc. A/810 (1948), available at <http://www1.umn.edu/humanrts/instree/bl1udr.htm> (last visited Sept. 28, 2004).

96. Ann Kent, *Waiting for Rights: China's Human Rights and China's Constitutions, 1949–1989*, 13 HUM. RTS. Q. 170, 199 (1991).

by constitutionally prescribed duties, acts of legislation, and the CCP.⁹⁷

Since the Tiananmen Square tragedy of 1989, the United States (except for 2003) has annually presented to the UN Human Rights Commission (UNHRC) a resolution in which it condemns China's human rights record.⁹⁸ The U.S. Country Reports on Human Rights Practices of China routinely find that, "[t]he Constitution and laws provide for fundamental human rights; however, these protections often are ignored in practice."⁹⁹ In terms of post-Mao constitutions, it has been the dominance of the CCP that has undermined the democratic potential of China's constitutions.¹⁰⁰

The 1982 Constitution has been amended four times. The first amendment was enacted during the First Session of the Seventh NPC on April 12, 1988.¹⁰¹ It comprised of two articles—the first addressed the private sector of the economy and the second prohibited the unlawful activities in the use and transfer of land.¹⁰² On March 29, 1993, the 1982 Constitution was amended a second time at the First Session of the Eighth NPC.¹⁰³ The amendments modified articles 3–11, most of which addressed economic issues.¹⁰⁴ On March 15, 1999, the Constitution was amended by adding articles 12–17, which also primarily addressed economic issues.¹⁰⁵

The NPC amended the constitution for a fourth time on March 14, 2004.¹⁰⁶ The amendments generally addressed the protection of human rights and private property, and the incorporation of Jiang Zemin's "The Theory of the Three Represents" (*San Ge Daibiao*) into the Preamble.¹⁰⁷ China's amendments address economic reform generally; however, the fourth amendment includes general provisions addressing human rights in article 33(3) and a rule addressing compensation in cases of property

97. *Id.*

98. See *EU Sends Human Rights Warning to China*, *supra* note 24.

99. *Country Reports on Human Rights Practices for 2000*, S. REP. NO. 107-32, at 737–38 (1st Sess. 2001). See also *Country Reports on Human Rights Practices for 2002*, S. REP. NO. 108-30, at 749 (1st Sess. 2003) (describing China's worsening human rights record).

100. NATHAN, *supra* note 61, at 73.

101. ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONST.] (1988) [hereinafter 1988 AMENDMENTS].

102. *Id.* arts. 1–2.

103. ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONST.] (1993) [hereinafter 1993 AMENDMENTS].

104. *Id.* arts. 3–11.

105. 1999 AMENDMENTS, *supra* note 88, arts 14–17.

106. 2004 Amendments, *supra* note 11. See also *Constitutional Progress*, CHINA DAILY, Mar. 22, 2004, at http://www.chinadaily.com.cn/english/doc/2004-03/22/content_316835.htm (last visited Sept. 28, 2004).

107. *Human Rights, Private Property Fixed as Pillars*, *supra* note 14. See also 2004 AMENDMENTS, *supra* note 11.

expropriation in articles 10(3) and 13(3).¹⁰⁸ Amendments are especially noteworthy in terms of Chinese political ideology, if not culture, because “the draft amendment also incorporates the theory of [the] ‘Three Represents’ into the Constitution’s Preamble as one of the guiding principles for the nation, together with the heritage and further development of Marxism, Leninism, Mao Zedong Thought and Deng Xiaoping Theory.”¹⁰⁹

In terms of ideology and culture, the earlier 1999 Amendments are equally noteworthy. Article 13 is a prescription for the rule of law, and adds the following words to article 5: “The People’s Republic of China governs the country according to law and makes it a socialist country ruled by law (*Zhonghua renmin gongheguo shixing yifa zhiguo, jianshe shehuizhuyi fazhi guojia*).”¹¹⁰ In addition, there is an amendment to the preamble, which adds Deng Xiaoping’s theory¹¹¹ and the phrase, “develop a socialist market economy (*fazhan shehuizhuyi shichang jingji*).”¹¹² The inclusion of these words bestowed constitutional import upon both the theory and the words, thereby granting credence to one of Deng Xiaoping’s Four Cardinal Principles (*Si Xiang Jiben Yuanze*), which is, “[t]o ensure people’s democracy, we must strengthen our legal system.”¹¹³

108. 2004 AMENDMENTS, *supra* note 11. The fourth amendment made the following changes: “. . . along the road of building socialism with Chinese characteristics . . . and . . . under the guidance of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory . . .” was changed to “. . . along the road of Chinese-style socialism . . . and . . . under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of ‘Three Represents’ . . .” *Id.*

And “The State may, in the public interest, requisition land for its use in accordance with the law” was changed to “The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned.” *Id.* art. 10, para. 3.

The clauses, “The State protects the right of citizens to own lawfully earned income, savings, houses and other lawful property,” and, “The State protects according to law the right of citizens to inherit private property,” were changed to, “[c]itizens’ lawful private property is inviolable,” and, “The State, in accordance with law, protects the rights of citizens to private property and to its inheritance,” and, “The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned.” *Id.* art. 13, para. 6. The phrase, “[t]he State respects and preserves human rights,” was also added. *Id.* art. 33 para. 8.

109. *Human Rights, Private Property Fixed as Pillars, supra* note 14.

110. 1999 AMENDMENTS, *supra* note 88, art. 13.

111. See Deng Xiaoping, *Uphold the Four Cardinal Principles* (Mar. 30, 1979), in *SELECTED WORKS OF DENG XIAOPING, supra* note 70, at 191.

112. 1999 AMENDMENTS, *supra* note 88, art. 12.

113. Deng Xiaoping, *Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future* (Dec. 13, 1978), in *SELECTED WORKS OF DENG XIAOPING, supra* note 70, at 151, 157. Deng Xiaoping explained further that, “the procuratorial and judicial organs should be strengthened. All this will ensure that there are laws to go by, that they are observed and strictly enforced, and that violators are brought to book.” *Id.* at 158.

Notwithstanding internal and external wars, militarism, political culture, underdevelopment, poverty, flaws in constitutional design, and other forces, ideology has been a primary force in causing Chinese democracy to fail.¹¹⁴ Due to the fact that Chinese institutions are value-laden and possess Confucian characteristics,¹¹⁵ culture may be the only force that equals, if not surpasses, the force of ideology in China. In this respect, the predominance of Confucianism is represented in all traditional schools of Chinese philosophical thought.¹¹⁶ Although they differ, “the major Asian religions and philosophies. . . share similar concepts about the origins and purpose of power.”¹¹⁷ Ideology and culture will influence the growth and direction of Chinese constitutionalism, rule of law, and judicial review because “[e]conomic transition is part of the transition in constitutional rules” and its “[s]peed and the time path of the transition are determined by its driving mechanism.”¹¹⁸ Constitutionalism reflects legal reform and economic development, as well as the forces of ideology and culture.

III. WESTERN JUDICIAL REVIEW AND LIBERTY

A. *History of Western Judicial Review*

Western universalism, especially in terms of U.S. constitutionalism, evolves around interrelated legal concepts of popular sovereignty, separation of powers, and independent judicial review. Rule of law is important for independent judicial review because independent judicial review evolves from the rule of law and exhibits characteristics distinctive of Western legal norms and history.

Many hail the U.S. Supreme Court’s decision in *Marbury vs. Madison*¹¹⁹ as establishing the “leading precedent” of independent judicial review.¹²⁰ However, the notion itself actually predates Chief Justice

114. NATHAN, *supra* note 61, at 63.

115. CH’IEN MU, *TRADITIONAL GOVERNMENT IN IMPERIAL CHINA* 121 (Chu-tu Hsueh & George O. Totten trans., 1982).

116. David A. Funk, *Traditional Chinese Jurisprudence: Justifying Li and Fa*, 17 S.U.L. REV. 1, 45–46 (1990). Chinese schools of philosophical thought include, among others, Confucianism, Neo-Confucianism, Legalism, Taoism, the Ying Yang School, Logicism, and Buddhism. *Id.* at 4.

117. KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960–1995* 33 (1998).

118. Jeffrey Sachs et al., *Economic Reforms and Constitutional Transition*, at 15 (Oct. 2000), at <http://ssrn.com/abstract=254110> (last visited Oct. 20, 2004).

119. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

120. CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 47 (1996) (discussing the role of *Marbury v. Madison* in the evolution of independent judicial review).

Marshall's 1803 decision.¹²¹

It was employed by the *parlements* of the Ancien Régime to justify their refusal to record acts contrary to the basic laws of the kingdom. Abbé Sieyès also invoked it, declaring in 1795 that either the constitution is binding or it is a nullity. The same idea was later proposed by Carré de Malberg, establishing a link between the possibility of review on the one hand and the separation of constituent and constituted powers on the other.¹²²

Notwithstanding the contributions of Thomas Hobbes (1588–1679) to modern philosophy with his materialist philosophy of the seventeenth century,¹²³ including the evolution of his rationality of absolute power into democratic power-sharing,¹²⁴ it was Baron de Montesquieu (1689–1755) who introduced the concept of separation of the powers of government.¹²⁵ However, just as the notion of judicial review preceded Marshall's pronouncement in *Marbury v. Madison*, others, like Machiavelli, preceded Montesquieu. One source finds that Machiavelli "anticipated Montesquieu in his enthusiasm for a mixed government."¹²⁶ In his *Discourses*, Machiavelli wrote, "In fact, when there is combined under the same constitution a prince, nobility, and the power of the people, then these three powers will watch and keep each other reciprocally in check."¹²⁷

In terms of Anglo-American jurisprudence, legal evolution in England¹²⁸ resulted in a divergence between the American notion of constitutional supremacy and England's doctrine of parliamentary sovereignty.¹²⁹ In England, the principle of *The Case of the College Physicians (Dr. Bonham's Case)*¹³⁰ fell into disfavor, but flourished in the

121. *Id.* at 55; Michel Troper, *The Logic of Justification of Judicial Review*, 1 INT'L J. CONST. L. 99, 103 (2003), available at http://www3.oup.co.uk/ijclaw/hdb/Volume_01/Issue_01/pdf/010099.pdf (last visited Sept. 28, 2004).

122. *Id.* (footnotes omitted). See also RAYMOND CARRE DE MALBERG, *LA LOI, EXPRESSION DE LA VOLONTÉ GÉNÉRALE* [LAW, AN EXPRESSION OF THE GENERAL WILL] 126 (Economica eds., 1984) (1931).

123. BRONOWSKI, *supra* note 17, at 196–97.

124. THOMAS HOBBS, *LEVIATHAN* 85 (Michael Oakeshot ed., Oxford 1946) (1651).

125. See CHARLES LOUIS DE SECONDAT, *BARON DE MONTESQUIEU, SPIRIT OF LAWS* (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) (discussing Montesquieu's conception of separation of powers).

126. BRONOWSKI & MAZLISH, *supra* note 17, at 41.

127. NICCOLÓ MACHIAVELLI, *THE DISCOURSES OF NICCOLO MACHIAVELLI* (Dr. W. Clark ed., Leslie J. Walker trans., Routledge & Kegan Paul 1950) (1513–21).

128. Irvine, *supra* note 80, at 12.

129. See *id.* at 3 (describing the difference between constitutional and parliamentary supremacy).

130. *The Case of the College Physician*, 8 Co. Rep. 107a, 114a (C.P. 1610), reprinted in 5 *THE FOUNDER'S CONSTITUTION* 303 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter *Dr.*

American colonies.¹³¹ In *Dr. Bonham's Case*, the famous words of Lord Coke read:

And it appears in our books, that in many cases the common law will controul acts of parliament and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void.¹³²

The Western concept of rule of law eventually established itself as the dominant legal system in America, and culminated in the landmark decision of *Marbury vs. Madison*.¹³³

Western jurisprudence, especially in the United States, stems from several origins: the Enlightenment thinkers,¹³⁴ *Dr. Bonham's Case*,¹³⁵ and *Marbury vs. Madison*.¹³⁶ An important distinguishing feature of Western jurisprudence is that it emanates from philosophical ideals, fear of oppressive government, and the need to limit the exercise of popular democracy.¹³⁷

B. The Dilemma of Rousseau's Liberty

Notwithstanding the contributions of John Locke, Thomas Hobbes, and other Enlightenment thinkers, it is perhaps the thematic discourses of Jean-Jacques Rousseau in *The Social Contract* that best demonstrate the potency of the Enlightenment and its concept of liberty.¹³⁸

Contrary to Rousseau's intention, his concept of liberty has been interpreted as a positive concept of liberty, rather than a negative one.¹³⁹ Positive liberty has been distinguished from negative liberty in that:

Bonham's Case] (all subsequent references will be cited to page numbers within THE FOUNDER'S CONSTITUTION).

131. Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 34, 61-68 (1926-27).

132. *Id.* at 34 (quoting *Dr. Bonham's Case*, *supra* note 129, at 303).

133. *See* *Marbury v. Madison*, 5 U.S. at 137.

134. *See supra* notes 123-26 and accompanying text.

135. *Dr. Bonham's Case*, *supra* note 130; *see generally* Plucknett, *supra* note 131, at 30 (discussing the cases place in the origin of independent judicial review).

136. *Marbury v. Madison*, 5 U.S. at 137.

137. *Id.*

138. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Hilail Gilden ed., The University of Chicago Press 1983) (1762).

139. MCCLELLAND, *supra* note 2, at 264.

Negative liberty is what we mean in ordinary speech by liberty—that is, absence of restraint: I am free to the extent that there are no external hindrances to my pursuit of my own self-chosen ends. These external hindrances can be physical or legal, moral or religious. This is an “end of the day” kind of liberty: you look around the world and you judge yourself free to the extent that physical, legal, moral or religious obstacles prevent you from doing what you happen to want to do. This view of liberty, which we have already called “Individualist”, frankly accepts that liberty will in fact be restricted: living in a world with other men guarantees that. Law, the positively enacted laws of a state, will itself be negative in this view of things.¹⁴⁰

Positive liberty “is a ‘beginning of the day’ kind of liberty because it would actually tell you what to do.”¹⁴¹ “Positive liberty consists of the pursuit of behaviour laid down by a self-chosen rational principle.”¹⁴²

In terms of constitutionalism, Rousseau’s concept of the General Will, perhaps inadvertently, serves as a measure of constitutionalism because of the constraints of positive and negative liberty. While negative liberty is deeply personal, positive liberty “is more easily attainable in a group than individually.”¹⁴³ In terms of positive liberty, freedom (or its pursuit) “becomes a collective venture, something *we* do, not something *I* do.”¹⁴⁴

Strikingly, the resulting interpretations and fate of Rousseau’s *Social Contract* resemble the fate of Thomas Hobbes’ *Leviathan*. As previously mentioned, Hobbes provides a modern foundation for Western jurisprudence by asserting the rationality of absolute power, which, also inadvertently, evolved into the seemingly dissimilar idea of a separation of power.¹⁴⁵

Rousseau’s ideas caused negative liberty to become one of—as opposed to the exclusive-means by which liberty could be conceived. In terms of the modern debates concerning totalitarianism, the issues can be expressed in two ways: First, has modern society evolved into a state requiring an election between negative (individual) liberty and positive (collective) liberty? Second, how much negative (individual) liberty must

140. *Id.* at 264–65; see also ISIAH BERLIN, TWO CONCEPTS OF LIBERTY: AN INAUGURAL LECTURE DELIVERED BEFORE THE UNIVERSITY OF OXFORD ON 31 OCTOBER 1958 7–16 (1958).

141. MCCLELLAND, *supra* note 2, at 264.

142. *Id.* at 265; see also Berlin, *supra* note 140, at 16–19.

143. MCCLELLAND, *supra* note 2, at 265.

144. *Id.*

145. HOBBS, *supra* note 124, at 85.

be surrendered in the pursuit of positive (collective) goals?¹⁴⁶

The negative-positive liberty dichotomy provides a measurement for gauging constitutional institutions, especially in terms of Western constitutionalism. Thus, a constitution may be measured in terms of promoting and safeguarding negative liberty, rather than positive liberty.

IV. CHINESE JURISPRUDENCE AND RULE OF LAW (*FAZHI*)

A. *Confucianism and Legalism*

Rule of law “is neither a rule nor a law”; instead, “it is now generally understood as a doctrine of political morality which concentrates on the role of law in securing the correct balance of rights and powers between individuals and the state in free and civilised societies.”¹⁴⁷ The correct balance is definable in terms of Western taxonomies: law may be defined in terms of either rule by man or rule by law; law may be either policy-driven or instrumental; and law may employ thin or thick theories of the rule of law.¹⁴⁸ Western authority employs the latter in each pairing to gauge China’s progress in adopting a Western style of rule of law as opposed to a Sinic-centered, or culture-specific rule of law.¹⁴⁹

Any genuine consideration of constitutionalism, rule of law, and judicial review must consider China’s historical particularities. A constitution’s efficacy is contingent upon it having constitutional provisions that reflect “not only sound political theory but also the values and historical experiences of the people whom the constitution will govern.”¹⁵⁰ It is a matter of “[a]uslegungsmaxime, general rules of interpretation . . . [that] constitutional values contribute to a proper understanding of constitutional provisions.”¹⁵¹ In addition, there is a tendency for third world countries to copy constitutional structures, regardless of their particular circumstances, a tendency that has resulted in

146. MCCLELLAND, *supra* note 2, at 265.

147. ALEX CARROLL, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 40 (2d ed. 2002).

148. “Everyone agrees that there is no real rule of law in China But we have a great deal of difficulty explaining why.” Michael W. Dowdle, *Heretical Laments: China and the Fallacies of “Rule of Law,”* 11 *CULTURAL DYNAMICS* 287 (1999), at <http://www.sagepub.co.uk/PDF/JOURNALS/FULLTEXT/a010175.pdf> (last visited Nov. 18, 2004).

149. *Id.*

150. Ricard A. Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience*, 24 *N.C. J. INT’L. L. & COM. REG.* 263, 274 (1999).

151. Hiroshi Nishihara, *The Significance of Constitutional Values* 2 (2001), at <http://www.puk.ac.za/lawper/2001-1/nisiharadoc.doc> (last visited Sept. 28, 2004).

the failure of several constitutions in the Third World.¹⁵² Culture-specific constitutions are a discernible trend in the countries created after the Cold War.¹⁵³ For China, historical particularities that should be considered include its distinctive jurisprudence, which emanates from its ontological base in tradition.

In China, rule by law (i.e. written law) dates back to its early dynastic history. Chinese historians attribute one of the earliest collections of laws, *Criminal Law of Yu (Yu Xing)*, to the Xia Dynasty (*Xia Chao*) (2205–1806 B.C.), the first dynasty described in Chinese historical records.¹⁵⁴ The Shang Dynasty (*Shang Chao*) (1600–1046 B.C.), which followed the Xia Dynasty, referred to its collection as the “Tang Criminal Code” (*Tang Xing*).¹⁵⁵ However, the first written systematic feudal code, *Law and Scripture*¹⁵⁶ or *The Book of Law*,¹⁵⁷ was authored by an early Legalist Likui (455–395 B.C.)¹⁵⁸ during the Spring and Autumn Period (*Chunqiu Shidai*) (722–481 B.C.) and the Warring States Period (*Zhanguo Shidai*) (403–221 B.C.).¹⁵⁹ To develop a feudal economy and protect the landlord class, Li Kui abolished the hereditary status of the old nobility and instead enforced measures rewarding and punishing each according to what he personally deserved.¹⁶⁰ It was in this sense that Li Kui stressed nothing is more important to the reign of a king “than the prevention of robbers.”¹⁶¹

The conception of rule with law reached its zenith during the Tang Dynasty (*Tang Chao*) (618–907 A.D.) in the writings, *Commentary on Tang's Law (Tang lv Shuyi)* and *Tang's Six Canons (Liudian)*.¹⁶² The *Commentary on Tang's Law* is hailed as “the earliest extant complete law code in China,” whereas, *Tang's Six Canons* provided “the earliest extant perfect administrative law code.”¹⁶³ These early writings evidence a

152. Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT'L & COMP. L. 155, 158 (1993) (providing examples of constitution “transplants,” and their results).

153. John S. Dryzek, *Constitutionalism and its Alternatives*, (Prepared for presentation at the Social and Political Theory Program Workshop on “Democratic Theory: The Canberra Papers,” Mar. 27, 2002), available at http://socopol.anu.edu.au/pdf-files/democracy_dryzek.pdf (last visited Sept. 28, 2004).

154. ZHAOWU, *supra* note 49, at 13.

155. *Id.*

156. JIANG, *supra* note 8, at 12–13 (quoting XIAN DAI MIN FA XUE (MODERN CIVIL LAW STUDY) 42 (1995)).

157. ZHAOWU, *supra* note 49, at 73.

158. *Id.*

159. JIANG, *supra* note 8, at 12.

160. *Id.*

161. *Id.* at 13.

162. *Id.* at 11.

163. *Id.* at 12 (quoting ZHONGGUO ZHENGZHI SIXIANG SHI, SUI TANG SONG YUEN MING QING

Chinese consciousness about law and its place in Chinese society. These written laws caused distinctive Chinese perspectives about law to develop,¹⁶⁴ and culminated in a body of philosophical literature known as traditional Chinese jurisprudence.¹⁶⁵

“Traditional Chinese jurisprudence . . . [is] extracted from the very large general philosophical literature representing various schools of traditional Chinese thought.¹⁶⁶ Primary sources of traditional Chinese jurisprudence include the writings and legal philosophies of the Confucianists and the Legalists.¹⁶⁷ While there were other schools of traditional Chinese philosophy, Confucianism and Legalism are the dominant legal philosophies.¹⁶⁸ An on-going debate between Confucianism and Legalism is a discourse directed to the clash between rule by man (*fa ren*) and rule by law (*fa li*).¹⁶⁹ Confucianism infuses law with moral qualities, while Legalism, as an antithesis, is a harbor for positive law (*li*).¹⁷⁰

“Traditional Chinese legal philosophy . . . begins with Confucius.”¹⁷¹ The *Analects of Confucius* are the principle source of Confucianism.¹⁷² The gist of Confucianism, the orthodoxy of the traditional Chinese state, is the notion that human society expresses itself through a finite number of hierarchical relationships.¹⁷³ The type of relationship in question imposed certain duties on, and granted certain rights to, respective individuals in such relationships.¹⁷⁴ These pre-determined relationships were reciprocal, if not mutual.¹⁷⁵ That properly defined relationships result in desired behavior on the part of both the individual and society is the essence of Confucianism.¹⁷⁶

JUAN (HISTORY OF CHINESE POLITICS) (Sui, Tang, Song, Ming, Qing Periods) 59 (Liv Zehua ed. 1996)).

164. Funk, *supra* note 116, at 2.

165. *Id.*

166. *Id.*

167. *Id.* at 2–4.

168. *Id.* Other philosophies include “the Taoists, Ying Yang school, Logicians, Chinese Buddhists, . . . the Sung dynasty (960–1279 AD), and Ming dynasty (1368–1644 A.D.), [and the] Neo-Confucianists.” *Id.* at 4.

169. *Id.*

170. *Id.* at 7.

171. *Id.* at 13.

172. Xin Guanjie, *Foreword* to ANALECTS OF CONFUCIUS 4 (Cai Xiqin, trans., 1994).

173. For a summary of Confucianism and its place in traditional Chinese jurisprudence, see Funk, *supra* note 116.

174. *Id.* at 7.

175. *Id.*

176. *Id.*

In contrast, Legalism embodies a radical reliance on centralized power and emphasizes Machiavellian principles for controlling and maximizing power.¹⁷⁷ Legalism relies on harsh laws, at least initially, to promote correct behavior.¹⁷⁸ Legalism became popular during the Spring and Autumn Period (*Chunqiu Shidai*) (722–481 B.C.) and the Warring States Period (*Zhanguo Shidai*) (403–221 B.C.), during which times the view was espoused that a monarch should rule according to law, as opposed to virtue.¹⁷⁹

Traditional Chinese philosophy, including the ethos of Confucianism, Daoism, and Legalism, continues to exert its influence and transform the practical realities of modern China. “Contemporary Chinese political figures are still influenced by those traditions, even though communist ideology plays an important role in shaping their worldview and guiding their revolutionary practice.”¹⁸⁰

B. China's Ontological Base in Tradition

It is difficult to discuss Chinese constitutionalism without considering the dynamics of culture. For China, culture flows from its ontological base in tradition, Confucianism.¹⁸¹ Confucian themes predominate all traditional schools of Chinese philosophical thought in that, while different in some respects, “the major Asian religions and philosophies . . . share similar concepts about the origins and purpose of power.”¹⁸² The persistence and preservation of Confucianism is a foundation for constitutional values that emanate from an ontological base in tradition.¹⁸³

The effects of Confucian values on Chinese law are undoubted and far reaching.¹⁸⁴ However, the *Analects of Confucius*, the principle source of Confucianism, contains differing interpretations. Some identify Confucianism with statism,¹⁸⁵ while others argue Confucianism is

177. *Id.* at 28; see also NICOLO MACHIAVELLI, *THE PRINCE* (Luigi Ricci trans., The New American Library of World Literature 1952) (1515).

178. Funk, *supra* note 116, at 28.

179. JIANG, *supra* note 8, at 12.

180. George Xuezhong Guo, *Guanxi in Chinese Politics 1* (2000) (unpublished dissertation, University of Virginia), at http://millercenter.virginia.edu/pubs/dissertation_chapters/2001/guo%20Chapter.pdf (last visited Sept. 28, 2004).

181. Funk, *supra* note 116, at 45–46.

182. PISTOR & WELLONS, *supra* note 117, at 33.

183. *Id.*

184. See, e.g., Teema Ruskola, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 *YALE L.J.* 2531, 2564 (1994).

185. See, e.g., Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 *BERKELEY J. INT'L*

compatible with, and perhaps enhances, Western notions of human rights.¹⁸⁶

In China, rational institutions (governmental organizations representing the public interest) are associated with Confucianism.¹⁸⁷ The term “institution,” unlike in the West, enjoys an intrinsic Confucian value. In the West, “any established practice, law, or custom, etc., which is a material and persistent element in the life and culture of an organized social group,” is considered to be an institution.¹⁸⁸ However, the Chinese equivalent to the term institution, *chih-tu*, is not as “broad or ‘value-free’” as its English counterpart.¹⁸⁹ *Chih-tu* refers only to an “institution” that is “desirable and possesses an intrinsic value, the English equivalent would be a more elevated and value-laden ‘rational institution.’”¹⁹⁰ Chinese institutions that are created to serve the public interest possess this moral characteristic.¹⁹¹ China’s ontological base in tradition and its Confucian values predict these foundational morals for institutions. As a result, institutions, such as the polity, socio-economics, and law, reflect Confucian values.¹⁹² From the consideration of personal relationships (*guanxi*) to the inner workings of China’s polity, in modern China, Confucianism as a vestige of antiquity is persistent and systemic.¹⁹³ Indeed, the CCP has used the nomenclature of Asian values to defend its giving priority to socio-economic rights over civil-political rights.¹⁹⁴

A problem with Confucianism in this context is that it is often employed for non-Confucian ends. The CCP introduced the world to a

L. 161 (2001).

186. See, e.g., WM. THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1999).

187. *Ch’ien*, *supra* note 115, at 121.

‘[R]ational institutions’ flourished during the Western Han period (206 B.C.–A.D. 8), while most of the political systems in the Eastern Han times (A.D. 25–220) were motivated by the self-interest of Emperor Kuang-wu (r. 25–57). The T’ang dynasty (618–907) was commendable in that a number of ‘rational institutions’ were established. The succeeding Sung dynasty (907–1279), however, was quite content to rule by ‘maneuvers’ of various types; and the Ming dynasty (1368–1644) was even worse, many of her political systems can only be regarded as expedient operations, lacking the intrinsic value of ‘rational institutions.’ The Ch’ing dynasty (1644–1911) was the worst.

Id. at 121–22.

188. *Id.* at 121.

189. *Id.*

190. *Id.*

191. *Id.*

192. DE BARY, *supra* note 186.

193. See Guo, *supra* note 180, at 1.

194. See Xiaorong Li, *A Question of Priorities: Human Rights, Development, and “Asian Values,”* 18 PHIL. & PUB. POL’Y 7 (1998).

variant of traditional Asian political rhetoric¹⁹⁵ by characterizing its priorities as a matter of traditional Asian values.¹⁹⁶ Social stability is a pre-eminent concern of the CCP, and because, according to them, nation-states have differing levels of stability,¹⁹⁷ there cannot be a universal standard of human rights applicable to all nation-states.¹⁹⁸ Within this context, economic reform is first and foremost; it is more important than the rights of individual citizens.¹⁹⁹

Nonetheless, it is difficult to deny that Confucianism is persistent in modern China, especially in terms of a distinctive Chinese ontology or ontological base in tradition.

Foucault calls it “history of the present” . . . in some others “ontology of the present” . . . or even “critical ontology of ourselves” On the other hand, this kind of critical understanding does not bear a merely theoretical interest, it also carries within itself practical concerns: through the understanding of the limitation of the present epoch, it paves the way to getting out of its impasse and helps to search for new possibilities for the development of humanity. Foucault even says that critique understood in this sense is the critical attitude itself: “it has to be conceived as an attitude, an *ethos*, a philosophical life in which the critique of what we are is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them.”²⁰⁰

Confucianism, tradition, and Asian values in general constitute China’s “history of the present.” It is through China’s distinctive ontological base in tradition that it will potentially make progress in the area of political and economic development, and in the areas of constitutionalism, rule of law, and judicial review.

Confucianism and Asian values serve as harbingers of foundational or societal values, encompassing the forces, if not the values, of China’s

195. See Seth R. Harris, *Asian Human Rights: Forming a Regional Covenant*, ASIAN-PAC. & POL’Y J. 17:10 (2000), available at <http://www.hawaii.edu/aplpj/pdfs/17-seth.pdf> (last visited Sept. 28, 2004).

196. See Xiaorang, *supra* note 194, at 7.

197. See Harris, *supra* note 195, at 13–14.

198. See *id.*

199. See Tay, *supra* note 94, § 1(2).

200. Kwok-ying Lau, *Jan Patočka: Critical Consciousness and Non-Euro-Centric Philosopher of the Phenomenological Movement*, 9–10 (2002), available at <http://www.o-p-o.net/essays/LauArticle.pdf> (last visited Sept. 28, 2004) (quoting Michael Foucault, *Qu’est-ce que les Lumières? [What is Enlightenment]* (1978), reprinted in THE FOUCAULT READER 50 (Paul Rabinow ed., 1984)).

political, socio-economic, and legal institutions. These foundational values will likewise translate into a genuine indigenous ethos for Chinese constitutionalism.

V. CHINA'S *MARBURY VS. MADISON*

A. *Chinese Judicial Independence*

Zui gao renmin fayuan guanyu yi qinfan xingming quan de shouduan qinfan xianfa baohu de gongmin shou jiaoyu de jiben quanli shi fou ying chengdan minshi zeren de pifu (The Official Reply of the Supreme People's Court On Whether the Civil Liabilities Shall Be Borne for the Infringement Upon a Citizens Basic Right of Receiving Education Which is Under the Protection of the Constitution by Means of Infringing Upon His/Her Right of Personal Name), was adopted by the Judicial Committee of the Supreme People's Court on June 28, 2001. It was issued on July 24, 2001 and came into effect on August 13, 2001 (the "Reply").²⁰¹ The Supreme People's Court's Reply included this language:

Through investigation of the facts in this case, We are of the opinion that Chen Xiaoqi and the others have by means of infringing upon the right of personal name infringed upon Qi Yuling's basic right of receiving education, which shall be enjoyed by her in accordance with the Constitution, and have caused specific losses, therefore, they shall bear the corresponding civil liabilities.²⁰²

Huang Songyou, Chief Judge of the First Civil Division of the Supreme People's Court, hailed the Reply as tantamount to Western style of judicial review akin to Western notions of constitutionalism and justiciability.²⁰³

Judge Huang argued that the Reply establishes a precedent for the justiciability of the Constitution because, like other laws and regulations, the Constitution may now be the subject of judicial proceedings, and may serve as a legal basis for judgment.²⁰⁴ Judge Huang sees far-reaching implications arising from this Reply. First, the Reply establishes a

201. *Official Reply of the Supreme People's Court on Whether the Civil Liabilities Shall Be Borne For the Infringement upon a Citizen's Basic Right of Receiving Education*, July 24, 2001, available at <http://www.lawinfochina.com/dispecontent.asp?ID=1954&DB=1> [hereinafter *July 24, 2001 Reply*].

202. *Id.*

203. Songyou Huang (Chief Judge of the First Civil Division of the Supreme People's Court), *Making the Constitution Justiciable and its Significance*, PEOPLE'S COURT DAILY, Aug. 13, 2001.

204. *Id.*

precedent for courts to use to protect the fundamental rights of citizens.²⁰⁵ It is in this distinction that Judge Huang argues that the Reply constitutes a landmark decision in the Chinese legal system.²⁰⁶ The fundamental rights of citizens, if so stipulated in the Constitution, are now protected, irrespective of a conversion of such rights under ordinary legal norms.²⁰⁷ Second, Judge Huang argues that the Reply implicitly creates a precedent for justiciability of the Constitution.²⁰⁸ Third, the Court uses civil law remedies, rather than criminal or administrative law remedies to redress violations of fundamental rights.²⁰⁹

B. Progeny of China's Marbury vs. Madison

Contrary to the contentions of Judge Huang, these cases are rare, typically involve disputes of nominal societal interests, and rarely challenge the government's actions. A litmus test of independent judicial review is whether there is judicial activism or judicial interpretations that call for social engineering.²¹⁰ Given the prevailing structures of democratic centralism and socialist democracy, when the CCP makes a policy decision for China, "the NPC is unable to block implementation of its decision, even if the decision proves to be a wrong one."²¹¹ Thus, the NPC does not have the power to challenge either the CCP's legislative or administrative decisions.²¹²

The situation is further exacerbated by the lack of popular sovereignty in China. Chinese citizens do not elect candidates to the NPC or SCNPC.²¹³ Consequently, NPC Deputies and SCNPC committee members retain their legislative seats without challenge from the people.²¹⁴ Deputies to the NPC are indirectly elected.²¹⁵ Contrary to Western notions of sovereignty, the power to elect and remove deputies is retained by the CCP.

The prospect that China's constitution will evolve toward a more independent judiciary is tenuous for additional reasons. The 1982

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. BLACK'S LAW DICTIONARY 847 (6th ed. 1990).

211. JIANG, *supra* note 8, 559.

212. *Id.*

213. *Id.* at 559–60.

214. *Id.*

215. *Id.*

Constitution prohibits an expansion of the judiciary's powers of review.²¹⁶ The Supreme People's Court has a power of judicial interpretation (*sifa jieshi quanli*), but it is limited to interpreting Chinese laws and regulations arising in actual cases.²¹⁷ This is not the same power as that constitutionally vested with the SCNPC to interpret the Constitution and laws of China (*lifa jieshi quanli*).²¹⁸ This alignment of governmental power grants the NPC and SCNPC greater power over the Supreme People's Court. Article 127 of the 1982 Constitution provides, "The Supreme People's Court is responsible to the National People's Congress and its Standing Committee."²¹⁹ Expanding Chinese courts' power of judicial review to include the power to interpret the Constitution and laws of China (*lifa jieshi quanli*) directly contravenes articles 67(1) and 67(4) of the 1982 Constitution, which constitutionally vest that power in the SCNPC.²²⁰ Moreover, the NPC, the highest organ of state power, acts through its standing committee, the SCNPC.²²¹ Both the NPC and SCNPC exercise the state's legislative power.²²² Given that the Supreme People's Court is responsible to both the NPC and SCNPC, an expansion of the judicial review powers of China's judiciary is improbable, perhaps unconstitutional.²²³ Granting the judiciary that power would disrupt the fundamental structure of China's present government, which clearly promotes the supremacy of the legislature, if not of the CCP itself. Indeed, "[d]isruption of the socialist system by any organization or individual is prohibited."²²⁴ This alignment of constitutional powers is further sanctioned by the People's Republic of China Legislation Law (*Lifa Fa*), which reaffirmed the legal hierarchy of the constitution, laws, administrative regulations, and orders, at both national and local levels.²²⁵

Further complicating the situation is the conflict of constitutional ethos, or values, that emanate from the respective philosophies of the East (Confucianism) and West (Enlightenment). Despite a persistent, though one-sided, flow of cultural influences from West to Sinic, such irredentism inevitably confronts a systemic ontological base in traditional

216. 1982 CONSTITUTION, *supra* note 9, art. 67.

217. *Id.*

218. *Id.* arts. 67(1), 67(4).

219. *Id.* art. 128.

220. *Id.* arts. 67(1), 67(4).

221. *Id.* art. 57.

222. *Id.* art. 58.

223. *Id.* art. 128.

224. *Id.* art. 1.

225. *Zhonghua renmin gongheguo lifa fa* (The Legislation Law of the People's Republic of China), President of the People's Republic of China, Mar. 15, 2000 [hereinafter Legislation Law].

Confucianism. Thus, it becomes difficult to envision China's polity adopting a constitutional regime reflective of Western ethos, in particular the notion of negative liberty. The Western notion of safeguarding liberty stems from the philosophies of the Enlightenment thinkers, from which the principles of separation of powers, popular sovereignty, and independent judicial review emanate.²²⁶ Moreover, the latter Western philosophies are responsible for the development of the legal concept of natural law that serves as a rationale for a number of U.S. Supreme Court decisions, such as *Lochner vs. New York*²²⁷ and *Griswold vs. Connecticut*.²²⁸

Neither the U.S. Constitution nor China's 1982 Constitution explicitly provide for independent judicial review. However, it was not the written document itself that served as the foundation from which independent judicial review evolved. There is a difference between a constitution as a written document, and the principles of constitutionalism.²²⁹ As previously mentioned, it is a matter of "*auslegungsmaxime*, [the] general rules of interpretation [or] constitutional values [that] contribute to [a] proper understanding of constitutional provisions."²³⁰ In the West, and especially in the United States, the legal concept of natural law served as the pivotal force in the evolution of judicial review, from the *Dr. Bonham's Case* to *Marbury vs. Madison*. Natural rights, along with other forces, further developed the concepts of separation of powers and popular sovereignty. It is for these reasons that the concepts of the separation of powers, popular sovereignty, and independent judicial review are requisite to any constitutional structure that safeguards negative liberty.

Defining liberty in terms of socialist democracy presents an obstacle to negative liberty and to China's relative constitutionalism. Chinese constitutionalism is best described as protecting social rights, rather than liberty.²³¹ Indeed, assuming there is a liberty interest in Chinese constitutionalism, it is a positive rather than a negative liberty.²³² These differing perceptions of liberty reflect the cultural divergences between the Sinic and West. China and its foundational values (Confucianism) oppose the adoption of a Western variety of liberty focused on the individual. Given the persistent and systemic ontological base in tradition (Confucianism), as recognized in both China at the turn of the nineteenth

226. See *supra* notes 124–45 and accompanying text.

227. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

228. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

229. ANDRÁS SAJÓ, *LIMITING GOVERNMENT* 2, 9–16 (1999).

230. Nishihara, *supra* note 151, at 2.

231. See *supra* Part IV.

232. *Id.*

century and in modern China, the continuing reality may well be that the general population still regards the monarchy to be a part of the “natural political order.”²³³ Furthermore, as previously mentioned, Chinese society was still suffused with hierarchical relationships and patriarchal values where authority was traditionally vested in the state not the people.²³⁴

Finally, there is the issue of social rights. Contrary to Judge Huang’s enunciation of a more justiciable 1982 Constitution, the July 24, 2001 Reply is the constitutionalization of social rights, rather than individual liberty. Moreover, and most important, the July 24, 2001 Reply is not an express or implied grant of the power of constitutional review.²³⁵

China’s democratic centralism and socialist democracy lack separation of powers and constitutional review. This absence challenges the enforceability and effectiveness of constitutional provisions, such as the 2004 Amendments, which supposedly address liberty, human rights, and property rights. Unlike Western constitutions, China’s constitutional provisions do not necessarily vest Chinese citizens with a cognizable legal right of action. In order for a provision in the 1982 Constitution to be enforceable in a court of law, the provision must first be reduced to an ordinary legal norm through the judicial process of converting fundamental rights into ordinary laws and regulations.²³⁶ Only then does a person’s cognizable legal right vest.²³⁷ A problem with Chinese legal norms is that, given China’s governmental structure and the *de facto* power held by the CCP, safeguarding liberty becomes an issue of safeguarding social rights. And the justiciability of social rights provisions in the 1982 Constitution become, ultimately, contingent upon China’s CCP, rather than the judiciary.

VI. ECONOMIC AND NON-ECONOMIC LIBERTY

A. Economic Equality Norms and Judicial Review

The growth and evolution of Chinese constitutionalism and, in particular, judicial review is contingent on several forces, ranging from the CCP’s institutions to China’s reform obligations. These factors encompass

233. Sullivan, *supra* note 52, at 21.

234. *Id.*

235. See Songyou, *supra* note 203; July 24, 2001 Reply, *supra* note 201.

236. See Songyou, *supra* note 203; July 24, 2001 Reply, *supra* note 201.

237. Songyou, *supra* note 203.

both domestic needs and obligations set forth in the Protocol on Accession to the WTO.²³⁸

Given China's ontological base in traditional Confucianism, the Protocol on Accession is as an important external force compelling both a further evolution of judicial review and a directional path for development. For China, the Protocol on Accession, an obligation of WTO membership,²³⁹ requires broad systemic reforms in the areas of transparency (*toumingdu*),²⁴⁰ independent judicial review (*duli sifa shencha*),²⁴¹ and fairness (*gongping*).²⁴²

However, there are problems with WTO rules serving as an external force for independent judicial review. First, China's constitutional values are genuinely indigenous and emanate from China's ontological base in tradition (Confucianism). Second, the WTO is an international organization dominated by developed countries and economies, rather than by developing countries and economies, such as China. This problem is demonstrated by the recent failure of the September 2003 Ministerial Conference due to a division between developed and developing countries.²⁴³ Third, WTO rules prescribing judicial review are in dire need of reform. Currently, the rules only require "judicial review," a notion that may include traditional judicial review rather than independent judicial review.²⁴⁴

Nonetheless, Chinese constitutionalism must evolve into either a more discursive model of independent judicial review or an alternative model of constitutional review. Legal reforms are needed to sustain economic growth and prosperity. The CCP, the Asian Development Bank,²⁴⁵ and other international bodies, such as the WTO,²⁴⁶ recognize this need to establish sound legal mechanisms.

238. See generally Protocol on Accession, *supra* note 25.

239. WTO Agreement, *supra* note 25.

240. Protocol on Accession, *supra* note 25, art. 2(c).

241. *Id.* art. 2(d); see also General Agreement on Tariffs and Trade, art. 13, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/19-adp.doc (last visited Sept. 28, 2004).

242. Protocol on Accession, *supra* note 25, arts. 6, 16.

243. WTO News, *Summary of September 14, 2003, Day 4: Conference Ends Without Consensus*, available at http://www.wto.org/english/thewto_e/minis_e/min03_14sept_e.htm (last visited Sept. 24, 2004).

244. Protocol on Accession, *supra* note 25, arts. 2(A)3, 2(D).

245. ASIAN DEVELOPMENT BANK, ASIAN DEVELOPMENT BANK PUBLICATION 1-4 (1999), available at http://www.adb.org/Documents/Others/Law_ADB/1&d_1999.pdf (last visited Sept. 28, 2004).

246. Wang Baoshu, *China's Accession to the WTO and the Building of a Socialist Market Economic Legal System*, in CHINA: ACCESSION TO THE WTO AND ECONOMIC REFORM, 338 (Wang

China's model of judicial review and its evolutionary path will affect both the economic and the non-economic sectors of China, and its effects will extend to the global economy and to issues of international law and politics. In terms of globalization, on-going Chinese legal reform will affect, albeit indirectly, issues of international trade and finance, encompassing competitive policy and laws, intellectual property, issues of anti-dumping and anti-subsidies, and other trade-related issues.

In terms of judicial review and international trade, the WTO rules achieved a small measure of success following the Supreme People's Court's December 2002 announcement concerning provisions for the handling of administrative decisions involving anti-dumping and anti-subsidy disputes.²⁴⁷ These provisions address issues of production of evidence,²⁴⁸ burden of proof,²⁴⁹ jurisdiction,²⁵⁰ and other procedural safeguards.²⁵¹ In conjunction with article 53 of China's Anti-Dumping Regulation²⁵² and article 52 of China's Anti-Subsidy Regulation,²⁵³ the Supreme People's Court rules propose to provide foreign exporters with a right of judicial review. However, the efficacy of these provisions, while in compliance with WTO standards, is nonetheless contingent on the CCP, trade and regional administration, departmental interests, and local protectionism, rather than China's constitution, rule of law, and judicial review.²⁵⁴

Mengku ed., 2002). China's major legislative goals are expressed threefold: "Continuing to revise laws that are not in conformity with China's obligations under the WTO rules; revising laws that are not conducive to enhancing the competitive power of Chinese enterprises in the international market; and improving laws offering protection to domestic enterprises and ensuring industrial safety." *Id.* For China, "a well-established socialist market legal system is naturally part of a well-established socialist market economic system." *Id.*

247. *Zhonghua renmin gongheguo zuigao renmin fayuan gonggao (Zui Gao Renmin Fayuan Guanyu Chengli Fanqingxiao Xingzheng Anjian Yingyong Falv Ruogan Wenti De Guiding)* [Provisions of the Supreme People's Court on Several Issues Concerning the Application of Anti-Dumping Administrative Cases], The Supreme People's Court, Nov. 2, 2002, <http://www.lawinfochina.com/dispecontent.asp?ID=2559&DB=1> (last visited Sept. 7, 2004).

248. *Id.* arts. 8, 9.

249. *Id.* art. 7.

250. *Id.* art. 5.

251. *Id.*

252. *Zhonghua renmin gongheguo fanqingxiao tiaoli* [Anti-Dumping Regulation of the People's Republic of China], State Council of China, Nov. 26, 2001, art. 53, <http://www.lawinfochina.com/dispecontent.asp?ID=2121&DB=1> (last visited Sept. 7, 2004) (2001).

253. *Zhonghua renmin gongheguo fabutie tiaoli* [Countervailing Regulation of the People's Republic of China], State Council of China, Nov. 26, 2001, art. 52, <http://www.lawinfochina.com/dispecontent.asp?ID=2124&DB=1> (last visited Sept. 7, 2004).

254. Wang, *supra* note 246, at 381.

The problem with the Chinese judiciary's ability to safeguard liberty and the norms of "economic equality" prescribed by WTO standards²⁵⁵ arises from the fact that liberty in terms of Western constitutionalism constitutes negative liberty, as opposed to positive liberty. Thus, independent judicial review addresses issues of substantive due process, rather than procedural due process. Substantive due process constitutes individual liberty, and, most important, poses a threat to the CCP, because it address both the government's power and the protection of fundamental rights,²⁵⁶ as opposed to the procedural due process safeguard of a right to be heard.²⁵⁷

B. Liberty and Independent Judicial Review

In terms of both economic and non-economic issues, the effectiveness of China's model of judicial review will always be contingent on the Chinese political system, rather than its constitution, rule of law, or system of judicial review. A problem for Chinese constitutionalism is the *de facto* power of the CCP. Since 1949, the CCP has prevailed in all confrontations within the ambit of its political, legal, and constitutional authority. A case in point is Hong Kong's right of abode case, *Ng Siu Tung v. Director of Immigrations*.²⁵⁸ The Court of Final Appeal of Hong Kong attempted to exercise an assumed power of independent judicial review, but afterwards, on June 26th, 1999, it had to yield to the superior authority of the SCNPC.²⁵⁹ The CCP will always prevail in such confrontations because of the realities of Chinese constitutionalism.

In the non-economic sector of China, one can occasionally witness the successful pleading of rights in a court of law based upon supposed

255. JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT & WTO—INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 57–58 (2002). The non-discrimination norm of *most-favoured-nations* treatment requires a country "to give equal treatment to economic transactions originating in, or destined for, other countries entitled to the benefit of the norm." *Id.* at 57 (emphasis in original).

256. *See Richardson v. Belcher*, 404 U.S. 78 (1971).

257. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Procedural due process entails "an opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

258. *Ng Siu Tung v. Director of Immigrations*, Court of Final Appeal of the Hong Kong Special Administrative Region, FACV Nos. 1–3 of 2001 (2002), http://www.hklii.org/hk/eng_jud/HKCFJA/2002/20020110_FACV000001_2001.html (last visited Sept. 28, 2004).

259. *The Interpretation by the SCNPC of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong S.A.R. of the People's Republic of China*, The Standing Committee of the Ninth National People's Congress at its Tenth Session (June 26, 1999), available at <http://citizensparty.org/laws/scnpc.html> (last visited Sept. 28, 2004).

constitutional norms, as evidenced by Judge Huang's article²⁶⁰ and the July 24th, 2001 Reply.²⁶¹ However, it is equally true that there are cases that shock the conscience of justice. An illustrative and recent case is what is being referred to as the *BMW case*.²⁶²

On October 16th, 2003, Su Xiuwen, while driving a new BMW, killed Liu Zhongxia, in Harbin, Heilongjiang Province, China.²⁶³ Prior to the accident,

Su admitted cursing Dai and hitting him with her purse after his tractor scraped her BMW. She said she was upset by the accident and thought the car was in reverse when it sped into the crowd. She also said she had learned to drive only recently and could not find the brakes.²⁶⁴

Dai Yiquan, 46, the widower of the deceased Liu Zhongxie, is a poor farmer.²⁶⁵

Following the case, many people were suspicious:

Newspaper reports noted that police never opened a manslaughter investigation, that no witnesses were called to testify in Su's trial and that statements taken from them were not read in court. Police would not say whether technicians examined Su's car or whether investigators tried to verify her claims of limited driving experience.²⁶⁶

The BMW, which struck Liu Zhongxia and caused her death, also injured several bystanders before crashing into a tree.²⁶⁷ On December 20, 2003, a local court in Heilongjiang Province, after ruling the case a "traffic disturbance," sentenced Su to a suspended sentence.²⁶⁸

The decision in the *BMW case* displays many of the problems of the Chinese legal system. First, the case represents the divide between the rich and the poor in China. Su Xiuwen was married to Guan Mingbo, a wealthy businessman;²⁶⁹ meanwhile, Dai Yiquan and his deceased wife, Liu

260. Songyou, *supra* note 203.

261. *July 24, 2001 Reply*, *supra* note 201.

262. Philip P. Pan, *The Unquiet Death of a Chinese Peasant—Lenient Treatment for Driver in 'BMW Case' Ignites Media Frenzy, Wide Discussion of Wealth and Justice*, WASH. POST, Jan. 16, 2004, at A14.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

Zhongxia, were part of the poor strata of Chinese society. Second, the public was under the impression that little, if any, investigation was undertaken in what should have been, at a minimum, a case of manslaughter.²⁷⁰ Third, assuming the guilt of Su, the resulting verdict of a suspended sentence shocks the conscience of justice.²⁷¹

However, and most important, the case of Su Xiuwen speaks to a problem of justice, be it civil or criminal, in Chinese society, especially in terms of independent judicial review. Yang Xiaohuai, a defense lawyer in Beijing, said the “basic problem was the lack of an independent judiciary, which undermines trust in the legal system. ‘In China, there is a phenomenon,’ he said. ‘Power is greater than the law, money is greater than the law and connections are greater than the law.’”²⁷²

Moreover, the growing public distrust resulting from the *BMW Case*, as evidenced by the flooding of the internet by Chinese citizens over this case, speaks to an issue of not only independent judicial review, but also the need for popular sovereignty.²⁷³

The *BMW Case* may also, eventually, demonstrate the *de facto* power of China's polity in that, in response to public outcry over the verdict, party officials ordered an investigation into the handling of the case.²⁷⁴ While this may lead to a just result in this particular case, it does little for the development of independent judicial review. Indeed, there is a growing fear that the CCP will increasingly interfere with the disposition of judicial cases, much to the dismay of those who favor independent judicial review.²⁷⁵

VII. CONCLUSION

In China, there is an inherent danger of a flexible constitutional amendment process that allows for the frequent constitutionalization of

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

[In December 2003], China's highest court ordered the execution of an alleged gangster after a similar outcry on the Internet against a decision to grant him a reprieve based on evidence he had confessed under torture. Several months earlier, outrage on the Internet over the death of a college student in police custody led the party to abolish a regulation allowing police to detain people without proper identification.

Id.

political ideology.²⁷⁶ Because the 1982 Constitution manifests a history of constitutionalizing official party ideology,²⁷⁷ China runs the risk of becoming victim to political and ideological forces as ideology supplants the 1982 Constitution, the 1982 Constitution emerges as no more than an affirmation of official party ideology and a demand for conformity to it.²⁷⁸

In terms of Chinese constitutionalism, past and present constitutions have constitutionalized a host of CCP ideologies. The amendments “incorporate the theory of ‘Three Represents’ into the Constitution’s preamble as one of the guiding principles of the nation, *together with* the heritage and further development of Marxism, Leninism, Mao Zedong Thought and Deng Xiaoping Theory.”²⁷⁹ The combination of these constitutionalized ideologies speaks to the survival of the CCP, democratic centralism, and social democracy. Because reforms have so profoundly changed Chinese society, traditional Marxist-Leninist institutions are increasingly becoming “less effective tools for building popular legitimacy or managing society.”²⁸⁰ In its search for political legitimacy, the CCP must formulate new forms of political legitimacy,²⁸¹ as it arguably intended to do when it constitutionally enshrined the “Three Represents” and other official party ideologies.²⁸²

Until China’s polity incorporates a more Western model of constitutionalism with separation of powers, popular sovereignty, and independent judicial review, amendments to the 1982 Constitution that supposedly safeguard liberty and social rights will remain without effect. The advent of independent judicial review or some other form of constitutional review may safeguard liberty and social rights; in the absence of independent judicial review, neither liberty nor social rights will be protected. Constitutionalism that could have evolved into a normative form but for the vesting of *de facto* power in the CCP, evolved into a semantic constitutionalism that fails to safeguard liberty or social rights.

The need for independent judicial review is imperative, especially in terms of safeguarding liberty and economic and non-economic rights.²⁸³ As for the future prospects of China’s polity adopting a more modern

276. KILI, *supra* note 12, at 131.

277. *See supra* Part II.B.

278. KILI, *supra* note 12, at 131–32.

279. *Human Rights, Private Property Fixed as Pillars, supra* note 14 (emphasis added).

280. McCormick, *supra* note 75, at 153.

281. Wong, *supra* note 27.

282. *Human Rights, Private Property Fixed as Pillars, supra* note 14.

283. *See generally* PISTOR & WELLONS, *supra* note 117, at 272–78.

variation of Western constitutionalism, rule of law, and judicial review, one can only speculate. However, there is a glimmer of hope offered in traditional Chinese jurisprudence. Given the natural evolution of legal systems,²⁸⁴ and acceleration of legal reform caused by accession to the WTO,²⁸⁵ there is a hope for an evolution of a Chinese constitutionalism, rule of law, and an independent judicial review that resembles Western jurisprudence to a greater degree. However, it is unreasonable to suspect that such an evolution will exactly replicate Western jurisprudence due to China's distinctive ontological base in tradition. Perhaps the resulting evolution will reflect vestiges of traditional Chinese jurisprudence in a mixture of Chinese and Western jurisprudence, though it may embody a distinctive modern Chinese jurisprudence that would reflect China's ontological base in tradition.

The gist of the problem will always be found in the foundational values representative of China's ontological base in tradition, because, in terms of Sinic-West relations, "the problem of China, however multifarious and complicated it may seem at first sight is in reality one of cultural conflict and readjustment."²⁸⁶ However, Confucianism may offer a possible solution to the impasse of cultural conflict. Wm. Theodore De Bary, in a discourse concerning Asian values and human rights, controversially argues that while the Confucian sense of the individual differs from the Western libertarian concept of the individual, Confucianism is not incompatible with Western notions of human rights. Rather, it enhances human rights²⁸⁷ and, in this respect, Rousseau's version of liberty presents a savior.²⁸⁸ In terms of China, "what is amiss in the argument is any consideration of the community as a form of infrastructure that might mediate between individuals and the state, and perform the function of a civil society in protecting the interests of either the individual or people in groups (rather than *en masse*)."²⁸⁹ By analogy, the "consensual, voluntaristic character of the Confucian ritual ideals,"²⁹⁰ resolves the dilemma of positive liberty versus negative liberty.²⁹¹ "Liberty becomes something *we* do, not something *I* do."²⁹² Confucian values are, hence,

284. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L. J. 1651, 1654–55 (1994).

285. Wang, *supra* note 246, at 332–37.

286. SHI, *supra* note 93, at 34.

287. See generally DE BARY, *supra* note 186.

288. See generally ROUSSEAU, *supra* note 138.

289. DE BARY, *supra* note 186, at 155.

290. *Id.*

291. MCCLELLAND, *supra* note 2, at 265.

292. *Id.*

potentially reconcilable with Western universalism.²⁹³

Although tradition fell into disfavor by those seeking to Westernize and modernize China at the turn of the nineteenth century, and particularly during the May Fourth Movement,²⁹⁴ Confucianism, now, contrarily offers hope for a more Western-oriented model of constitutionalism, rule of law, and independent judicial review. It is a hope bolstered by the rebirth of traditional Confucian values in modern China, a rebirth that is sanctioned, if not promoted, by China's polity, albeit for non-Confucianism ends.²⁹⁵

Assuming Confucianism can, or does, foster universal values and norms, the discovery of corresponding universal values resembling Western ethos may result in Confucianism's rebirth. This rebirth would represent a new Chinese Renaissance (*Zhongguo De Wenyi Fuxing*),²⁹⁶ paralleling the Western Renaissance (*Rinascimento*) of the sixteenth century that marked a turning point for Western civilization.²⁹⁷ In seventeenth century China, history witnessed a similar process. "In the pivotal moment of transition from Ming to Qing there emerged a new intellectual awakening of humanity and humanism, and in the sphere of political thought it manifested itself in the formation of democratic ideas with a distinctive modern hue."²⁹⁸ Moreover, a historical basis exists for democracy in China, traceable to a history in traditional Chinese government and traditional Chinese political theory.²⁹⁹

In this respect, there is hope for an evolution toward a more discursive model of judicial review, if not a more Western-oriented model of Constitutionalism, rule of law, and judicial review. Although Chinese *ziyou* (liberty) might best be described as "something *we* do," one would expect that for the Chinese citizenry, Chinese *ziyou* will, eventually, evolve into something *I* do, rather than something *we* do.

293. DE BARY, *supra* note 186, at 155.

294. See generally Schwarcz, *supra* note 51.

295. MICHAEL NYLAN, THE FIVE CONFUCIAN CLASSICS n.327-1 (1st entry online notes), at <http://www.yalepress.yale.edu/YUPBooks/pdf/nylan7notes.pdf> (last visited Sept. 28, 2004) (citations omitted). "Post-World War II dictators in both South Korea and Vietnam also tried to induce compliance with central government decrees by exploiting traditional respect for Confucian values. Like Chiang, they reduced Confucian teachings to mere slogans intended to serve highly un-Confucian ends." *Id.*

296. SHI, *supra* note 93, at 295–314 (discussing early Chinese Renaissance).

297. See PAUL JOHNSON, THE RENAISSANCE: A SHORT HISTORY 3–4 (2000).

298. ZHAOWU, *supra* note 49, at 550.

299. SHI, *supra* note 93, at 295–314; CHÉN, *supra* note 115, at 125.