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ARTICLES

Interpreting Sacred Texts: Preliminary Reflections On Constitutional Discourse In China

by

JANET E. AINSWORTH*

In the summer of 1989, people the world over were reeling from the enormity of the Chinese government's attack on the student-led democracy movement at Tiananmen Square.¹ The magnitude of this catastrophe exceeded even the tragedy of the many individuals who were killed and injured in the attack. What many feared, both inside and outside of China, was that the physical assault on the democracy demonstrators would herald an ensuing political assault on the proponents of ideological and economic moderation and signal the end of a period in which China aspired to full and equal participation in the community of na-

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Throughout this Article, I have used the Wade-Giles system of transliteration for Chinese names and words. Wade-Giles transliteration was universally used in English language scholarly work until quite recently. In the past few years, some Western scholars have chosen to adopt the *pin-yin* transliteration currently used in the People's Republic of China. However, because the vast bulk of the reference works cited use the Wade-Giles system, I have chosen to maintain consistency by using Wade-Giles transliteration even for citations to contemporary Chinese documents.

1. For a succinct narrative of the rise and fall of the democracy movement of 1989, see JONATHAN SPENCE, *THE SEARCH FOR MODERN CHINA* 738-47 (1990). A fuller account can be found in DAVID TURNLEY & PETER TURNLEY, *BEIJING SPRING* (1989).

tions. Would China plunge into another period of internal repression, of turning away from the outside world?

For those of us engaged in the comparative study of Chinese law, this larger question raised a subsidiary issue: how would changing events in China affect the Chinese legal system, which had seen dramatic change in the past decade? Until the events at Tiananmen Square, the 1980s apparently promised the development of a mature Chinese socialist legal order.² After almost completely abandoning formal legal institutions in the 1960s and 1970s,³ the Chinese government reversed itself, concluding that a regularized legal infrastructure was necessary for modernization. To promote the institutional development of a legal system, the Chinese government launched a mass campaign⁴ for the inculcation of legal values and for education on the new laws being drafted.⁵ In support of this mass campaign, the Chinese domestic press was replete with articles extolling the principle of the rule of law⁶ and lauding the accelerated pace of enactment of statutes and codes.⁷ The Chinese people were exhorted

2. A summary of the trends in the reconstruction of Chinese civil law in the 1980s can be found in the symposium, *The Emerging Framework of Chinese Civil Law*, 52 LAW & CONTEMP. PROBS., Spring & Summer 1989, at 1-216, 1-224.

3. To borrow a term from Robert Cover, China in the Cultural Revolution period can be said to have been institutionally jurispathic, systematically extinguishing juridical institutions which were thought to be ideologically heterodox. Cf. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) (calling judges jurispathic for their role in killing off alternative possibilities in legal interpretation). Formal courts were ignored, statutes constructively repealed, law schools closed, and legal professionals sent to the countryside to clean privies. Paul D. Reynolds, *The Role of Law in China's Modernisation*, 6 POLY L. REV., Autumn 1980, at 12, 12-13. In short, at the height of the Cultural Revolution, the formal legal system ceased to exist in any meaningful sense. For a description of the way in which the Chinese utilized informal mechanisms of dispute resolution during this period, see VICTOR H. LI, LAW WITHOUT LAWYERS 33-66 (1978).

4. The mass campaign, designed to mobilize popular awareness of and support for current government priorities and goals, has been an enduring feature of political life from the earliest days of the People's Republic of China to the present. Launched by a central government directive defining its objectives and scope, a mass campaign is pursued by local government, mass organizations, and the mass media. For a fuller description of this distinctly Chinese form of mass mobilization, see JAMES R. TOWNSEND, POLITICAL PARTICIPATION IN COMMUNIST CHINA (1967) and Lucian W. Pye, *Mass Participation in Communist China: Its Limitations and the Continuity of Culture*, in CHINA: MANAGEMENT OF A REVOLUTIONARY SOCIETY 3-33 (John M. H. Lindbeck ed., 1971).

5. See, e.g., *Conduct Education in the Legal System Well So As to Usher in the Enforcement of the New Laws*, LIAONING RIBAO, Nov. 26, 1979, microformed on U.S. Foreign Broadcast Information Service, Daily Report, People's Republic of China [hereinafter FBIS], No. 79-230, at S1.

6. For a representative example, see Li Buyun et al., *It Is Necessary to Practice Socialist Rule of Law*, GUANGMING RIBAO, Dec. 2, 1979, at 3, microformed on FBIS No. 79-236, at L4-L9.

7. See, e.g., Peng Zhen, *The Importance of Improving China's Legislation*, BEIJING REV., Aug. 27, 1984, at 16. Among the codes and statutes enacted in this period were the

both to develop an ideological appreciation for the principle of the rule of law and to model their behavior in accordance with formally enacted law, rather than the vicissitudes of Party policy as enunciated by Party cadres.⁸

The keystone of constructing a formal legal system was the drafting and implementation of a new Constitution for the country in 1982.⁹ The 1982 Constitution,¹⁰ which remains in force today, represented a dra-

Criminal Procedure Code of 1979, the Criminal Law Code of 1979, the Organic Law of the People's Courts of 1979, the Organic Law of the People's Procuratorate of 1979, the Marriage Law of 1980, the Provisional Regulations on Lawyers of 1980, the Economic Contract Law of 1981, the Trademark Law of 1982, the Civil Procedure Code of 1982, the Foreign Economic Contract Law of 1983, the Patent Law of 1984, and the Inheritance Law of 1985. In all, more than 300 new statutes were promulgated between 1979 and 1985, a dizzying pace of codification unlike anything seen before or since in China. Jeanette L. Pinard, *The People's Republic of China: A Bibliography of Selected English-Language Materials*, 3 CHINA L. REP. 46, 48 (1985).

8. See, e.g., *Turn Law Over to the People*, RENMIN RIBAO, June 16, 1985, *microformed on FBIS No. 85-116*, at K1-K3. This article, which appeared in the official People's Daily, had a nationwide readership and is characteristic of many similar articles and broadcasts made to the Chinese public. In it, education of the public in general, and of the political cadres in particular, was emphasized as needed to overcome earlier "mistaken" views about the role of law and its relationship to Party policy:

In order to translate law into a powerful material force, it is necessary to popularize knowledge of the law among the masses of the people to enable them to have a good grasp of the law and to cultivate the habit of doing things in accordance with the law. At the same time, it is necessary to enable every individual department of our country to gradually change its method of handling matters from relying mainly on [Party] policy to relying on both policy and law. Currently, some cadres do not have adequate understanding of the importance of the legal system Some leading cadres have even maintained that laws apply only to common people, not to themselves; and others have even substituted their words and powers for the law, placing themselves above it Only when leading cadres know the law, understand the law, and handle matters strictly according to law, can they lead the broad masses of cadres and masses to study the law and abide by it.

Id. at K1-K2.

9. In September of 1980, the Committee for the Revision of the Constitution was established to begin drafting a new constitution. For the next year and a half, the Committee solicited input from a variety of official and unofficial sources. After a proposed constitution was drafted, it was submitted to the Standing Committee of the National People's Congress for further discussion. Following revisions at this stage, the revised draft was submitted to the Fifth Session of the National People's Congress, which debated over a hundred amendments to the draft, of which thirty were included in the final document. Jill Barrett, *What's New in China's New Constitution?*, 9 REV. SOCIALIST L. 305, 305 (1983); Hu Sheng, *On the Revision of the Constitution*, BEIJING REV., May 3, 1982, at 15. On December 4, 1982, the new constitution was ratified by the National People's Congress. Chin Kim, *The Modern Chinese Legal System*, 61 TUL. L. REV. 1413, 1415 (1987).

10. For an English language text of the 1982 Constitution of the People's Republic of China (*Chung-hua jen-min kung-ho kuo hsien-fa*), see 9 REV. SOCIALIST L. 183 (1983), and BEIJING REV., Dec. 27, 1982, at 10-29. A government-sponsored edition in English was published in 1987 by the Foreign Language Press. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA: ADOPTED AT THE FIFTH SESSION OF THE FIFTH NATIONAL PEOPLE'S CONGRESS

matic departure from its two immediate predecessors, the Constitutions of 1975 and 1978.¹¹ The 1975 Constitution in particular, influenced by the radical Maoist insistence that a normative appeal to the concept of legality was inherently counter-revolutionary,¹² was closer to a programmatic call to ideological arms than to what Western legal scholars would define as a constitution.¹³ In contrast, the 1982 Constitution, far more detailed and specific in its provisions,¹⁴ appeared to provide the foundation for a nation governed by the rule of law rather than by Party fiat.

The question repeatedly posed by observers in the West has been whether, and to what extent, the ambitious new Chinese constitution will be implemented in practice.¹⁵ Given China's relative paucity of legal re-

AND PROMULGATED FOR IMPLEMENTATION BY THE PROCLAMATION OF THE NATIONAL PEOPLE'S CONGRESS ON DECEMBER 4, 1982 (1987).

11. English translations of the 1975 Constitution of the People's Republic of China (*Chung-hua jen-min kung-ho kuo hsien-fa*) can be found in *SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA* 65-91 (Joseph En-pao Wang ed., 1976), and in *PEKING REV.*, Jan. 24, 1975, at 12-17. Translations of the 1978 Constitution of the People's Republic of China are found in 4 *REV. SOCIALIST L.* 247-58 (1978), and in *PEKING REV.*, Mar. 17, 1978, at 5-14. The government-run Foreign Language Press also published English language editions of both documents. *CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA: ADOPTED ON MARCH 5, 1978 BY THE FIFTH NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA AT ITS FIRST SESSION (1978); CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1975)*.

12. For a representative Cultural Revolution broadside blasting the notion that the rule of law is proper in a socialist country, see *Completely Smash the Feudal, Capitalist, and Revisionist Legal System*, in *SELECTIONS FROM CHINA MAINLAND MAGAZINES*, Sept. 3, 1968, at 23. The tenor of the article is completely consistent with its title, assailing proponents of a formal legal system: "They talk such nonsense as 'all men are equal before the law' and confine the role of the people's court to trying criminal and civil cases, convicting and punishing the criminals and settling civil disputes." *Id.*

13. Jerome A. Cohen, *China's Changing Constitution*, 76 *CHINA Q.* 794, 837 (1978) [hereinafter Cohen, *China's Changing Constitution*]. Professor Cohen appears to acknowledge the ethnocentrism inherent in defining "authentic constitutions" as those patterned on the model of Western liberal constitutions, but he nonetheless ultimately concludes that the Chinese constitutions are defective for failing to satisfy Western constitutional criteria. *Id.* at 841.

14. The 1982 Constitution consists of 138 articles, whereas the 1975 Constitution had but 30, and the 1978 Constitution had 60. Even the 1954 Constitution had less detail, with 106 articles. Obviously, a long constitution with numerous articles does not in and of itself guarantee a sensitive government committed to the rule of law. However, the shorter constitutions of the Cultural Revolution supplied so little guidance for the institutional and legal development of China that legal development inevitably was truncated for lack of institutional legitimization. For example, in the 1975 Constitution the provisions defining the structure and functions of various governmental organs were so perfunctory that it was impossible to determine what, if anything, most governmental organs were supposed to do. See Chin Kim & Timothy G. Kearley, *The 1978 Constitution of the People's Republic of China*, 2 *HASTINGS INT'L & COMP. L. REV.* 251, 263-76 (1979) (detailing the changes between the 1975 and 1978 Constitutions in their provisions defining the organs of government and noting that the 1978 Constitution provided much more specific detail in its articles defining state structure).

15. See, e.g., Tony Saich, *The Fourth Constitution of the People's Republic of China*, 9

sources,¹⁶ its absence of a tradition of constitutional litigation, and its history of ignoring written law in times of political turmoil,¹⁷ the obstacles to implementation are formidable.¹⁸ The importance of implementation to the Chinese themselves is reflected in the text of the 1982 Constitution, which provides that "all acts in violation of the constitution and the law must be examined."¹⁹ Some Western analysts have criticized this provision as being too vague to provide an effective mechanism for implementing constitutional guarantees.²⁰ Such criticism assumes that effectuation of constitutional provisions requires textually explicit enforcement mechanisms within the constitution, an erroneous assumption, as the example of the American Constitution demonstrates. The doctrine announced in *Marbury v. Madison*,²¹ that the judiciary possessed the power to review governmental acts for constitutional validity, is not spelled out in the text of the Constitution.²² Similarly, although the United States Constitution's Bill of Rights lacks an express mechanism for effectuating the provisions of its Fourth and Fifth Amendments, this has not prevented American courts from fashioning exclusionary remedies to ensure the citizens' enjoyment of these constitutional rights.²³

REV. SOCIALIST L. 113, 122 (1983); see also Jerome A. Cohen, *Due Process?*, in THE CHINA DIFFERENCE 237, 242-43 (Ross Terrill ed., 1979) [hereinafter Cohen, *Due Process*] (asking the same question of the 1978 constitution).

16. Despite a massive effort to train lawyers in recent years, China had, as of early 1991, only 50,000 qualified lawyers in the entire country of over a billion people. *Qualified Lawyers to Increase to 80,000*, CHINA DAILY, Jan. 16, 1991, at 3, col. 3.

17. Cohen, *Due Process*, *supra* note 15, at 239-59.

18. It is the enormity of these obstacles to implementation that allows observers to continue to speculate on the degree of future implementation of the 1982 Constitution nearly a decade after its promulgation.

19. CHUNG-HUA JEN-MIN KUNG-HO KUO HSIEN-FA [Constitution] [hereinafter HSIEN-FA] (1982) art. 5 (P.R.C.).

20. See, e.g., Saich, *supra* note 15, at 122.

21. 5 U.S. (1 Cranch) 137 (1803).

22. As many constitutional scholars have pointed out, judicial review as mandated by *Marbury v. Madison* was not inevitable given the text of the Constitution. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 23-42 (2d ed. 1988) (discussing *Marbury* and its progeny, including citations to sources maintaining that the doctrine was not inherent in the Constitution).

23. Insofar as the texts of the Fourth and Fifth Amendments are silent as to the remedy to be applied for their violation, some commentators have argued that the exclusionary rule is both constitutionally unnecessary and socially unwise. See, e.g., Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635 (1982). Other scholars have rushed to the rule's constitutional defense. See, e.g., Yale Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an "Empty Blessing,"* 62 JUDICATURE 337 (1979); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition,"* 16 CREIGHTON L. REV. 565 (1983); Thomas S. Schrock & Robert C. Welsh, *Up from*

Only time will tell if the Chinese will develop their own institutional mechanisms for the implementation of their constitution. The question that I would like to pose, however, is not whether China will judicially implement its constitution, but rather how that constitution might be used in Chinese political discourse.

Most Western commentators have looked at the successive constitutions of the People's Republic of China in one of two ways. On the one hand, some analysts have dismissed these documents as meaningless shams—propaganda intended to fool the native population or gullible outsiders by disguising the arbitrary and oppressive character of the government.²⁴ Commentators adopting this perspective assume that Chinese constitutional language ought to be interpreted precisely in accord with Western constitutional practice. The Chinese constitution is then judged according to how well that constitution effectuates the values embodied in Western constitutional thought which correspond to the terms used in the Chinese constitutions. Not surprisingly, measured by that yardstick, the Chinese constitutions appear woefully deficient.²⁵

This perspective presupposes that using Western terminology and categories to represent and evaluate the legal system of a non-Western culture is unproblematic.²⁶ It ignores the fundamental difficulty that

Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1975). Regardless of whether the exclusionary rule is thought to be constitutionally required, it is clear that, like *Marbury's* judicial review, the exclusionary rule can only be supported by appeal to *implicit* institutional needs, not *explicit* textual provisions.

24. See, e.g., Cohen, *China's Changing Constitution*, *supra* note 13, at 836-41. Certain Western scholars display this attitude of dismissive skepticism in addressing the constitutions of other socialist countries as well as China. See, e.g., Georg Brunner, *The Functions of Communist Constitutions: An Analysis of Recent Constitutional Developments*, 3 REV. SOCIALIST L. 121, 146-47 (1977); John N. Hazard, *A Soviet Model for Marxian Socialist Constitutions*, 60 CORNELL L. REV. 985, 986 (1975); Lowell Dittmer, *The Succession Drama in China*, 26 PROBS. COMMUNISM, Jan.-Feb. 1977, at 57 (book review). Christopher Osakwe has observed that many Western academicians maintain a nihilistic stance with respect to socialist legal systems, apparently believing "that socialist law is an oxymoron." Christopher Osakwe, *Introduction: The Greening of Socialist Law as an Academic Discipline*, 61 TUL. L. REV. 1257, 1258-62 (1987).

25. Cohen, *China's Changing Constitution*, *supra* note 13, at 840-41.

26. Legal anthropologists have long grappled with the problem of choosing appropriate vocabulary for the description of non-Western legal systems, an issue referred to as the Bohannan-Gluckman controversy. Paul Bohannan insisted on using native terms for legal concepts because he believed that Western terminology was inevitably misleading in its connotations. Max Gluckman, on the other hand, thought that universal legal terminology, which might or might not correspond to Western legal terminology, did exist and could adequately describe non-Western legal systems. See Paul Bohannan, *Ethnography and Comparison in Legal Anthropology*, in *LAW IN CULTURE AND SOCIETY* 401-18 (Laura Nader ed., 1969); Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, in *LAW IN CULTURE AND SOCIETY*, *supra*, at 349-73; Laura Nader, *Introduction to LAW IN CULTURE AND SOCIETY*, *supra*, at 4-6.

translation cannot provide exactly equivalent terms—that connotations are invariably added and lost in translation,²⁷ particularly when the languages involved are as radically different as Chinese is from the Indo-European languages of the West.²⁸ Slippage in meaning²⁹ occurs even

27. As Walter Benjamin phrased it, "(A)ll translation is only a somewhat provisional way of coming to terms with the foreignness of languages." Walter Benjamin, *The Task of the Translator*, in *ILLUMINATIONS* 69, 75 (1969). Jacques Derrida, reflecting upon the difficulty of selecting a Japanese word to translate his term "deconstruction," observed that the issue of translation is inextricably linked to the fact that the meaning of any concept is inseparable from its cultural context:

[T]he difficulty of defining and therefore also of translating the word "deconstruction" stems from the fact that all the predicates, all the defining concepts, all the lexical significations, and even the syntactic articulations, which seem at one moment to lend themselves to this definition or to that translation, are also deconstructed or deconstructible, directly or otherwise, etc. . . . The word "deconstruction," like all other words, acquires its value only from its inscription in a chain of possible substitutions, in what is too blithely called a "context."

Jacques Derrida, *Letter to a Japanese Friend*, in *A DERRIDA READER: BETWEEN THE BLINDS* 270, 274-75 (Peggy Kamuf ed., 1991). On the issue of cross-cultural translation generally, see Talal Asad, *The Concept of Cultural Translation in British Social Anthropology*, in *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* 141-64 (James Clifford & George E. Marcus eds., 1986). Problems in translation can be seen as a subset of the more general problem of how foreign cultures can be represented in Western scholarly discourse. See CLIFFORD GEERTZ, *Found in Translation: On the Social History of the Moral Imagination*, in *LOCAL KNOWLEDGE* 36, 36-54 (1983); CLIFFORD GEERTZ, "From the Native's Point of View": *On the Nature of Anthropological Understanding*, in *LOCAL KNOWLEDGE*, *supra*, at 55, 55-70; GEORGE E. MARCUS & MICHAEL M. J. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE* 45-76 (1986).

28. Scholars of Chinese history and literature have similarly been confronted with the problem of cross-cultural translation. For a sensitive discussion of the issue, including aspects which are unique to the Chinese language, see Achilles Fang, *Some Reflections on the Difficulty of Translation*, in *STUDIES IN CHINESE THOUGHT* 263-85 (Arthur F. Wright ed., 1953); I. A. Richards, *Toward a Theory of Translating*, in *STUDIES IN CHINESE THOUGHT*, *supra*, at 247-62; Arthur F. Wright, *The Chinese Language and Foreign Ideas*, in *STUDIES IN CHINESE THOUGHT*, *supra*, at 286-303. See also PAUL A. COHEN, *DISCOVERING HISTORY IN CHINA: AMERICAN HISTORICAL WRITING ON THE RECENT CHINESE PAST* 14 (1984) [hereinafter COHEN, *DISCOVERING HISTORY*] (giving the example of translating the English words "freedom" or "liberty" with the Chinese word *tzu-yu*, the etymology of which gives the Chinese term connotations of anarchistic, selfish license which are absent in the English words it purportedly reproduces in translation); JOHN E. SCHRECKER, *THE CHINESE REVOLUTION IN HISTORICAL PERSPECTIVE* 200-01 n.9 (1991) (noting that Western languages lack an adequate vocabulary to translate the Chinese terminology describing features of the social and political structure of high imperial China).

29. I should point out that linguistic incommensurability between two languages is a product, not only of slippage in translation, but also more generally of the fact that the meaning of a concept is constructed within cultures which may have radically differing contexts in which the concept is understood. For a striking example of this problem, see JOHN LYONS, *LANGUAGE AND LINGUISTICS* 325-27 (1981) (using the example of the Greek word "sophia," usually translated into English as "wisdom," to demonstrate that such a translation either forces the translator to use the English word "wisdom" in contexts that render the translation absurd or requires the translator to choose more than one English word to express "sophia," thereby obscuring the consistency of the original discourse). See generally the essays collected

when the choice of foreign terminology is made by actors within the native legal culture, since they are likely to be unaware of the precise connotations of the adopted vocabulary within the Western social and historical contexts.³⁰ Moreover, even aside from the considerable problems inherent in translation, the very categories and concepts with which the scholar organizes her description and analysis of a legal system are freighted with culturally contingent normative baggage.³¹ Scholarship that ignores these problems suffers precisely because the scholar is not conscious of the Western cultural assumptions intrinsic to the analysis.

Other Western commentators analyze the Chinese constitutions in an alternative, less implicitly ethnocentric way. These scholars meticulously pore over each provision of the documents, comparing new constitutional texts with their antecedents to ferret out evidence of political and ideological trends in China.³² It is not surprising that China's constitutions are subjected to this kind of microscopic, word-by-word examination. Since the founding of the People's Republic of China, the Chinese

in CULTURAL MODELS IN LANGUAGE AND THOUGHT (Dorothy Holland & Naomi Quinn eds., 1987) (anthropologists, linguists, and psychologists addressing culturally constructed aspects of language and thought); Roy G. D'Andrade, *Cultural Meaning Systems*, in CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION 88, 88-119 (Richard A. Shweder & Robert A. Levine eds., 1984) (discussing the replication of conceptual structures through culturally contextual systems of meaning).

30. Paul Cohen gives one example from the late nineteenth century, when Chinese scholars translated the Western word "sociology" as *ch'ün-hsüeh*, incorporating into their translation their misperception that Western sociology centered upon the need to inculcate a sense of community within the body politic. COHEN, DISCOVERING HISTORY *supra* note 28, at 200 n.8. For a more recent example, see Xiaomei Chen, "Misunderstanding" Western Modernism: The Menglong Movement in Post-Mao China, 35 REPRESENTATIONS 143, 146-48, 156-59 (Summer 1991) (noting that contemporary Chinese poetry has been influenced by an erroneous interpretation of Western modernism shared both by these poets and their critics). See also the essays cited *supra* note 28.

31. For a persuasive demonstration of the way in which normative content permeates even legal scholarship that ostensibly is purely descriptive in its scope, see Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 811-14 (1991), noting that "the context and the legal unconscious . . . perform normative work in selecting, establishing, and organizing the so-called 'descriptive' categories deployed in legal thought." *Id.* at 812.

32. For an example of this type of analysis, see Tony Saich's article which adopts the metaphor of the constitution as a "barometer for China's political, economic, and social climate," and later compares it to a "snapshot" of the current leadership's view of their system and the way they feel it should operate." Saich, *supra* note 15, at 113, 122. For other such analyses, see, e.g., Barrett, *supra* note 9, at 309-39; Ph. de Heer, *The 1978 Constitution of the People's Republic of China*, 4 REV. SOCIALIST L. 309 (1978); R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 41, 52-74 (R. Randle Edwards et al. eds., 1986); Kim, *supra* note 9, at 1415-18; Andrew J. Nathan, *Political Rights in Chinese Constitutions*, in HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra*, at 77, 102-20 [hereinafter Nathan, *Political Rights*].

political process has been largely, and at times entirely, closed to Western observers. As a result, Western scholars have eagerly seized any information to which they have had access, including officially released documents such as constitutions. True, a close parsing of such documents may help shed light on the evolving political situation in China. One must keep in mind, however, that a finished document often represents a negotiated consensus that may obscure conflicts between various political factions. Even if such a perspective is useful to political scientists assessing current political trends in China, it fails to address the role of the constitutional text within the context of Chinese political discourse.

Both of these ways of looking at Chinese constitutions share the presumption that the text itself is a transparent container for its subject matter. Yet the subject matter of a text is only one aspect of its meaning. What a text *says* may be less important than what it *is*. In this Article, I will consider how the nature of the text, in this case a constitution, contributes to the meaning of the text.

Interpretation of any text involves the reader in a series of interpretive choices.³³ Because interpretive practices are culturally situated,³⁴ textual interpretive choices must be made from the set of contingent interpretive strategies that the culture provides to the reader. Therefore, Chinese constitutional interpretation necessarily will be governed by Chinese textual interpretive strategies and assumptions. Moreover, a constitution is a specific type of written text—it is a political text which is both foundational and generative of subsequent juridical discourse. Such texts, I will suggest, tend to be interpreted using the specific interpretive strategies with which a culture interprets its archetypal foundational texts, that is, its sacred texts.

Many American scholars have drawn parallels between the place of scripture in our religious tradition and the role of the U.S. Constitution

33. The nature of interpretation has been a central preoccupation of modern literary criticism as well as of legal theory. For a representative collection of essays on interpretation, see *THE POLITICS OF INTERPRETATION* (W.J.T. Mitchell ed., 1983). Stanley Fish has written extensively in both legal and literary journals of the ways in which interpretation is constrained by locally situated practice. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 1-17, 338-55 (1980) (asserting that interpretive communities produce meaning through shared values, assumptions, and ideology). For a discussion of the applicability of literary theory to the problem of legal interpretation, see Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, in *INTERPRETING LAW AND LITERATURE* 115-29 (Sanford Levinson & Steven Mailloux eds., 1988).

34. Contemporary anthropology has explored the cultural contingency of the construction of meaning. See, e.g., GEERTZ, *LOCAL KNOWLEDGE*, *supra* note 27, and the essays collected in *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY*, *supra* note 27. See also the essays cited *supra* note 29.

in the American political culture.³⁵ The reverence for the American constitutional system which makes criticism of it tantamount to heresy, the faith that the "founding fathers" were divinely inspired in their drafting of the Constitution,³⁶ and the veneration of the text itself³⁷ are three hallmarks of what has been called America's "civil religion."³⁸ The Constitution can be seen as the foundational text of that civil religion.³⁹

When American judges and lawyers were first faced with the problem of how their new Constitution should be interpreted, they already had a set of interpretive strategies derived from the Anglo-American Christian hermeneutical tradition.⁴⁰ Professor Sanford Levinson has identified what he calls "Protestant" and "Catholic" positions on both the question of the significance of the constitutional text for doctrinal

35. American constitutional scholars have found the Biblical analogy a fruitful one in a variety of contexts. See, e.g., Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984); Cover, *supra* note 3, at 1; Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984) (acknowledging the prevalence of theologically based methods of textual exegesis in constitutional interpretation, but insisting that this is not a desirable interpretive strategy); Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123.

36. See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 225 n.17 (1986) (citing examples of prominent American commentators making this claim).

37. For an early observation on the quasi-religious mythology surrounding the Constitution, see Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937). Professor W. Tarver Rountree explains the veneration of the Constitution in sociological terms, asserting that since the Constitution "symbolizes what we think we are as a society, . . . it is worth celebrating. In worshipping the Constitution we collectively reinforce and extend its values." W. Tarver Rountree, Jr., *Constitutionalism as the American Religion: The Good Portion*, 39 EMORY L.J. 203, 205 (1990).

38. See the essays collected in *AMERICAN CIVIL RELIGION* (Russell E. Richey & Donald G. Jones eds., 1974); ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN A TIME OF TRIAL* (1975).

39. Levinson, *supra* note 35, at 125; see also KAMMEN, *supra* note 36, at 22-23, 36-37, 224-26 (documenting the cult of constitution worship throughout American history); Rountree, *supra* note 37, at 203-07 (arguing that American constitutionalism satisfies sociologists' definition of religion).

40. In a detailed historical examination of the origins of constitutional interpretation, Professor H. Jefferson Powell noted the influence of Anglo-American scriptural hermeneutics on the earliest attempts at constitutional interpretation. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889-94 (1985). I argue that the hermeneutic model of interpretation derived from the Judeo-Christian scriptural exegesis has exercised, and continues to exercise, a powerful if often unacknowledged influence on the practice of American constitutional interpretation. However, I do not mean to suggest that the hermeneutical model is the *sole* interpretive modality for American constitutional interpretation. Plainly there are a number of other interpretive assumptions—literal textualism, framer's intent, etc.—which have informed our practice of constitutional interpretation in the past as well as in the present. For a representative sampling of these positions, see the essays collected in JOHN H. GARVEY & T. ALEXANDER ALEINIKOFF, *MODERN CONSTITUTIONAL THEORY: A READER* (1989).

generation and the question of authority to interpret that text.⁴¹ Eighteenth century Protestants, particularly those who were followers of Martin Luther, believed that the scriptural text embodied the sole source of Christian doctrine.⁴² Similarly, one interpretive strategy adopted for American constitutional exegesis is the stance that constitutional law can look only to the precise text of the document for constitutional doctrine.⁴³ In contrast, the dominant view on scripture held by eighteenth century Catholics was that unwritten church tradition was the equal of scripture as a source of valid theological doctrine.⁴⁴ The parallel position in constitutional theory maintains that unwritten social and political values embedded in American culture are as legitimate a source of constitutional law as the wording of the text itself.⁴⁵

Just as American constitutional theorists have adopted recognizably "Protestant" and "Catholic" interpretive positions on the authority of the text, they have also developed "Protestant" and "Catholic" positions on the question of who can be an authoritative interpreter of the foundational text.⁴⁶ A central tenet of Protestantism is its attack on the authority of the organized church, which Protestant theology denies has any superior claim to correct scriptural interpretation.⁴⁷ The Catholic Church, on the other hand, consistently asserts its authority to establish a privileged interpretation of the Bible.⁴⁸ The corresponding positions on constitutional law are the so-called "Protestant" view that constitutional analysis can be considered "correct" solely on the objective calibre of the logic and insight of the person doing the analysis,⁴⁹ as opposed to the "Catholic" notion that judges, particularly those of the highest court, are, by virtue of their office, the sole interpreters whose constitutional exegesis can be considered valid.⁵⁰

In describing these interpretive strategies as "Protestant" and "Catholic,"⁵¹ I do not mean to suggest that constitutional scholars are

41. Professor Levinson set forth this typology in his influential essay, Levinson, *supra* note 35. A revised and expanded version of this discussion can be found in SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 9-53 (1988). Professor Levinson's analogy between scriptural exegesis and constitutional analysis was adopted and elaborated upon in Grey, *supra* note 35.

42. Levinson, *supra* note 35, at 125-27.

43. *Id.* at 132-33, 133-35.

44. *Id.* at 125-27.

45. *Id.* at 132-33, 135-36.

46. *Id.* at 137-41.

47. *Id.* at 127-30.

48. *Id.* at 127-28.

49. *Id.* at 138-41.

50. *Id.* at 137-38.

51. It should be noted that these descriptions of Protestant and Catholic exegetical models are of necessity schematic in nature. By eliminating details of the development of these

influenced in their legal analysis by the religious beliefs which they hold or with which they were raised as children.⁵² Nor do I claim that an individual's view on issues of institutional authority is necessarily consistent with that person's position on the question of textual authority. In fact, it is common for a particular individual to adopt a "Protestant" position of textual authority but a "Catholic" posture on institutional authority, or, less commonly, the other way around.⁵³ Positions on constitutional interpretation bear no necessary relationship to the actual religious beliefs of the interpreter. Rather, these religiously grounded interpretive strategies are part of the ordinarily unnoticed cultural framework in which constitutional exegesis is embedded. As such, the interpreter does not need to be conscious of the theological origin of the interpretive strategy chosen for constitutional analysis, nor of the fact that her constitutional interpretation is predicated upon culturally specific interpretive assumptions.⁵⁴ In effect, interpretive assumptions and strategies form part of the inventory of cultural resources available for members of the interpretive community to draw upon in the construction of meaning.

China, too, has a tradition of textual exegesis applied to its own canon of generative, foundational texts, the Confucian Classics. Without getting mired in the hoary debate on whether Confucianism⁵⁵ is a religious or a humanist tradition,⁵⁶ one can surely agree that the Confucian

theological positions, the richness and subtle diversity of thought within each religious tradition are understated. Nonetheless, I believe that the outline of these contrasting stances is a valid characterization of each tradition.

52. Professor Levinson considers this possibility with respect to Justice Hugo Black, but ultimately concludes that it would be premature to attempt to correlate constitutional stances with personal religious beliefs. Levinson, *supra* note 35, at 133 & n.41.

53. *Id.* at 132-33.

54. Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1794-98 (1987) (arguing that interpretive constructs are not, and can not, be consciously chosen); cf. Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 681-91 (1990) (refuting Fish's claim by asserting that situated self-consciousness makes it possible to choose among competing interpretive constructs).

55. Professor John Schrecker has described Confucianism as a sociohistorical analysis combined with an ethical system . . . [I]t is a normative sociology that . . . deals with all aspects of human life, from personal psychology to the political system, from religion to the family . . . The goal of Confucianism is to develop an effective, peaceful, and ethical society, with a decent life for the people. SCHRECKER, *supra* note 28, at 10-11. For a concise yet finely nuanced description of the Confucian persuasion, see *id.* at 10-20.

56. Asking whether Confucianism is a religion is not a particularly meaningful question, because the answer to the question is determined by the definition of the term "religion." If one defines religion as a theistic belief system concerned with the origin and destiny of humanity, then Confucianism does not appear to be a religion. If, however, the definition embraces an ethical system which marginalizes supernatural elements and is grounded in empirically

canon was comparable in significance and centrality to the importance of Judeo-Christian scripture in the West.⁵⁷ The interpretive strategies developed in the course of the unfolding of the Confucian tradition, however, entail very different assumptions from those inherent in the Judeo-Christian hermeneutic tradition. Confucianism has its own distinctive answers to the questions of how the sacred canon is constituted and how the texts convey meaning. An examination of the historical development of these interpretive assumptions will illustrate certain interpretive strategies that are embedded within Chinese culture, which in turn will suggest a way in which an autochthonous Chinese constitutionalism might develop in the future.

The Confucian Classics are a collection of writings said to date from the late Chou Dynasty (1122 - 221 B.C.).⁵⁸ In accord with the Chinese cultural penchant for enumeration, they are referred to as either the Five Classics or the Six Classics.⁵⁹ The Five Classics are but a small sample of

established reason, then Confucianism is indeed a religious tradition. Such a battle of definitions by its very nature can have no decisive winner. For a representative presentation of each side of this debate, however, compare C. K. YANG, *RELIGION IN CHINESE SOCIETY: A STUDY OF CONTEMPORARY SOCIAL FUNCTIONS OF RELIGION AND SOME OF THEIR HISTORICAL FACTORS* 244-77 (1961) (arguing that Confucianism is a religious belief system) with FUNG YU-LAN, *A SHORT HISTORY OF CHINESE PHILOSOPHY* 1-10 (1948) (contending that it is a secular, humanistic philosophy). For a discussion which goes beyond the rehashing of old arguments, see Young-chan Ro, *The Significance of the Confucian Texts as "Scripture" in the Confucian Tradition*, 15 *J. CHINESE PHIL.* 269 (1988). Ro declines to characterize Confucianism as either a religious or a humanist tradition, calling it an ambiguous "boundary situation" which challenges our definition of both religion and scripture. *Id.* at 269-72.

57. See Ro, *supra* note 56, at 270. Although Ro is ambivalent about classifying the Confucian Classics as a form of scripture, he does not doubt that the Classics occupied a position in the Confucian order comparable to that assumed by scripture in the premodern West. See also JOHN B. HENDERSON, *SCRIPTURE, CANON, AND COMMENTARY: A COMPARISON OF CONFUCIAN AND WESTERN EXEGESIS* (1991) (comparing texts and methods of textual exegesis used in interpreting the Confucian Classics, the Christian Bible, the Judaic Torah, the Islamic Koran, the Indic Vedas, and the Mediterranean Homeric epics); Daniel K. Gardner, *Modes of Thinking and Modes of Discourse in the Sung: Some Thoughts on the Yü-lu ("Recorded Conversations") Texts*, 50 *J. ASIAN STUD.* 574, 577-79 (1991) (classifying the Confucian Classics as a body of sacred texts).

58. The latter part of the Chou Dynasty was a feudal period in which many warring states vied for dominance over China. During this era, the so-called Hundred Schools of Chinese philosophy competed for influence, seeking the patronage of the warring principalities. Although at the time, Confucius and his followers were merely one among a number of rival political philosophers, by the time of the Han Dynasty, Confucianism had become the sanctioned state orthodoxy. Ro, *supra* note 56, at 279-82.

59. The Five Classics are the Book of Changes (*I ching*), the Book of Poetry (*Shih ching*), the Book of Documents (*Shu ching*), the Book of Rites (*Li chi*), and the Spring and Autumn Annals (*Ch'ün chiu*). A sixth classic, the Book of Music (*Yüeh ching*) was lost in antiquity. During the Sung Dynasty (960 - 1279 A.D.), some scholars re-invigorated the numbering of the original Six Classics by adding a new sixth volume to the canon, the Rites of Chou (*Chou li*). WING-TSIT CHAN, *A SOURCE BOOK IN CHINESE PHILOSOPHY* 17, 728 (1963).

the voluminous writings generated during this golden age of philosophical ferment, when many competing schools of political philosophy were actively promoting their prescriptions for a better world. After the collapse of the Chou Dynasty, the succeeding Ch'in emperor, Shih Huang-ti, was said to have ordered the burning of the Classics in a literary inquisition in 213 B.C. in order to suppress sources of subversive ideology which might have undermined Ch'in legitimacy.⁶⁰

When the ensuing Han Dynasty (206 B.C. - 221 A.D) assumed power a few years after the death of Shih Huang-ti, scholars attempted to reconstruct the Classics from memory, writing them in the then current style of script. Some years later, certain scholars claimed to have discovered surviving copies of the Classics which had ostensibly escaped the Ch'in burning decree—texts written using the ancient style characters of the Chou Dynasty. For a brief time, the two rival sets of texts, the "New Texts" (*chin wen*) in contemporary Han Dynasty script and the "Old Texts" (*ku wen*) in ancient script, vied for dominance among Confucian scholars. By the closing years of the Han Dynasty, however, the Old Text versions of the Classics prevailed over the New Texts. Nevertheless, the episode of the book-burning shaped the Confucian attitude towards the Classics, fueling a perpetual insecurity that the canon which survived was in some way defective or incomplete. That fear was to provide the justification for revising and reconstructing the canon throughout Chinese history.⁶¹

As a result, one of the most striking characteristics of the Confucian canon is its openness, its resistance to closure.⁶² Classical scholars over the centuries felt free to propose additions or deletions to the Confucian canon.⁶³ The Book of Rites, for example, was originally supposed to have contained 204 chapters. Later scholars whittled it down to eighty-five, then to forty-nine chapters.⁶⁴ Confucius himself provided a precedent for such wholesale revision of the classical texts, in that he traditionally was credited with excising major portions of the Book of Poetry, and perhaps the Book of Documents as well.⁶⁵

60. See Ro, *supra* note 56, at 275-77.

61. HENDERSON, *supra* note 57, at 40.

62. John Henderson has noted that the Confucian canon is singular among world traditions in its resistance to final fixation of both the identity of the constituent texts of the canon and of the wording within the canonical texts themselves. *Id.* at 49, 53. In contrast, he observed that "in the Christian tradition, heretics were often recognized by their refusal to recognize the closure of the Canon, as was the case of the Gnostics of late antiquity." *Id.* at 56.

63. *Id.* at 53-56, 153-54; Gardner, *supra* note 57, at 581 & n.10.

64. HENDERSON, *supra* note 57, at 29.

65. *Id.* at 27-30.

Undoubtedly, the most consequential instance of an addition to the canon was that made by twelfth century Neo-Confucian Chu Hsi.⁶⁶ Chu Hsi collected together the Analects of Confucius (*Lun-yü*), the Book of Mencius (*Meng-tzu*), the Doctrine of the Mean (*Chung-yung*), and the Great Learning (*Ta hsüeh*), calling them the Four Books. From 1313 to 1905, the Four Books eclipsed even the Five Classics in importance in the imperial examination system.⁶⁷ Until Chu Hsi and his followers canonized them,⁶⁸ neither the Analects nor the Book of Mencius had attained classical status, and the other two works had never even been recognized as independent texts in their own right.⁶⁹

Although Chu Hsi's canonization of the Four Books was his most spectacularly influential addition to the canon,⁷⁰ it was not his only con-

66. Chu Hsi, also known as Chu Yüan-hui, was born in 1130 and died in 1200. CHAN, *supra* note 59, at 588.

67. *Id.* at 18 & n.11. The imperial examination system provided the predominant means of staffing the government bureaucracy for much of Chinese history. Beginning in the T'ang Dynasty (618 - 907 A.D.), those wishing to enter government service had to pass a series of examinations in which the candidates needed to demonstrate sophisticated mastery of the Confucian canon. The examination questions required the candidate to identify fragments of classical text, and compose a dissertation on the text using a highly stylized analytic format called the "eight legged" essay (*pa-ku wen-chang*). Mastering the canon and the required "eight legged" manner of writing required years of intensive study. In some cases, this study could stretch into decades—some candidates sat for the preliminary exams as many as sixteen times over a lifetime. JOHN R. WATT, *THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA* 24 (1972). For a fuller description of the examination system and its functioning in late imperial China, see CHANG CHUNG-LI, *THE CHINESE GENTRY* 35-43, 165-209 (1955); JOANNA F. HANDLIN, *ACTION IN LATE MING THOUGHT* 16-20 (1983); WATT, *supra*, at 23-25.

Upon passing the exams, the degree holder became a member of the scholar-gentry class, the acknowledged elite in Chinese society. Imperial China lacked any significant competing bases of social status and power. Neither military nor commercial achievement carried even remotely equivalent prestige, nor was there a powerful religious infrastructure for most of Chinese history. Only through success in the examination system could one achieve recognized status in the social hierarchy. See CHANG, *supra*, at 32-35; JOHN W. DARDESS, *CONFUCIANISM AND AUTOCRACY: PROFESSIONAL ELITES IN THE FOUNDING OF THE MING DYNASTY* (1983); HO P'ING-TI, *THE LADDER OF SUCCESS IN IMPERIAL CHINA* 1-91 (1962). Because the social elite and the governmental bureaucracy were by necessity steeped in the Confucian canon, this shared discourse constituted the political and ideological grammar of imperial China.

68. The content of the Confucian canon was established by an imperially commissioned body of scholars who gave their official imprimatur to the corpus of Confucian texts which served as the basis for the Confucian examination system. HENDERSON, *supra* note 57, at 38-39.

69. Both the Doctrine of the Mean (*Chung-yung*) and the Great Learning (*Ta hsüeh*) originated as chapters of the Book of Rites (*Li chi*). CHAN, *supra* note 59, at 589.

70. Despite the fact that the Chu Hsi canonization of the Four Books, together with his classical commentaries, became the orthodox Confucian course of study to be used in the examinations, the ascendancy of the Chu Hsi version of the canon was by no means uncontested, even among scholars who otherwise adhered to Neo-Confucian doctrine. For example, the imperially commissioned *Essence of Moral Truth* (*Hsing-li ch'ing-i*), compiled in 1715

tribution to reshaping the Confucian Classics. Chu Hsi felt free to rearrange the order of portions of the classical texts. He filled in what he regarded as textual lacunae, and excised individual characters and even whole passages which he thought were spurious or merely redundant.⁷¹ Such wholesale canonical revision could only have been tolerated within a tradition in which the openness of its canon was unproblematical.⁷²

The contestability of the classical Confucian texts was to have dramatic political consequences in late imperial China. During the late Ming Dynasty (1368 - 1644), a handful of scholars began to contest the authenticity of certain Neo-Confucian texts.⁷³ By the seventeenth century, many Confucian scholars followed this lead in questioning orthodox reliance on the Old Text versions of the Classics, which supposedly had been uncovered centuries after the infamous burning of the books. Using sophisticated philological techniques, these scholars exposed a number of these classical texts as forgeries.⁷⁴ They therefore advocated

during the reign of the K'ang-hsi Emperor of the Ch'ing Dynasty, constituted the officially sanctioned compendium of Neo-Confucianism. Despite its deference to Chu Hsi's classical commentaries, however, the *Hsing-li ch'ing-i* rejected Chu Hsi's rearrangement of the text of the Great Learning and the Doctrine of the Mean. Wing-tsit Chan, *The Hsing-li ch'ing-i and the Ch'eng-Chu School of the Seventeenth Century*, in *THE UNFOLDING OF NEO-CONFUCIANISM* 543, 557 (William T. De Bary ed., 1975); see also KWANG-CHING LIU, *ORTHODOXY IN LATE IMPERIAL CHINA* 15-16 (1990) (noting that the *Hsing-li ch'ing-i* compendium demonstrated the extent to which the state equivocated in accepting Chu Hsi's views on Confucian doctrine).

71. HENDERSON, *supra* note 57, at 153.

72. Professor Daniel Gardner notes that Neo-Confucian epistemology contributed to what he calls their "freer attitude" towards the Confucian canon. Gardner, *supra* note 57, at 596. Because Neo-Confucian philosophy was committed to the epistemological position that the human mind has the inherent capacity for recognizing and comprehending truth, it followed not only that the ancient sages had no a priori privileged monopoly on philosophical correctness, but also that Neo-Confucian contemporary scholars could themselves add to the Confucian canon of sacred texts. *Id.* at 580-83.

73. Chiao Hung (1540? - 1620) was an early critic of Neo-Confucian textual exegesis, exploiting the contestability of the text in his own scholarship. For instance, Chiao Hung altered the reading of three characters in one text, changing its meaning completely. Edward T. Ch'ien, *Chiao Hung and the Revolt Against Ch'eng-Chu Orthodoxy*, in *THE UNFOLDING OF NEO-CONFUCIANISM*, *supra* note 70, at 271, 285-86. For a further discussion of Chiao Hung and his recognition of the problematic nature of the canonical texts, see EDWARD T. CH'EN, *CHIAO HUNG AND THE RESTRUCTURING OF NEO-CONFUCIANISM IN THE LATE MING* 178-94 (1986). Edward Ch'ien sees Chiao Hung as a forerunner of the later *k'ao-cheng* school of textual criticism. *Id.* at 30.

74. This group of scholars, referred to as the empirical research (*k'ao-cheng*) school, used techniques of philology, phonetics, and etymology to test the authenticity of the canonical texts. Yen Jo-chü (1636 - 1704) used the *k'ao-cheng* methodology to prove that the accepted Old Text of the Book of Documents was a post-Han forgery. From that point on, all of the canon was subjected to searching philological examination. BENJAMIN A. ELMAN, *CLASSICISM, POLITICS, AND KINSHIP: THE CH'ANG-CHOU SCHOOL OF NEW TEXT CONFUCIANISM IN LATE IMPERIAL CHINA* 103-16 (1990) [hereinafter ELMAN, *CLASSICISM, POLITICS, AND*

going back to the so-called New Text versions of the Classics, which Han Dynasty scholars had reconstructed from memory. They rejected not only the Old Texts themselves but the influential Chu Hsi commentaries on the discredited Old Texts as well.

In abandoning the Old Texts and their attendant commentaries, these scholars necessarily also rejected the orthodox interpretation of Confucian doctrine. During the later years of the Ch'ing Dynasty (1644 - 1911), some New Text proponents, led by K'ang Yü-wei, argued for sweeping social and political change to the Chinese order, supported by their interpretation of the New Text canon.⁷⁵ The image of Confucius was recreated, making him an "uncrowned king" whose hortatory pronouncements were seen as pointing the way to a future utopian order.⁷⁶

Having captured the attention of the young Kuang-hsü emperor,⁷⁷ the New Text challengers to the political order nearly succeeded in seizing the opportunity to transform the dynastic system. During the summer of 1898, Kuang-Hsü issued a comprehensive series of edicts designed to implement sweeping political and social reforms advocated by K'ang and his supporters.⁷⁸ Unhappily for the reformers, the revolutionary potential of the New Text advocates was recognized by conservatives within the government, including Tz'u-hsi, the powerful Dowager Empress.⁷⁹ At her order, the edicts were rescinded, the emperor was placed under what amounted to house arrest, and a number of the New Text

KINSHIP]. For additional assessment of the impact of the *k'ao-cheng* school on late imperial Chinese thought, see BENJAMIN A. ELMAN, *FROM PHILOSOPHY TO PHILOLOGY: INTELLECTUAL AND SOCIAL ASPECTS OF CHANGE IN LATE IMPERIAL CHINA* (1984).

75. K'ang Yü-wei began his scholarly career in typical *k'ao cheng* form by exposing additional classical texts to be forgeries. He quickly broadened his critique, advocating the wholesale transformation of the Chinese social and political order. K'ang and like-minded reformers attempted to accomplish major institutional reforms in the dynastic government, but were ultimately balked by conservatives allied with the Dowager Empress. For a fuller account of K'ang Yü-wei and the ill-fated *chin-wen* reform movement, see HSIAO KUNG-CHUAN, *A MODERN CHINA AND A NEW WORLD: K'ANG YU-WEI, REFORMER AND UTOPIAN 1858-1927* (1975); 1 JOSEPH R. LEVENSON, *CONFUCIAN CHINA AND ITS MODERN FATE 79-94* (1958); SCHRECKER, *supra* note 28, at 117-27.

76. 1 LEVENSON, *supra* note 75, at 79-85.

77. Kuang-hsü became emperor at the age of three in 1875. His ascendancy to the throne was engineered by his aunt, Tz'u-hsi, who had been the de facto ruler of China since 1861, when she became regent for her five-year-old son, the T'ung-chih emperor. When T'ung-chih suddenly died, Tz'u-hsi arranged the imperial succession so that, as Dowager Empress, she could continue to be, quite literally, the power behind the throne. SPENCE, *supra* note 1, at 194, 216-17.

78. These edicts encompassed major reforms in the Chinese governmental, educational, and military establishments. Because they were issued within the brief period between June and September of 1898, they are often referred to as the Hundred Days' Reforms. *Id.* at 229.

79. See *supra* note 77.

advocates were put to death.⁸⁰ The political coup was coupled with an ideological attack on New Text thought by scholars upholding the Old Text tradition. The Old Text scholars supporting the government did not base their counter-attack on a substantive critique of the reformers' proposals, but rather on the argument that the New Text philological analysis was flawed.⁸¹ Textual exegetical discourse thus served as the political grammar⁸² of late imperial China,⁸³ and it was a form of discourse explicitly premised on the essential contestability of the foundational canon.

The Confucian Classics were a generative, foundational text, but they were not, of course, a constitution. High imperial China had no such foundational legal document to serve as the charter of the monarchy.⁸⁴ During the last years of the crumbling Ch'ing Dynasty, the impe-

80. SPENCE, *supra* note 1, at 229-30.

81. For the specifics of the *ku-wen* scholars' criticism of K'ang Yü-wei's philological work, which was used as a substitute for criticism of his concrete political program, see 1 LEVENSON, *supra* note 75, at 88-94.

82. I have appropriated the term "political grammar" from Thomas Metzger, although I am using it in a slightly different sense from his use in THOMAS A. METZGER, *ESCAPE FROM PREDICAMENT: NEO-CONFUCIANISM AND CHINA'S EVOLVING POLITICAL CULTURE* 14-15 (1977). I chose the term in conscious evocation of the idea, called the Sapir-Whorf hypothesis, that language acts to constrain world-view and its corollary that experience is conceptualized according to implicitly accepted, structurally inflexible linguistic rule systems. LYONS, *supra* note 29, at 303-12. "Political grammar" is a better metaphor than, say, "political vocabulary," because it suggests the dynamically structural nature of the evolution of political discourse, in which new political meaning is generated in a way analogous to the way in which the transformational rules of grammar are said to generate new utterances. Cf. NOAM CHOMSKY, *LANGUAGE AND MIND* 115-60 (1972) (describing transformational grammatical rules as a model for linguistic analysis). Just as newly generated utterances, which are potentially infinite in number, are nevertheless constrained by the syntactic possibilities inherent in grammar, so, too, the expressions of political discourse within a culture are constrained by its "political grammar."

83. Benjamin Elman suggests that New Text studies ultimately resulted in the substitution of political discourse for classical philology. ELMAN, *CLASSICISM, POLITICS, AND KINSHIP*, *supra* note 74, at 306-17. I would go further and say that classical philology became a form of political discourse in light of the significance of the contestability of the canonical texts.

84. This is not to say that China did not have written law. Beginning in 739 with the T'ang Dynasty code (*T'ang lü shu i*), each dynasty in turn built on the legal efforts of its predecessors, assembling a massive, complex code of statutes and substatutes. However, these codes of penal and administrative law did not function as a constitutional charter of governance. For a more detailed account of the successive Chinese legal codes, see DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 52-143 (1967); PAUL HENG-CHAO CH'EN, *CHINESE LEGAL TRADITION UNDER THE MONGOLS: THE CODE OF 1291 AS RECONSTRUCTED* (1979); SYBILLE VAN DER SPENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA: A SOCIOLOGICAL ANALYSIS* 56-65 (1962); Edward L. Farmer, *Social Order in Early Ming China: Some Norms Codified in the Hung-wu Period*, in *LAW AND THE STATE IN TRADITIONAL EAST ASIA: SIX STUDIES ON THE SOURCES OF EAST ASIAN LAW* 1-36 (Brian E. McKnight ed., 1987); and Brian E. McKnight, *From Statute to Precedent: An Introduction to*

rial government, desperate to stave off its downfall, made a half-hearted gesture towards implementing a constitutional monarchy patterned on the Meiji Constitution of Japan.⁸⁵ However, neither of two draft constitutions issued by the dynastic government were ever put into force.⁸⁶ In 1911, the forces of revolution overtook the Ch'ing's desultory stab at constitutionalism. The republican government that replaced the dynastic monarchy took up the constitutional gauntlet where the Ch'ing had left off,⁸⁷ promulgating no fewer than ten constitutions and draft constitutions in rapid succession.⁸⁸ Just as competing political factions in late

Sung Law and Its Transformation, in LAW AND THE STATE IN TRADITIONAL EAST ASIA: SIX STUDIES ON THE SOURCES OF EAST ASIAN LAW, *supra*, at 111-31.

85. Cohen, *China's Changing Constitution*, *supra* note 13, at 794-95.

86. The first of these draft constitutions, the Principles of Constitution (*Hsien-fa ta-kang*), was issued by the imperial government on August 27, 1908. For an English translation, see NORBERT MEIENBERGER, THE EMERGENCE OF CONSTITUTIONAL GOVERNMENT IN CHINA (1905-1908) 91-93 (1980); another English version can be found in WILLIAM L. TUNG, THE POLITICAL INSTITUTIONS OF MODERN CHINA 318-19 (1964). The Principals of Constitution was quickly superseded by the Nineteen Articles (*Shih-chiu hsien-t'iao*), issued on November 2, 1911. The Nineteen Articles are translated in TUNG, *supra*, at 320-21. For a brief historical account of the ultimate failure of Ch'ing constitutionalism, see Peng-yüan Chang, *The Constitutionalists*, in CHINA IN REVOLUTION: THE FIRST PHASE, 1900-1913, at 143-83 (Mary C. Wright ed., 1968).

87. For a historical account focusing specifically on constitutionalism in China, from the waning years of the Ch'ing Dynasty to the draft constitution of 1937, see WEN-YEN TS'AO, THE CONSTITUTIONAL STRUCTURE OF MODERN CHINA 1-22 (1947); see also ANDREW J. NATHAN, PEKING POLITICS, 1918-1923: FACTIONALISM AND THE FAILURE OF CONSTITUTIONALISM (1976) (analyzing the failure of early republican constitutionalism); Herbert H. P. Ma, *American Influence on the Formation of the Constitution and Constitutional Law of the Republic of China: Past History and Future Prospects*, in CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE 39 (Lawrence W. Beer ed., 1979). Although Ma claims that American and other Western constitutionalism was influential in the development of republican constitutions, he cites no examples to support this assertion. He does point out the concrete ways in which Sun Yat-sen's political philosophy shaped the republican constitutions. *Id.* at 44-50, 55.

88. To some extent, the profusion of republican constitutions was a function of the competing political factions that fractured China in the early years of the Chinese republic. The initial republican constitution, the Provisional Constitution of the Republic of China (*Chung-hua min-kuo lin-shih yüeh-fa*), was hastily issued shortly after the Ch'ing emperor was deposed, on March 11, 1912. It can be found in translation in TUNG, *supra* note 86, at 322-25. On October 13, 1913, this constitution was replaced by the Draft Constitution of the Republic of China (*Chung-hua min-kuo hsien-fa ts'ao-an*), also known as the Temple of Heaven Draft Constitution. On May 1, 1914, the Yüan Shih-k'ai government published the Provisional Constitution of the Republic of China (*Chung-hua min-kuo yüeh-fa*), which was followed on August 12, 1919 by the Draft Constitution of the Republic of China (*Chung-hua min-kuo hsien-fa ts'ao an*), also called the Anfu Draft Constitution. The Ts'ao K'un government optimistically issued what it hoped would be a permanent constitution on October 10, 1923, calling it the Constitution of the Republic of China (*Chung-hua min-kuo hsien-fa*). An English text of this document is found in CH'ÏEN TUAN-SHENG, THE GOVERNMENT AND POLITICS OF CHINA 436 (1961). Another Draft Constitution of the Republic of China (*Chung-hua min-kuo hsien-fa ts'ao an*) was promulgated by Tuan Ch'i-jui on December 12, 1925, and a Draft Provisional

imperial China used the contestability of canonical texts as the forum upon which they waged their struggle for the political future of China, so, too, republican factions contended for political control at least in part through an attempt to control the content of the foundational text of the new order—the republican constitution.

In light of the contestability of foundational texts in both the imperial and early republican political orders, it can come as no surprise that the government of the People's Republic of China likewise has used its foundational political texts as a vehicle for expression of a changing social and political order. Immediately upon declaring the creation of the government of the People's Republic of China, the fledgling state promulgated a temporary constitution.⁸⁹ This temporary constitution was superseded in 1954 by the Constitution of the People's Republic of China,⁹⁰ a document patterned after the 1936 Constitution of the Soviet Union.⁹¹

The 1954 Constitution was expressly conceived of as an impermanent document, designed to mark the current stage of China's evolution from a people's democratic dictatorship toward full socialism.⁹² When

Constitution of the Republic of China (*Chung-hua min-kuo yüeh-fa ts'ao-an*), also referred to as the Taiyüan Draft, was issued by Yen Hsi-shan and Wang Ching-wei on October 27, 1930. The Nationalist Party (*Kuo-min-tang*), which eventually held power under Chiang K'ai-shek, was responsible for three additional constitutions. The first of these, the Provisional Constitution for the Republic of China during the Period of Tutelage (*Chung-hua min-kuo hsün-cheng shih-ch'i yüeh-fa*), was published on June 30, 1931, and can be found in English in TUNG, *supra* note 86, at 344-49. It was followed by yet another Draft Constitution of the Republic of China (*Chung-hua min-kuo hsien-fa ts'ao-an*), or the May Fifth Draft, issued on May 5, 1936. This document is translated in TS'AO, *supra* note 87, at 239-50. The final Nationalist constitution, the Constitution of the Republic of China (*Chung-hua min-kuo hsien-fa*), was promulgated during the Civil War between the Nationalists and the Communists on December 25, 1946. English versions can be found in CH'IEN TUAN-SHENG, *supra*, at app. D, and in TS'AO, *supra* note 87, at 275-92.

89. The Common Program of the Chinese People's Political Consultative Conference, issued in 1949, can be found in English translations in THE CHINESE COMMUNIST REGIME: DOCUMENTS AND COMMENTARY 34-45 (Theodore Hsi-en Chen ed., 1967), and in FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 34-53 (Albert P. Blaustein ed., 1962). An earlier constitution enacted in 1931 by the Communists to govern the abortive Chiangsi Soviet can be found in English in CONRAD BRANDT ET AL., A DOCUMENTARY HISTORY OF CHINESE COMMUNISM 220-24 (1966).

90. English language texts of the 1954 Constitution of the People's Republic of China (*Chung-hua jen-min kung-ho kuo hsien-fa*) can be found in THE CHINESE COMMUNIST REGIME: DOCUMENTS AND COMMENTARY, *supra* note 89, at 75-92, and FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA, *supra* note 89, at 3. The Chinese government's Foreign Language Press issued its own English language version in DOCUMENTS OF THE FIRST NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA 131-63 (1955).

91. Barrett, *supra* note 9, at 308.

92. The Preamble to the 1954 Constitution asserted that it "reflects the basic needs of the state in the period of transition, as well as the general desire of the people as a whole to build a

China progressed further along the road to that socialist utopia promised by teleological Marxist doctrine, then a new constitution would be necessary. That time came in 1975, during the Cultural Revolution,⁹³ when the second constitution of the People's Republic was enacted. The 1975 Constitution represented a dramatic deviation from the earlier Soviet-influenced constitution, and embodied the Maoist ideological vision of the Cultural Revolution.⁹⁴

The 1975 Constitution was a hastily conceived document, only a fraction of the length of the original 1954 Constitution.⁹⁵ It failed to provide a coherent institutional framework for the government and legal system required by a more politically stable China, and only three years later a new constitution was perceived as necessary. The balance of power had shifted in the years immediately after the issuance of the 1975 Constitution.⁹⁶ The deaths of Chou En-lai⁹⁷ and Mao Tse-tung, the re-

socialist society." In describing the state apparatus for regulating the economy, the Constitution explicitly acknowledged the temporary nature of its provisions. *See, e.g.*, HSIEN-FA (1954) art. 5 (P.R.C.) ("[a]t present, the following basic forms of ownership of means of production exist . . .") (emphasis added); *id.* art. 7 ("Partial collective ownership . . . is a *transitional* form by means of which . . . individual working people organize themselves in their advance towards collective ownership by the working masses") (emphasis added).

93. The Cultural Revolution (1966 - 1976) represented a period of ultra-leftist upheaval approaching civil war. The magnitude of the convulsion, and the continuing impact of the experience of the Cultural Revolution on the Chinese people today, cannot be overstated. For further information on the Cultural Revolution and its aftermath, see TANG TSOU, *THE CULTURAL REVOLUTION AND POST-MAO REFORMS: A HISTORICAL PERSPECTIVE* (1986).

94. The 1975 Constitution was harshly criticized by the Soviet Union for deviating so markedly from the Soviet model, to which all previous socialist governments had strictly adhered in their constitutions. A summary of the Soviet critique can be found in Hazard, *supra* note 24, at 985.

95. The 1954 Constitution consisted of 106 articles of some 15,000 words, while the 1975 Constitution had only 30 articles and 2000 words. For the significance of this textual change, *see supra* note 14.

96. As late as 1976, Chinese politics were still dominated by the aging generation of leaders who had come to prominence during the 1949 revolution, including Mao Tse-tung, Chou En-lai, and Teng Hsiao-p'ing. For a history of the shifting alliances between the geriatric "old guard" and their supporters and protégés during the waning days of the Cultural Revolution, see SPENCE, *supra* note 1, at 645-82.

97. Chou En-lai became a Chinese revolutionary activist just after World War I. Along with a number of other Chinese radical students, he studied in France and returned to China to organize cadets at the Whampoa Military Academy. *Id.* at 321-22, 338. Chou rose to prominence during the long revolutionary campaign, as both a military and a political leader. *Id.* at 403-04, 423-24. Upon the Chinese communist victory in the civil war, Chou assumed a crucial role in the government as one of five men making up the Standing Committee of the Politburo. *Id.* He also served as the premier of the State Council and as foreign minister. *Id.* at 520-22. Until his death in 1976, Chou remained one of China's most powerful and revered leaders. Even in death, Chou affected the course of Chinese political affairs. The spontaneous public demonstrations and tributes marking Chou's death in large measure contributed to the downfall of the extremist proponents of the Cultural Revolution. *Id.* at 645-48.

ascendance of Teng Hsiao-p'ing,⁹⁸ and the arrest of the radical Maoist "Gang of Four" (*ssu jen pang*)⁹⁹ signaled a decisive change in the Chinese power structure. The new leadership needed a constitution which more accurately reflected the more pragmatic political perspective of the government as it was then constituted. The result was the 1978 Constitution.¹⁰⁰

Within the next few years, Teng Hsiao-p'ing further consolidated his power, and the government accelerated the pace of policies designed to promote economic modernization.¹⁰¹ A more detailed constitution, spelling out the institutional and legal structure of the new China, was seen as crucial in facilitating the political stability and economic reforms necessary to modernize the nation.¹⁰² The product of that perceived need, the 1982 Constitution, is still in effect.

In tracing the evolution of the Chinese socialist constitutions, one can find structural traits reflecting the archetypal sacred text interpretive practices of Confucianism. Just as the Confucian canon was singularly resistant to closure, so, too, modern Chinese constitutions have been open to contest and change. The frequency with which Chinese constitutions have been replaced has been viewed by most Western observers in a

98. Like Chou En-lai, Teng Hsiao-p'ing's revolutionary pedigree included socialist education in France. *Id.* at 321-22. He participated militarily in the revolutionary struggle in a remote rural base of operations and was a veteran of the Long March retreat of the Chinese communist forces into the interior of China. *Id.* at 377, 792. After the communist victory, Teng was appointed to prominent political posts within the southwest region of China. *Id.* at 523-24. Twice purged for "rightist" tendencies, Teng managed to return to even more powerful positions in the Central Committee upon his "rehabilitations." *Id.* at 606, 634, 640, 653, 792. After the death of Chou En-lai in early 1976 and the attendant public demonstrations, Teng for a third time attained political power. *Id.* at 653-59.

99. The so-called "Gang of Four" consisted of Chiang Ch'ing (wife of Mao Tse-tung), Wang Hung-wen (Vice-Chairman of the Central Committee of the Chinese Communist Party), Chang Ch'in-ch'iao (head of Shanghai's Communist Party), and Yao Wen-yüan (Shanghai propagandist who wrote the influential editorial kicking off the Cultural Revolution). All were members of the Chinese Communist Party Central Committee during the Cultural Revolution period. Upon their purge in 1976, the "Gang of Four" came to personify leftist extremism in Chinese political discourse. *See, e.g.,* CHI HSIN, *THE CASE OF THE GANG OF FOUR 1-74* (2d ed. 1978) (providing an analysis of the Cultural Revolution in terms of the rise and fall of the Gang of Four, written by a pseudonymous Chinese writer).

100. Cohen, *China's Changing Constitution*, *supra* note 13, at 794.

101. For analysis of the post-Cultural Revolution campaign for economic modernization, see *CHINA'S FOUR MODERNIZATIONS: THE NEW TECHNOLOGICAL REVOLUTION* (Richard Baum ed., 1980); *POLICY CONFLICTS IN POST-MAO CHINA* (John P. Burns & Stanley Rosen eds., 1986); and *ORVILLE SCHELL, DISCOS AND DEMOCRACY: CHINA IN THE THROES OF REFORM* (1988).

102. For an official Chinese assessment of the need for the 1982 Constitution, see Hu Sheng, *On the Revision of the Constitution*, *BEIJING REV.*, May 3, 1982, at 15.

negative light¹⁰³ because the Western sacred text archetype for interpreting foundational texts regards such texts as the embodiment of truths, which, if not absolutely immutable and eternal, ought to be exceedingly resistant to change. When seen in light of the Chinese textual exegetical tradition, however, the Chinese openness to constitutional change is entirely consistent with the interpretive assumptions inherent in the Confucian canonical tradition.¹⁰⁴ As we have seen, the political grammar of China has consistently utilized the contestability of its foundational texts as a primary mode of political discourse.

In a second parallel between the Confucian canon and modern Chinese constitutions, both structure their discourse as prescriptive of utopian goals rather than as descriptive of contractual obligations enforceable against the state.¹⁰⁵ In contrast to the covenantal nature of much of the Judeo-Christian scriptural tradition, the Confucian canon contained no covenants.¹⁰⁶ Rather, the Confucian texts comprised a set of ethical prescriptions about the way a superior person ought to live and how a perfect social order ought to be structured.¹⁰⁷ Particularly as interpreted by the late nineteenth century New Text reform movement, the Confucian canon constituted a discourse of utopian possibility.¹⁰⁸ Similarly, all four Chinese constitutions have contained numerous articles intended as hortative prescriptions for the new China rather than as legally executable provisions.¹⁰⁹ For example, several provisions of the 1982

103. See, e.g., Brunner, *supra* note 24; Cohen, *China's Changing Constitution*, *supra* note 13.

104. Professor Gardner characterizes the Neo-Confucian attitude towards their canonical texts as "desacralized," observing that they considered the canon "less an object of worship, and more a repository of evidence to be used in 'winning' debates." Gardner, *supra* note 57, at 596.

105. Compare *supra* notes 75-83 and accompanying text with *infra* notes 110-23 and accompanying text.

106. The influence of Puritanism's covenant theology on the subsequent development of American constitutional interpretation has been well documented. See Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 35-36, 40 (1990); John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, 44-54 (1990).

107. See FREDERICK W. MOTE, *INTELLECTUAL FOUNDATIONS OF CHINA* 29-65 (1971).

108. See *supra* notes 75-76 and accompanying text.

109. Compare the similarly hortatory nature of the Declaration of Independence, and its ringing rhetoric of equality and justice, with the precise, business-like quasi-contractual provisions of the American Constitution. James Boyd White has performed an extended rhetorical comparison of these two texts in JAMES B. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 231-47 (1984). He characterizes the Declaration of Independence as an "inspirational text" of "impossible and harmless ideal[s]," in contrast to the Constitution, which he calls a "charter for collective life." *Id.* at 234, 239-40. The contrast would apply equally to a comparison of the Chinese and United States Constitutions.

Constitution proclaim that the state will promote various aspects of an idealized social order, such as a more advanced economy,¹¹⁰ an improved educational system,¹¹¹ increased scientific development and technological innovation,¹¹² promotion of an "advanced culture" of high ideals and ethics,¹¹³ and equality between the sexes in all aspects of political, economic, cultural, social, and family life.¹¹⁴ Other provisions appear to grant citizens entitlements to benefits which the Chinese economy is obviously inadequate to provide, such as vacations,¹¹⁵ retirement benefits,¹¹⁶ and social security insurance for the sick, the handicapped, the disabled, and the dependents of military casualties.¹¹⁷ Still other provisions prohibit, in vague and sweeping terms, a vast spectrum of antisocial behavior, as various as sowing discord among ethnic minorities,¹¹⁸ dam-

110. HSIEN-FA (1982) art. 14 (P.R.C.) provides, in part:

The state continuously raises labour productivity, improves economic results and develops the productive forces by enhancing the enthusiasm of the working people

The state practices strict economy and combats waste.

The state properly apportions accumulation and consumption, concerns itself with the interests of the collective and the individual as well as of the state and, on the basis of expanded production, gradually improves the material and cultural life of the people.

111. Article 19 provides, in part: "The state undertakes the development of socialist education and works to raise the scientific and cultural level of the whole nation." *Id.* art. 19.

112. Article 20 provides: "The state promotes the development of the natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions." *Id.* art. 20.

113. Article 24 provides:

The state strengthens the building of a socialist society with an advanced culture and ideology by promoting education in high ideals, ethics, general knowledge, discipline and legality, and by promoting the formulation and observance of rules of conduct and common pledges by various sections of the people in urban and rural areas.

The state advocates the civic virtues of love of the motherland, of the people, of labour, of science and of socialism. It conducts education among the people in patriotism and collectivism, in internationalism and communism and in dialectical and historical materialism, to combat capitalist, feudal and other decadent ideas.

Id. art. 24.

114. Article 48 provides, in part: "Women in the People's Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life." *Id.* art. 48.

115. Article 43 states that citizens are entitled to rest and vacation from work. *Id.* art. 43.

116. Article 44 states that the state will provide retirement pensions. *Id.* art. 44.

117. Article 45 provides for social insurance for the old, the sick, the disabled, and the handicapped. It also provides for pensions for military casualties and their families. *Id.* art. 45.

118. Article 4 provides, in part: "Discrimination against and oppression of any nationality are prohibited; any act which undermines the unity of the nationalities or instigates division is prohibited." *Id.* art. 4.

aging or misappropriating natural resources,¹¹⁹ disturbing the socioeconomic order,¹²⁰ insulting, libeling, or falsely accusing others,¹²¹ mistreating the elderly, women, or children,¹²² and committing acts detrimental to the security, honor, or interests of the nation.¹²³ While Western commentators have cynically seen the inherent unenforceability of these provisions as proof that the Chinese do not take their constitutions seriously, such provisions are better understood as consistent with the interpretive practices deeply embedded in Chinese political tradition. The political grammar of late imperial China was hortative and utopian in character; those interpretive practices continue to be expressed in Chinese foundational textual discourse today.

In pointing out the corresponding interpretive structures of the Confucian and Communist foundational texts, I do not mean to imply that the People's Republic of China is nothing more than the latest in a long series of Confucian dynasties. Despite the parallels in interpretive strategies and in substantive values¹²⁴ between Confucian and socialist China, to exaggerate the continuity between these social orders would be to un-

119. Article 9 provides, in part: "Appropriation or damaging of natural resources . . . by whatever means is prohibited." *Id.* art. 9.

120. Article 15 provides, in part: "Disturbance of the socioeconomic order or disruption of the state economic plan by any organization or individual is prohibited." *Id.* art. 15.

121. Article 38 provides: "The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited." *Id.* art. 38.

122. Article 49 prohibits "maltreatment of old people, women and children . . ." *Id.* art. 49.

123. Article 54 prohibits commission of "acts detrimental to the security, honour and interests of the motherland." *Id.* art. 54.

124. Andrew Nathan has traced the continuity of a wide range of political and ethical values through the imperial, republican, and socialist constitutions, persuasively arguing that an indigenous Chinese value system has been maintained despite the radical differences in the three political regimes. See Nathan, *Political Rights*, *supra* note 32, at 121-24; Andrew J. Nathan, *Sources of Chinese Rights Thinking*, in HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra* note 32, at 125-64 [hereinafter Nathan, *Sources of Chinese Rights Thinking*]; see also Jonathan K. Ocko, *Preface to Symposium, The Emerging Framework of Chinese Civil Law*, 52 LAW & CONTEMP. PROBS, Spring & Summer 1989, at 1, 11-13 (distinguishing distinctly Chinese from borrowed foreign aspects of contemporary civil law developments in China).

Many historians of China have noted the persistence of Confucian values and patterns of thought in socialist China. See, e.g., ETIENNE BALAZS, CHINESE CIVILIZATION AND BUREAUCRACY 159-60 (Arthur F. Wright ed. & Hope M. Wright trans., 1964); JOHN K. FAIRBANK, THE GREAT CHINESE REVOLUTION: 1800-1985, at 361-68 (1986); JOHN K. FAIRBANK, THE UNITED STATES AND CHINA 49-51 (3d ed. 1971); METZGER, *supra* note 82, at 231-35; FREDERIC E. WAKEMAN, JR., HISTORY AND WILL: PHILOSOPHICAL PERSPECTIVES OF MAO TSE-TUNG'S THOUGHT 97-152, 238-73 (1973). These scholars emphasize continuity within Chinese historical development, maintaining that contemporary Chinese socialism should not be considered as an externally grafted foreign transplant onto the Chinese body politic. For a recent study examining the Chinese Revolution as an organic development within the internal dynamics of Chinese historical processes, see SCHRECKER, *supra* note 28.

dervalue the significance of Marxist ideology and practice in transforming contemporary China. Nor do I mean to suggest that modern Chinese constitutional development cannot profitably be compared with that in other Marxist nations.¹²⁵ When examined as just another case study of socialist legality, however, modern Chinese legal development appears strangely anomalous compared with that in other socialist states. Such a perspective misses the mark by inevitably marginalizing continuities with traditional Chinese legal practices and values in its focus on Marxist elements in Chinese legal development. By suppressing the significance of, on the one hand, China's Chineseness or, on the other hand, its Marxism, both of these perspectives seriously distort our understanding of Chinese constitutional discursive practice.

Instead, taking the Chinese historical and social context as my frame of reference, I assert that Confucianism created a form of political discourse with its own characteristic set of interpretive assumptions and strategies, which are deeply embedded in Chinese culture. The continuing legacy of the Confucian political grammar has shaped the patterns of discourse in modern Chinese constitutional development. Therefore, as Western scholars look to China for evidence of implementation of its 1982 Constitution, we ought not look for Western style constitutional interpretation, which is premised upon a Western tradition of interpreting foundational texts. To do so would be to commit the fallacy of false universalism,¹²⁶ of assuming that the frameworks within which we structure inquiry into constitutional interpretation are as applicable to the study of constitutional discourse in China as to the study of American constitutional law.

On a more general level, those of us engaged in the comparative study of law must face the question of how to avoid imposing an ethnocentric framework that fundamentally misrepresents the foreign legal system. This problem is particularly acute when the legal system being studied is that of a non-Western society.¹²⁷ The questions we ask, the issues we think are worthy of study, the answers we propose, however tentatively, are all determined as much by our own cultural biases and

125. See, e.g., Brunner, *supra* note 24, at 121; Hazard, *supra* note 24, at 985.

126. This fallacy is similar to what David Hackett Fischer termed the fallacy of the universal man, or the implicit assumption that all human beings, regardless of their social or historical context, share the same psychological makeup. DAVID H. FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 203-07 (1970). Instead, Fischer argues, "[p]eople, in various places and times, have not merely thought different things. They have thought them differently." *Id.* at 203. See also Clifford Geertz, *Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263 (1984) (criticizing attempts to posit a culturally invariant human nature).

127. See *supra* note 26 and accompanying text.

political preoccupations as by the abstract realities of the system we are examining.¹²⁸ Of course, no scholarship can be totally free of the distortion caused by the historical and cultural situatedness of the scholar. At best, we can only hope to minimize misrepresentation and misinterpretation, not to eliminate them.¹²⁹ But it is possible to become conscious of the cultural contingency of categorization,¹³⁰ and to constantly question

128. This problem is not peculiar to legal scholarship, but is also common in other fields of scholarship concerned with foreign societies. See, e.g., EDWARD W. SAID, *ORIENTALISM* (1978) (arguing that nineteenth-century European scholars and statesmen systematically created the concept of "the Orient" and imposed this construct for their own political ends). Historian Paul Cohen has demonstrated the degree to which American scholarship on Chinese history has been informed, perhaps even deformed, by American experiences such as the Cold War and the Vietnam War. COHEN, *DISCOVERING HISTORY*, *supra* note 28, at 58-63, 98-111. According to Cohen, American political preoccupations successively generated a set of conceptual frameworks, or paradigms, which constrained historical study of China in the United States. *Id.* at 9-55 (the Western impact—Chinese response paradigm); *id.* at 57-96 (the tradition—modernization paradigm); *id.* at 97-147 (the imperialism paradigm).

The constraints placed on historical inquiry described by Cohen operate analogously to the scientific paradigms of Thomas Kuhn. Kuhn argued that scientific inquiry normally proceeds on the basis of paradigms, or meta-theories about the nature of reality, which then generate specific scientific theories commensurate with the paradigms. Intellectual paradigms, be they scientific or historical, organize and constrain scholarly research, making some questions seem natural, leading to potentially fruitful avenues of research, and others irrelevant, dead-end, perverse or even literally unthinkable. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-51 (2d ed. 1970).

129. In one of his early essays, Jacques Derrida critiqued the work of structuralist anthropologist Claude Lévi-Strauss, suggesting that Lévi-Strauss overestimated the possibility of an anthropological discourse untainted by Western assumptions and values:

[E]thnology . . . is primarily a European science employing traditional concepts, however much it may struggle against them. Consequently, whether he wants to or not—and this does not depend on a decision on his part—the ethnologist accepts into his discourse the premises of ethnocentrism at the very moment when he denounces them. . . . But if no one can escape this necessity, and if no one is therefore responsible for giving in to it, however little he may do so, this does not mean that all the ways of giving in to it are of equal pertinence. The quality and fecundity of a discourse are perhaps measured by the critical rigor with which this relation to the history of metaphysics and to inherited concepts is thought. Here it is a question both of a critical relation to the language of the social sciences and a critical responsibility of the discourse itself. It is a question of explicitly and systematically posing the problem of the status of a discourse which borrows from a heritage the resources necessary for the deconstruction of that heritage itself. A problem of *economy* and *strategy*.

Jacques Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 278, 282 (Alan Bass trans., 1967) (emphasis in original). As Derrida recognized, the mere fact that all discourse is, to some degree, inherently a product of the culture in which it is situated, does not mean that all discourse is equally ethnocentric. Thus, conscious striving to minimize ethnocentric aspects of scholarly discourse is both possible and desirable. See also *infra* notes 130-31.

130. This point is suggested by the position taken by Steven Winter in his disagreement with Stanley Fish on the consequences of theory for practice. See *supra* note 54 for the sources of this debate. Winter contends, correctly I think, that self-conscious awareness of one's own

and test those categories against the cultural context we are studying.¹³¹ The bottom line question for the scholar of the Chinese legal system must always be whether her analysis rings true given a Chinese historical and cultural context for the inquiry.¹³²

John K. Fairbank, the doyen of American historians of China, once cautioned Western observers of China against complaining, like Professor Henry Higgins in "My Fair Lady": "Why can't *they* be more like *us*?"¹³³ If we look for signs that the Chinese are adopting a Western liberal constitutionalism, then we are likely to be disappointed. Chinese constitutional interpretation must evolve in Chinese terms, drawn from interpretive strategies and assumptions with roots in Chinese patterns of discourse. It is to that Chinese political grammar that we must look if we are to understand Chinese constitutional practice in the future.

interpretive constructs is both possible and necessary. Winter, *supra* note 54, at 677-93. One aspect of being aware of one's own interpretive constructs is the recognition that the constructs could be other than as they are, in short that constructs are radically contingent, depending on, among other factors, one's social, cultural, and historical context.

131. Paul Cohen suggests a similar stance in his advocacy of what he terms a "China-centered" history of China. COHEN, *DISCOVERING HISTORY*, *supra* note 28, at 149-98. A different approach to the same end is that proposed by Clifford Geertz, who urges "thick description," or highly contextualized, multi-layered narrative as an anthropological methodology. CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3 (1973).

132. In advocating that Western scholars analyze Chinese constitutional discourse in the context of an autochthonous Chinese political culture, I am in no way suggesting that Western commentators ought to be uncritical as to the moral or political dimensions of the values or actions of the Chinese government. It is one thing to take internal Chinese dynamic forces seriously in historical analysis, and another thing entirely to applaud them on a normative level. Even assuming that a scholar could avoid making value judgements about contemporary China, which I believe impossible in any event, such a stance seems to me to be an unnecessary and unwarranted abdication of intellectual responsibility.

133. Maurice Meisner, *Marxism and Chinese Values*, in *THE CHINA DIFFERENCE* 101, 101 (Ross Terrill ed., 1979).