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CONSTITUTIONAL REVISIONISM IN THE PRC: "SEEKING TRUTH FROM FACTS"

*Hal Blanchard**

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I. INTRODUCTION

On March 14, 2004 the Tenth National People's Congress (NPC) approved by an overwhelming majority a series of high-profile changes to the Constitution of the People's Republic of China (PRC) intended to enshrine the protection of lawful private property, the promotion of the private sector, and respect for human rights as guaranteed under the nation's fundamental law.¹ The amendments drew nationwide attention as

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1. The 2004 amendments were passed by a vote of 2863 in favor and 10 in opposition. See Anil K. Joseph, *China Legalises Private Property*, Rediff.com, Mar. 14, 2004, available at <http://us.rediff.com/news/2004/mar/14china.htm> (last visited June 1, 2005). See also *China Amends Constitution*, CHINA LAW, Apr. 2004, at 53-54 (containing a table of the 2004 amendments). For an excellent discussion by a mainland scholar of the policies behind the recent amendments, see The Consulate General of the People's Republic of China in Los Angeles, *Constitutional*

newspaper editorials around the country discerned a renewed focus on “people-oriented” policies, and entrepreneurs, once considered the enemies of communism, embraced their newfound status within the hierarchy of the Communist Party of China (CPC).² The volume alone is indicative of China’s growing commitment to the pursuit of constitutionalism: the thirteen amendments nearly equal those made over the three previous rounds in 1988, 1993, and 1999.³ They also represent, to some extent, the culmination of an ongoing trend to eradicate the system of public ownership in China and to elevate human rights from a capitalist notion meant to conceal proletarian exploitation to a legal concept afforded the full protection of the law.⁴

Led by a growing number of foreign-investment enterprises and a rising class of private entrepreneurs, the amendments are in large part a response to China’s economic modernization drive. According to the PRC Constitution, the fundamental task of the state is to concentrate its effort on “socialist modernization” pursuant to the theory of building “socialism with Chinese characteristics” (*zhongguo tese de shehui zhuyi*).⁵ The 2004 pledge to safeguard the “legitimate rights and interests of the non-public sectors of the economy” is based on the belief that such protection is a prerequisite for the survival and development of the private sector, and for the Chinese economy as a whole.⁶ From a more optimistic perspective, the amendments may also be indicative of an emerging trend towards political liberalization, as suggested by recent comments of Chinese President and

Amendment: A Look Through Expert Eyes, Mar. 22, 2004 [hereinafter *A Look Through Expert Eyes*], available at <http://losangeles.china-consulate.org/eng/Topics/NPC/t80321.htm>.

2. See Li Wuzhou, *People-Oriented Constitutional Amendments*, CHINA TODAY, May 2004, available at <http://www.chinatoday.com.cn/English/e2004/e200405/p10.htm> (last visited June 1, 2005); *China Embraces Property Rights*, CNN.com, Dec. 23, 2003, available at <http://www.cnn.com/2003/WORLD/asiacf/12/22/china.private.ap/> (last visited June 1, 2005).

3. See *A Look Through Expert Eyes*, *supra* note 1. Among the more radical proposals for constitutional amendments that were not approved by the NPC in 2004 include: abrogating the dictatorship articles, establishing the transparency of public administration, removing the preamble from the Constitution, establishing a Constitutional Commission or Court, and implementing universal direct elections for members of the legislature. See *Non-Governmental Sector Submits to the Central Authorities a Proposal on Constitution Amendment; Forty Scholars Call for Abrogation of Dictatorship*, H.K. MING PAO, June 30, 2003 [hereinafter *Proposal on Constitution Amendment*].

4. See Li Wuzhou, *supra* note 2; *Inclusion of Human Rights in Constitution Marks a Milestone*, XINHUA ONLINE, Mar. 14, 2004 [hereinafter *Inclusion of Human Rights*], available at http://news.xinhuanet.com/english/2004-03/14/content_1365532.htm (last visited June 1, 2005).

5. See XIAN FA [Constitution] pmbl. § 7 (1982) (amended 1999) (P.R.C.).

6. See *id.* art. 11(2) (1982) (amended 2004); see also Bian Yaowu, *Legal Bases for Development of Nonpublic Economy in China*, CHINA LAW, Dec. 2003, at 54-55.

CPC General Secretary, Hu Jintao, about the importance of embracing rule of law and decentralizing government.⁷ In 1996 former CPC chief Jiang Zemin adopted the official policy of ruling the country in accordance with law (*yifa zhiguo*), an idea which in 1999 was incorporated into Article 5 of the Constitution.⁸ Although the principle that state organs must comply with the law initially inspired little confidence in the CPC's willingness to accept meaningful limitations on its power, the regime has subsequently taken concrete steps to reinforce legal institutions and create a legal basis for challenging the state.⁹ The authority of the central government may end up being further undermined by China's policy of fiscal decentralization, which some contend has resulted in a sort of de facto federalism in which local authorities are given more and more autonomy over the regulation of the regional economy and the promotion of economic reform.¹⁰

But in an age in which the perceived indispensability of judicial enforcement for rule of law has spawned a proliferation of constitutional courts around the world, the Constitution continues to be regarded as more of a political-philosophical declaration than a set of legally binding norms.¹¹ Without any democratic check on government or effective enforcement machinery, the long list of rights it provides for is dismissed

7. See Hu Jintao, *China's Vice-President Hu Jintao Stresses Importance of Constitution*, XINHUA NEWS AGENCY, Dec. 4, 2002; see also Arjun Subrahmanyam, *Constitutionalism in China: Changing Dynamics in Legal and Political Debates*, CHINA L. & PRAC., May 2004, at 27.

8. According to Article 5, the state "practices ruling the country in accordance with the law and building a socialist country of law." XIAN FA art. 5 (1982) (amended 1999); see Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT L. 471, 474 (2002).

9. See Peerenboom, *supra* note 8, at 520. Representative of these efforts is the changing role of administrative law: initially intended to ensure that government officials serve the interest of the state, it is now based on a "balance theory" designed to both protect individual rights and enhance government efficiency. See generally XIANDAI XINGZHENG FA DE PINGHENG LILUN [THE BALANCE THEORY OF MODERN ADMINISTRATIVE LAW] (1997).

10. The idea is that the post-Mao shift from a centrally-planned to a market economy will inevitably lead to greater political diffusion — a sort of federalism with Chinese characteristics — as local governments compete in diversifying regional economies and encouraging private investment. See Sean M. Dougherty & Robert H. McGuckin, *Federalism and the Impetus for Reform in China*, CHINA L. & PRAC., May 2002, at 30; see also Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 NW. J. INT L. & BUS. 383, 402 (2000) (arguing that the influence of local governments over economic resources and local business activity has "weakened the 'Leninist structure' of the party-state").

11. See Albert H.Y. Chen, *The Interpretation of the Basic Law — Common Law and Mainland Perspectives*, 30 H.K.L.J. 380, 409-10 (2000); see also MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 186-87 (1989); DONALD P. KOMMERS & JOHN E. FINN, *AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES* 43-44 (1998).

as largely symbolic.¹² Human rights groups are quick to point out the incongruity between China's ostensible obligations under the Constitution and the status of human rights in China, noting that Chinese authorities' cooperation with the international human rights regime has been limited and highly selective.¹³ The Chinese government has responded in kind by characterizing Western pressure to adopt a Western-style legal system and an European notion of human rights as a form of cultural imperialism.¹⁴ Though China has grown more receptive to internationally recognized notions of human rights, the PRC Constitution itself is founded on a distinctly Chinese orientation that subordinates citizen's rights to the interest of the state¹⁵ and prioritizes the rights to subsistence and development at the expense of all others.¹⁶

Immersed in the liberal democratic tradition, Western critics tend to consider a non-justiciable constitution lacking the support of either an independent judiciary or a constitutional commission to be a particularly flagrant example of "paper liberty" undeserving of the honorific designation of rule of law.¹⁷ By mandating the consistent and systematic application of legal rules and delineating the constitutional functions of the government, rule of law necessarily assumes the existence of mechanisms through which citizens may seek legal redress against government

12. See Amnesty: China Human Rights Amendment "Must be Backed by Concrete Action," EPOCH TIMES, Mar. 17, 2004 [hereinafter *Concrete Action*], available at <http://english.epochtimes.com/news/4-3-17/20438.html> (last visited June 1, 2005); Luis Ramirez, *China Amends Constitution to Protect Private Property Rights*, CLARINET, Mar. 15, 2004, available at <http://quickstart.clari.net/voa/20040315.html> (last visited June 1, 2005).

13. See Press Release, Amnesty International, China: Constitutional Amendment on Human Rights Must be Backed by Concrete Action (Mar. 15, 2004) [hereinafter Amnesty International Press Release] (on file with author).

14. See Lubman, *supra* note 10, at 410-11.

15. According to Article 51 of the PRC Constitution, "[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens." XIANFA art. 51 (1982); see Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 145 (1998); *Human Rights to be Protected by Constitution*, XINHUANET, Mar. 8, 2004, available at <http://english.pladaily.com.cn/special/e2004lh/zyxw/25.htm> (last visited June 1, 2005).

16. Despite the widespread advocacy for liberal democracy in China, studies indicate that most people are actually more concerned about national prosperity and economic stability than civil and political rights. See Peerenboom, *supra* note 8, at 473-74; Thomas A. Metzger, *Collision Course?*, 3 HOOVER DIG. (2004), available at <http://www.hooverdigest.org/043/metzger.html> (last visited June 1, 2005).

17. See, e.g., James A. Dorn, *15 Years after the Massacre, Chinese Still Wait on Reform*, INVESTOR'S BUS. DAILY, June 4, 2004, at A16.

encroachment.¹⁸ Absent judicial enforcement of these rights, rule of law is widely held to be meaningless. It would be unfair, however, to condemn Chinese constitutionalism outright without considering the historical and social conditions in which it has developed.¹⁹ To some extent, rule of law may be nothing more than a means of justifying the exercise of power with an underlying belief system that is arguably no more legitimate than China's communist ideology.²⁰ Nor does rule of law necessarily guarantee good government. As Randall Peerenboom points out, if rule of law is not necessarily rule of good law, an authoritarian legal system based on the denial of human rights, religious persecution, and widespread poverty may actually embody rule of law better than any of the legal systems of the more enlightened Western democracies.²¹

The fact remains that without a relativistic approach towards rule of law, constitutional development in China would be impossible, as it would in any regime lacking electoral democracy and/or judicial review.²² In the absence of these defining characteristics, however, China is indeed in the process of working out its own hybrid form of constitutionalism, one in which a certain degree of independence is maintained from political pressures and in which law has begun to replace party policy and the "cult of personality" as an independent source of legitimation.²³

18. Michael Dowdle defines rule of law as a "condition under which the legal authority of an act is determined more or less exclusively by its consistency with positively established legal norms." See Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1, 12 (2002). Randall Peerenboom's definition emphasizes the need for a credible normative commitment to the principle that law is to bind the state and state actors. See Peerenboom, *supra* note 8, at 519.

19. See Zhenmin Wang, *The Developing Rule of Law in China*, 4 HARV. ASIA Q. (2000), available at <http://www.fas.harvard.edu/~asiactr/haq/200004/0004a007.htm> (last visited June 1, 2005).

20. See Lubman, *supra* note 10, at 410 (attributing China's reluctance to embrace a liberal democratic rule of law to the underlying fear of displacing communist ideology as the source of the ruling party's legitimacy).

21. See Peerenboom, *supra* note 8, at 480-81. Peerenboom makes a distinction between two conceptions of rule of law: a *thin theory*, which stresses the formal or instrumental features that any legal system must possess to function as a system of laws; and a *thick theory*, which takes into account elements of political morality such as economic arrangements (free market capitalism or central planning), forms of government (democratic or socialist), or conceptions of human rights (liberal, collectivist, or "Asian values,"). See *id.* at 472.

22. See generally Dowdle, *supra* note 18 (attempting to explain the phenomenon of constitutional development in authoritarian regimes). See also ROBERT WEATHERLY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA: HISTORICAL AND IDEOLOGICAL PERSPECTIVES* 120-21 (1999).

23. See Peerenboom, *supra* note 8, at 521.

The following is an analysis of the theoretical considerations and practical implications of constitutional revisionism as it has developed in China since 1982. Part II discusses the function of the PRC Constitution with respect to the changing role of the CPC as well as the ideological and political incentives for constitutional reform. Part III examines the trajectory of China's constitutional reform agenda by considering the implications of the recent amendments for the promotion of socialist modernization, the advancement of socialist democracy, and the protection of human rights. The third and final part briefly addresses the practical shortcomings and positive developments of constitutional implementation and enforcement within the framework of an alternative conception of rule of law that is more consistent with China's own circumstances.

II. CONSTITUTIONAL REFORM AND THE SEARCH FOR POLITICAL LEGITIMACY

Constitutionalism in China originated in the late Qing Dynasty with the adoption of the 1908 Principles of the Constitution, and evolved with the subsequent enactment of at least twelve constitutional documents.²⁴ Its most recent manifestation emerged towards the end of World War II when the PRC embraced Marxism and one-party rule.²⁵ Introduced in 1954 and modeled after the 1936 Constitution of the Soviet Union, the original draft of the PRC Constitution contained China's first expression of modern-day constitutionalism by guaranteeing equality before the law, mandating the independence of the adjudicative and procuratorial branches of government, and protecting private ownership of the means of production.²⁶ Within a few years, however, the 1954 Constitution fell into disuse as Mao's radical economic plans and sweeping political agendas left no room for legal restrictions on state power.²⁷

When the second draft of the official PRC Constitution was finally adopted in 1975, the social and political devastation wrought by the "Great

24. See Andrew Nathan, *Political Rights in Chinese Constitution*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 77 (1986).

25. See Davis, *supra* note 15, at 142.

26. In many ways synonymous with "rule of law," the term "constitutionalism" generally refers to the subordination of government administration and lawmaking to the clear terms and limitations on power imposed by the constitutional text. See Subrahmanyam, *supra* note 7.

27. See *id.* For a fascinating and exhaustively researched account of Mao's fifty-year struggle to dominate China and the twentieth century political landscape, see JUNG CHANG & JON HALLIDAY, *MAO: THE UNKNOWN STORY* (2005).

Leap Forward" and the Cultural Revolution was complete.²⁸ Abolishing most of the legal protections offered in the 1954 Constitution and pronouncing the need to struggle against the capitalist elements of society, the document remains a testament to what many still consider the "inverted order" of China's political structure.²⁹ Three years later, however, the Eleventh Central Committee of the CPC concluded that political centralization, as had been attempted in the Cultural Revolution, would necessarily require a certain measure of democracy, and drafted the 1978 Constitution accordingly.³⁰ Of course, the meaning of "democracy" in China is strikingly different than in the West, and the resulting "people's democratic dictatorship" (*renmin minzhu zhuanzheng zhidu*), based on an alliance of the proletariat classes as led by the Communist Party, continues to be derided as a backwards system in which so-called "constitutional rights" refer to the authority of the state to deny individual liberties rather than the authority of individuals to challenge the state.³¹ In essence, if the 1978 Constitution was an attempt to counteract the anarchy and bloodshed of the preceding decade by superimposing a form of socialist democracy on the existing authoritarian model of government, the 1982 Constitution may be viewed as an expression of Deng Xiaoping's determination to lay a lasting institutional foundation for China's economic modernization.³² Progressive in many respects, the current constitutional document de-emphasizes class struggle, omits all references

28. China's adoption of rule of law in its 1982 Constitution was motivated, at least in part, by a desire to prevent such sociopolitical disasters as the Cultural Revolution. *See* Wang, *supra* note 19.

29. *See* Dorn, *supra* note 17, at A16 (attributing the CPC's unwillingness to respect property rights to the "upside-down" relationship between the individual and the state as well as the tendency of the Communist Party to deny others the rights it claims for itself).

30. *See* Wang, *supra* note 19. For a discussion of the Chinese "democratic" tradition, see *infra* text accompanying notes 136-50.

31. *See* XIAN FA art. 1 (1982) ("The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants"). The people's democratic dictatorship is derived from the concept of a "proletariat dictatorship," in which the proletariat, as a class, exercises powers as a dictator over those classes that remain hostile to China's political system (the opponents of the "people"). *See* Shingo Morikawa, *Citizen's Rights and Democracy Under the Constitution of the PRC*, CHINA CONNECTION: LEGAL F., available at http://www.enstar.co.uk/china/law/articles/legal_e.htm (last visited July 31, 2004).

32. By balancing centralized economic planning with supplementary market competition, the 1982 PRC Constitution provided a solid legal foundation for the progressively liberal policies of the CPC's economic agenda. *See* XIAN FA art. 11 (1982) ("[t]he individual economy of urban and rural working people, operated within the limits prescribed by law, is a complement to the socialist public economy").

to the Cultural Revolution, clarifies citizens' "fundamental rights and duties,"³³ and stresses the importance of socialist law for the regulation of political behavior.³⁴

Among the most common criticisms of constitutionalism in China is that, despite the nation's professed commitment to rule of law, the status of the 1982 Constitution remains subordinate to that of the CPC. Article 5 expressly states that all Chinese organizations "must abide by the Constitution," while the party's deference to it goes unquestioned among Chinese legal scholars and officials.³⁵ In rare cases, proposed measures by the CPC have even been struck down as unconstitutional.³⁶ Critics argue, however, that the distinction between the CPC and the PRC Constitution itself is meaningless.³⁷ Although the state professes to accept certain constitutional limits on its authority, the CPC maintains tight control of the political system through its appointment of key legislative officials as well as the exclusive authority of the NPC and its Standing Committee (NPCSC) to determine and interpret the constitutionality of any given law.³⁸ Also, because the Constitution specifies neither the scope of legislative authority nor of citizen's rights, the meaning of a given provision necessarily depends on the party-elected legislature's interpretation of the relevant legislation.³⁹ In a "democratic" system in which the CPC acts as the vanguard of the people but the "people" necessarily excludes anyone opposed to the government, the PRC Constitution remains essentially a disingenuous means of legitimizing

33. See *id.* arts. 33-35, 41 (1982); see also *infra* text accompanying notes 180-209.

34. See, e.g., XIAN FA art. 5(3) (1982) ("[a]ll state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law").

35. See *id.*; see also Hu Jintao, *supra* note 7 (stating that "the party organizations at all levels and the whole body of party members must abide by the constitution in model fashion").

36. In 1993, for example, the NPC refused to allow the party to directly submit constitutional amendments for consideration on the grounds that it was not a state organization recognized by law. See *Constitution of the People's Republic of China*, Free Dictionary.com, available at encyclopedia.thefreedictionary.com (last visited June 1, 2005).

37. Under Article 67 of the PRC Constitution and article 42 of the "PRC Legislative Procedure Law" (Law-Making Law), the power of interpreting the PRC Constitution, and therefore determining the scope of citizen's rights, belongs exclusively to the NPC and/or its Standing Committee. See XIAN FA art. 67(1, 7, 8) (1982); Law-Making Law art. 42 (2000); see also Morikawa, *supra* note 31.

38. See *supra* text accompanying note 37.

39. Article 33 of the PRC Constitution simply provides that "[e]very citizen is entitled to the rights and . . . duties prescribed by the Constitution and the law," but does not specify exactly what these "rights and duties" entail. See XIAN FA art. 33(3) (1982); see also Morikawa, *supra* note 31.

party policy.⁴⁰ According to Randall Peerenboom, this is entirely consistent with socialist legal theory, which conceives of law as a tool of the ruling class.⁴¹

This underlying tension between the function of law and policy in the legitimation of power is manifest in everything from Chinese leaders' ambivalence towards rule of law to the vague and indeterminate language of Chinese legislation and of the Constitution itself. Under Mao, CPC policy alone governed the Chinese Party-State.⁴² Although the 1982 Constitution called for legislation to take a more active role as the appropriate vehicle for defining and implementing policy, party leaders remain reluctant to relinquish control. When President Jiang Zemin proclaimed in 1996 that the China should be ruled by law, he immediately qualified it with a short-hand reference to maintaining the power of the CPC.⁴³ Referring to the PRC Constitution as the "expression of the people's will," Hu Jintao nonetheless proclaimed that its implementation necessarily requires strict adherence to party leadership.⁴⁴ In point of fact, China has made some progress in specifically enumerating legislative powers.⁴⁵ Yet the continued use of broad administrative discretion in interpreting law, as facilitated by the vague language of Chinese legislation, reinforces the underlying tendency to apply laws like the policies they were meant to replace.⁴⁶ Under the Western tradition, laws which fail to set precise limits on legal and illegal behavior or to define the consequences of noncompliance are deemed unconstitutional for several

40. Although the scope of the "people" has gradually expanded as the exploiting classes have supposedly vanished over time, it still implicitly excludes any opponent of the government who is hostile to China's political system. See, e.g., XIAN FA pmbl. § 8 (1982) ("the Chinese people must fight against those forces and elements, both at home and abroad, that are hostile to China's socialist system and try to undermine it"); see also Morikawa, *supra* note 31.

41. See Peerenboom, *supra* note 8, at 506.

42. See Lubman, *supra* note 10, at 384; Peerenboom, *supra* note 8, at 506.

43. See Lubman, *supra* note 10, at 399. Jiang endorsed rule of law in order to "protect the long-term peace and stability of the country." *Id.*

44. According to Hu, the most fundamental task of developing socialist democratic politics is to "organically combine adhering to party leadership, having the people as the masters of the house, and ruling the country according to law." Hu Jintao, *supra* note 7.

45. In an effort to compensate for the inadequate allocation of legislative powers by the PRC Constitution, the Law-Making Law specifically lists the exclusive legislative powers of the central government for the first time in PRC legislative history. See Li Yahong, *The Law-Making Law: A Solution to the Problems in the Chinese Legislative System?*, 30 H.K.L.J. 120, 125-26 (2000).

46. The problem is exacerbated by the application of so-called "policy laws," consisting of administrative regulations, meetings, instructions, and speeches that become legally binding simply because they emanate from authoritative government or party bodies. See Lubman, *supra* note 10, at 391-92.

reasons, one of which is to prevent legal fragmentation and internal inconsistency.⁴⁷ In China, however, the failure to expressly define the substantive and procedural contents of a given law also has a distinct advantage: by ensuring greater interpretive flexibility, it guarantees the continued domination of the ruling party in spite of its apparent subordination to the Constitution.⁴⁸

The manipulation of ideology has also played an important role in legitimizing the authority of the Chinese Communist regime, and the PRC Constitution is no exception.⁴⁹ In liberal democracies the normative agenda for society is determined by the people through elections; in China the CPC itself establishes the social agenda in its role as vanguard of the people.⁵⁰ Currently, this agenda consists of four cardinal principles: the leadership of the Communist Party, adherence to the socialist cause, the dictatorship of the proletariat, and devotion to Marxism-Leninism-Mao Zedong thought.⁵¹ No constitutional amendment may violate any of these principles, which does not mean, however, that the principles themselves may not be altered or supplemented.⁵² The March 2004 amendments, for example, incorporated the “three civilizations” into the preamble, a reference for the need to develop a “socialist spiritual civilization” so as to keep up with the improved material conditions brought on by industrialization.⁵³ According to some critics, it was also meant to preempt

47. Chinese legal scholars have used a similar argument to criticize China’s “policy laws.” See, e.g., Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in *THE LIMITS OF THE RULE OF LAW* 21-29 (2000).

48. As evident in the use of criminal sanctions against any social movements that appear to threaten CCP rule, the CCP continues to use law as an instrument to maintain and carry out party policies. See Lubman, *supra* note 10, at 399.

49. Based on the notion that constitutionalism in China is inextricable from communist ideology, some have argued that the incorporation of ideology into Chinese legislation affords certain laws a special heightened status. See Li Yahong, *supra* note 45, at 122 (arguing that the insertion of the four cardinal principles into the final draft of the Law-Making Law is an indication of its status as “an important basic law that has a very close relationship with the Constitution”).

50. See Peerenboom, *supra* note 8, at 492-93.

51. See XIAN FA pmbl. § 7 (1982); see also *16th Party Congress Spirit to be Written into Constitution*, PEOPLE’S DAILY, Oct. 15, 2003, available at http://english1.peopledaily.com.cn/200310/15/eng20031015_126025.shtml (last visited June 1, 2005).

52. See *Qiao Shi Speaks at Constitution Anniversary Rally*, BBC Summary of World Broadcasts, Dec. 7, 1992 [hereinafter *Qiao Shi Speech*] (“To implement and enforce the Constitution, we must unswervingly uphold the party’s basic line. . . . In unswervingly upholding the party’s basic line, we must steadfastly adhere to the four cardinal principles”).

53. See XIAN FA pmbl. § 7 (1982) (amended 2004) (“[T]he Chinese people . . . [will] work hard and self-reliantly to realize the modernization of industry, agriculture, national defense and science and technology step by step, in order to promote coordinated development of the material, political and spiritual civilizations”); see also Hu Jintao, *supra* note 7 (arguing that the development

the formation of an autonomous popular culture considered by many in the party to be vulgar, superstitious, unhealthy, and even pornographic.⁵⁴ At the same time that the NPC amended Article 5 in March 1999 to proclaim rule of law in China, it also revised the preamble to incorporate "Deng Xiaoping Theory" as a founding principle of communist ideology.⁵⁵ That the incorporation of rule of law into the PRC Constitution was offset by the inclusion of an additional "-ism" is characteristic of the party's tendency to consolidate its authority behind the guise of constitutionalism.⁵⁶

As part of the process of providing a theoretical justification for China's current pro-capitalist course, the most recent addition to the party ideological repertoire effectively alters the fundamental makeup of the CPC itself. Presented by Jiang Zemin in February 2000 as the cornerstone for the CPC's governance,⁵⁷ and subsequently incorporated into the PRC Constitution in March 2004,⁵⁸ the doctrine of the "Three Represents" (*san ge daibiao*) mandates that the CPC pursue economic prosperity by embodying: first, the development of China's advanced productive forces; second, the orientation of China's advanced culture; and third, the fundamental interests of the overwhelming majority of the Chinese people.⁵⁹ Though the inclusion of yet another ideology within the preamble may seem like bowing to dogma, the cryptic language of the "Three Represents" is actually part of a larger effort to incorporate a new social stratum of non-working classes into the communist fold.⁶⁰ By some

of socialist spiritual civilization is necessary to provide a "powerful spiritual driving force and mental support for modernization").

54. See Stefan Landsberger, "Get Up, Stand Up": The Power of Chinese Patriotism, *available at* <http://www.nottingham.ac.uk/iaps/LandsbergerABS.pdf> (last visited June 1, 2005).

55. See *Party Paper Editorial Marks Closure of NPC Session*, XINHUA NEWS AGENCY, Mar. 15, 1999. Following the devastation left behind by the Cultural Revolution, Deng Xiaoping redefined the fundamental task of the CPC as the promotion of economic reconstruction and opening up. See *Qiao Shi Speech*, *supra* note 52.

56. See Lubman, *supra* note 10, at 399.

57. See Norihiro Sasaki, *Transfer of Power from Jiang to Hu: the CPC's Transformation*, in CHINA'S NEW LEADERSHIP 20 (Yasuo Onishi ed., 2003).

58. See XIAN FA pmbl. § 7 (1982) (amended 2004).

59. See *People to Get More Rights*, BEIJING REV., Jan. 15, 2004, *available at* [http://www.bjreview.com.cn/200403/Cover-200403\(A\).htm](http://www.bjreview.com.cn/200403/Cover-200403(A).htm) (last visited June 1, 2005). According to Norihiro Sasaki, the "Three Represents" requires the CPC to pursue the following goals: (1) develop the productive forces necessary for economic progress; (2) absorb the foreign knowledge required for developing such productive power as scientific technology and human resources while maintaining a culture of Communism; and (3) cultivate those benefits that give satisfaction to the greatest number of people. Sasaki, *supra* note 57, at 19-20.

60. According to recent statistics, 59.5% of the Ninth "Chinese People's Political Consultative Congress" (CPPCC) members and 63.4% of its Standing Committee were comprised

estimates, the percentage of industrial and agricultural workers in China dropped from 87.2% of the total population in 1978 to 66.6% by 2002.⁶¹ This decline was accompanied by an unprecedented growth in the number of blue collar workers, cadres, intellectuals, soldiers, as well as such members of the “advanced social strata” as entrepreneurs, professionals, and technicians.⁶² In an effort to maintain its status as the representative of the “overwhelming majority,” the CPC has thus decided to accept “outstanding elements” of China’s changing demographics as both an “advanced productive force” for economic development and an important constituent of its “advanced culture.”⁶³

Given their long-standing status as enemies of the party, the official recognition of private entrepreneurs as constituents of the CPC has attracted the most attention, and raised the most eyebrows.⁶⁴ According to the State Economic and Trade Commission, by 2002, private enterprises contributed 9.3% of the total industrial and commercial tax, comprised up to 60% of the GDP, and hired 70% of the workers who had been laid off through the restructuring of national enterprises.⁶⁵ Aware of their indispensable role for the development of the Chinese economy and motivated, at least in part, by their increasing political clout, Jiang Zemin formally admitted capitalists to the CPC in November 2002 by identifying them as “builders of socialism with Chinese characteristics.”⁶⁶ Their

of people from the “new social stratum” and other nonaffiliated “patriots.” See *China’s Human Rights Progress: Eight Historic Changes*, China.org, May 13, 2003, available at <http://www.china.taiwan.org/web/webportal/W5042137/Uadmin/A5045836.html>.

61. See Sasaki, *supra* note 57, at 20.

62. Jiang Zemin’s so-called “new social stratum” specifically includes, though is not necessarily limited to: entrepreneurs and technical personnel employed by private enterprises; managerial and technical staff employed by foreign-funded enterprises; the self-employed; private entrepreneurs; employees in intermediaries; and freelance professionals. See Li Minsheng, *Entrepreneurs from Non-Public Sector Hail Jiang’s Speech*, BEIJING REV., 2001, available at <http://www.bjreview.com.cn/2001/200132/CoverStory-200132.htm> (last visited June 1, 2005).

63. The second prong of the “Three Represents,” the orientation of China’s so-called “advanced culture,” refers to the assimilation of those aspects of foreign culture required for the development of such “productive forces” as scientific technology and human resources. See Sasaki, *supra* note 57, at 19.

64. Ever since the founding of the PRC in 1949, the word “private” has been a common target of attack: slogans like “Destroy the word private whenever it appears” was common throughout China while private firms, although legalized in 1978, could only be called *minying* (“citizen-operated”) enterprises for a long period of time. See *Constitution to Clarify Private Rights*, XINHUA NEWS AGENCY, Jan. 5, 2004.

65. See Sasaki, *supra* note 57, at 21.

66. See Eva Cheng, *China: Constitution Change to Promote Private Property*, GREEN LEFT WKLY., Mar. 10, 2004, available at <http://www.greenleft.org.au/back/2004/574/574p21.htm> (last visited June 1, 2005).

elevated status was subsequently codified in the 2004 amendment to paragraph 10 of the preamble, which seeks to include "the builders of the cause of socialism" into the "patriotic united front," a reference to the Chinese People's Political Consultative Congress (CPPCC).⁶⁷

Note that party membership is by no means unconditional. Private entrepreneurs, and members of the new social strata in general, must meet fairly stringent requirements before they can be deemed suitable candidates.⁶⁸ Many current CPC members consist of either "*xiahai*," former government cadres who have "jumped into the sea" of the private sector and therefore possessed some degree of political power to begin with, or wealthy managers of large companies who have amassed considerable economic power.⁶⁹ Some have proposed that extending party membership to affluent businesspeople, undoubtedly attractive for their potential monetary contributions, may also be intended to prevent them from using their influence to engage in subversive activities against the central government.⁷⁰

There are several ways to interpret the underlying intent of the "Three Represents" and its associated references to private entrepreneurs. Rather than discounting it as another obscure ideology aimed at legitimizing authoritarian rule, some have suggested that the "Three Represents" effectively reinforces the legality of the CPC's authority by laying out a specific agenda by which the people may assess its performance.⁷¹ In the absence of any of the "Three Represents," so goes the argument, the CPC would lose its rightful place as the governing party.⁷² Staking political legitimacy on the creation of economic prosperity is generally a risky venture, however, and it is difficult to imagine a scenario in which the CPC would relinquish its power following an economic recession.⁷³

67. See XIAN FA pmbl. § 10 (1982) (amended 2004).

68. No more than 19.8% of all private entrepreneurs were allowed to join the party in 2001. See Sasaki, *supra* note 57, at 22.

69. See *id.*

70. See, e.g., Zhong Mingzu, *Minzhu Zhengzhi Jianshu Yao Cong Zhongguo Shiji Chufa: Jianping Guchui Xifang Minzhu Ziyou De Guandian* [The Establishment of Democracy must Begin with Chinese Reality: Views on Assessing and Promoting Western Democratic Freedom], 20 QIUSHI, 2000; see also Sasaki, *supra* note 57, at 22.

71. See *People to Get More Rights*, *supra* note 59 (pointing out that the CPC's failure to adhere to any of the "Three Represents" could lead to the loss of its legitimacy as China's governing party).

72. See *id.*

73. The language of the "Three Represents" is also not nearly specific enough to provide a useful benchmark for citizens to assess the CPC's effectiveness as the governing party.

The doctrine may also be viewed as part of a progressive effort by the CPC to shore up its legitimacy and expand its support base by reaching out to newly emerging loci of social and economic power.⁷⁴ This is borne out by the selectivity with which the CPC recruits its previously nonaffiliated members as well as the so-called *xiaohai* phenomenon.⁷⁵ Whatever the underlying intent of the “Three Represents” amendment turns out to be, however, its implications for China’s economic modernization are clear: the private sector is to gain more official support while the interests of capital will be given renewed emphasis.⁷⁶

There is one ideological conflict within the doctrine of the “Three Represents” that remains to be resolved. In its eagerness to develop China’s “advanced productive forces” by affording wealthy capitalists preferential treatment, the CPC may soon find itself unable to represent the “fundamental interests of the overwhelming majority” by providing relief for the poor and socially vulnerable.⁷⁷ China’s modernization policy has already exacerbated existing economic disparities between its small fraction of urban elite and the hundreds of millions of peasants far removed from the country’s new-found wealth.⁷⁸ Farmers are denied an education because they cannot afford tuition, and urban residents are forced to relinquish their property to government appropriation and commercial development.⁷⁹ Although Jiang Zemin offered his assurances that the “Three Represents” does not deviate from traditional Marxist theory, it is also difficult to discern how a legitimacy founded on economic prosperity within a free market system can be reconciled with the Marxist claim that socialism will inevitably succeed capitalism in its ultimate

74. See Subrahmanyam, *supra* note 7.

75. See *supra* text accompanying notes 68-70.

76. The amendment should, for example, have an impact on private enterprises’ limited access to credit, which has been one of the most often-cited indications of the unequal treatment of private and state-owned businesses as well as one of the most common grievances of the private sector in China. See Subrahmanyam, *supra* note 7.

77. See Sasaki, *supra* note 57, at 23.

78. See, e.g., Joseph Kahn & Jim Yardley, *The Great Divide: Amid China’s Boom, No Helping Hand for Young Qingming*, N.Y. TIMES, Aug. 1, 2004, § 1, at 1 (reporting on the circumstances surrounding the death of a young Chinese peasant who committed suicide after being unable to afford to take the college entrance examination).

79. *Id.*; see Zhangfan, *Sichan Baohu Luxian Tu* [A Roadmap for the Protection of Private Property], CHINA ECON. TIMES, Mar. 17, 2004 (discussing the ideological foundations and practical implications of China’s “privatization roadmap”); Xie Guangfei, *Anzhao Xian fa Jingshen Jianli Gongmin Chanquan Zhidu* [Establishing a System of Private Property Rights According to the Spirit of the Constitution], CHINA ECON. TIMES (China), Mar. 17, 2004 (discussing the need to establish a mechanism capable of assessing the constitutionality of existing laws and regulations), available at <http://www.cet.com.cn>; see also *Constitution to Clarify Private Rights*, *supra* note 64.

evolution towards the communist ideal.⁸⁰ In a nation founded on the workers and peasants as a core constituency of the Communist Party, the CPC's willingness to embrace capitalism for the sake of economic progress runs the risk of alienating the vast majority of China's populace while repudiating the socialist heritage upon which the country still relies.⁸¹

Well aware of these internal contradictions, the CPC has gone to great lengths not to undermine its egalitarian claim to legitimacy by branding capitalism as an evil to be replaced. This is why large segments of constitutional text referring to the Marxist revolution have been deleted entirely.⁸² The declaration that "China is currently in the primary stage of socialism" has likewise been amended to read, "China will stay in the primary stage of socialism for a long time" — presumably an indication that the Marxist revolution will take longer than expected.⁸³ Counter-intuitive arguments have also been made to the effect that the private sector is now an integral element of the centrally planned socialist economy.⁸⁴ With few exceptions, the CPC has adhered to the disingenuous policy of encouraging the private sector while avoiding its existence in ideology, and of dismantling the public sector while proclaiming its importance.⁸⁵ The party tactic of repeatedly changing policy while maintaining its ostensible conformity with established ideology seems to derive from the notion that political legitimacy somehow depends on ideological consistency — only by embracing the forces driving change

80. See Jiang Zemin, Speech at the Meeting Celebrating the 80th Anniversary of the Founding of the Communist Party of China, July 1, 2001 (reiterating the belief that human society will inevitably move towards communism but maintaining that the exact course of the Marxist revolution cannot be predicted with accuracy), available at <http://www.china.org.cn/e-speech/a.htm> (last visited June 1, 2005).

81. See Kahn & Yardley, *supra* note 78.

82. The text of pre-1982 PRC Constitutions used to make claims of the following type: "Although socialism has its turns and twists and its repetition, it is a general non-retrogressive trend of historical development of society that communism never fails to take the place of capitalism." See Sasaki, *supra* note 57, at 22.

83. XIAN FA pmbl. § 7 (1982) (amended 1999).

84. See, e.g., Li Minsheng, *supra* note 62 (contending that "only with the development of the non-public economy can overall social development be achieved, which will eventually lead to the real success of socialism and accomplishment of communism").

85. See *Constitution to Clarify Private Rights*, *supra* note 64; Cheng, *supra* note 66 (describing the Chinese government's campaign to transform state firms into shareholding companies).

does the CPC seem to think that can it retain control.⁸⁶ The phenomenon can be seen in the nature of the PRC Constitution itself, which must be regularly altered to conform to the realities of economic modernization, and which presents Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, and Jiang Zemin's "Three Represents" as if they were all part of one continuous line of thought.⁸⁷

Stanley Lubman has described the PRC Constitution as more of a guide to the CPC's ideological agenda at a particular moment in time than a document codifying fundamental rights.⁸⁸ Considering the often glaring discrepancies between the rights provided for in the Constitution and those actually enjoyed by the populace, the effects of constitutional revisionism in China may indeed be largely symbolic. The failure to designate private entrepreneurs as "builders of socialism," for instance, did nothing to prevent them from comprising 13.1% of total CPC membership in 1993, more than ten years before the 2004 amendment.⁸⁹ Nor did the absence of constitutional protection afforded private businesses thwart would-be capitalists from entering the private sector, though the recent amendments will no doubt make it more convenient by strengthening the rule of law in commercial transactions.⁹⁰ Essentially, the four series of constitutional amendments since 1982 have prompted changes in the law which enable Chinese people to do what they were already doing but without legal guidelines or protections. Though it may seem strange to proponents of rights-based constitutionalism, this is entirely in keeping with the socialist model of law as a superstructure of ideas reflecting the economic and materialist basis of society.⁹¹ As China advances towards its ideal socialist

86. See Lubman, *supra* note 10, at 404; Subrahmanyam, *supra* note 7 ("The party leadership seem to think that the more consistent they can claim to be, the more legitimate they are"); see also *China Embraces Property Rights*, *supra* note 2.

87. The amendments may also derive from the reverential attitude to authority that is a cornerstone of the Maoist tradition, in which the CPC strives to maintain the notion that its leadership is omniscient and infallible. See Subrahmanyam, *supra* note 7 (arguing that "[f]or any leader of China to admit that his predecessors in the party were wrong would indirectly undermine his own legitimacy").

88. According to Lubman, the PRC Constitution "defines the direction that the communist party is marching in at the particular moment, rather than endowing citizens with rights that are fundamental." See Subrahmanyam, *supra* note 7.

89. See Cheng, *supra* note 66.

90. See *China Embraces Property Rights*, *supra* note 2.

91. According to the party line, "[l]aw is a manifestation of the will of the people, and the amendment of the constitution itself is a vivid manifestation of the governance according to law." See Li Shufeng et al., *Provide Legal Guarantee for Rejuvenating the Nation — On the Occasion of the 20th Anniversary of the Promulgation of the Present Constitution*, XINHUA NEWS AGENCY, Dec. 3, 2002. This is in direct contrast to the Western constitutional tradition based on the notion

state and the economy changes accordingly, constitutional amendments are only to be expected.⁹²

Pursuant to Article 64 of the PRC Constitution, the CPC has established an elaborate series of legally prescribed procedures for the proposal and examination of draft resolutions.⁹³ In order to maintain stability while ensuring that the revisions fully represent the people's will, constitutional amendments may only be proposed when conditions are ripe and must be implemented according to the "two principles" of "scientificity" [sic] and "democracy" — the former referring to the necessity of ensuring the rationality and legality of the amendments and the revisions procedure, and the latter focusing on the need to entertain the views of the populace by submitting proposed amendments to the people for a public referendum.⁹⁴ In theory at least, the amendment procedure seems to closely adhere to these principles. Draft resolutions originate with the Secretariat of the CPC Central Committee, are then presented by a constitutional amendment team to the Standing Committee of the Political Bureau of the CPC Central Committee, subsequently disseminated to the standing committees of the various provinces and autonomous regions for their input, and eventually submitted to the NPC for deliberation and ratification.⁹⁵ Meetings may also be convened to solicit the opinions and recommendations of legal and economic experts as well as the general populace.⁹⁶

that certain fundamental principles, such as individual liberty, are immutable regardless of how the economic or political system evolves. See Subrahmanyam, *supra* note 7.

92. See Peerenboom, *supra* note 8, at 506; see also Yang Fan & Chung Xueping, *China Said to Revise the Constitution in the Year after the Next, and the "Three Represents" is Expected to be Incorporated into the Constitution*, H.K. WEN WEI PAO (China), Dec. 15, 2002 (quoting Hu Jintao as saying that the PRC Constitution "should undergo a process of constant improvement along with the development of [socialist modernization] . . . so that [it] can reflect the demands of the times"), available at <http://www.wenweipo.com>.

93. According to Article 64, "[a]mendments to the Constitution are to be proposed by the Standing Committee of the National People's Congress or by more than one-fifth of the deputies of the National People's Congress and adopted by a vote of more than two-thirds of all deputies to the Congress." XIAN FA art. 64(1) (1982).

94. The "two principles" derive from the policy of representing the fundamental interests of the people pursuant to the third prong of the "Three Represents." See Sun Chih & Liu Ying, *Freedom of Movement to be Written into the Constitution to Protect Human Rights*, H.K. TAK KUNG PAO (China), Aug. 13, 2003, available at <http://www.takungpao.com>; *Chinese Congress Leader Li Peng on Constitution Changes*, XINHUA NEWS AGENCY, Jan. 30, 1998.

95. See Jen Hui-wen, *Speech by Hu Jintao to Dominate Fourth Constitutional Amendment*, H.K. XIN PAO, Feb. 19, 2003.

96. See, e.g., *Proposal on Constitution Amendment*, *supra* note 3 (lauding the CPC's acceptance of a radical amendments proposed by nonaffiliated scholars as an indication of the democratic nature of the constitutional amendment process).

The CPC euphemistically refers to the amendment process as “emancipating the mind and seeking truth from facts,” or more specifically, “integrating basic Marxist tenets with China’s concrete reality.”⁹⁷ Symptomatic of post-Mao China’s pragmatic approach towards government in general, the practice of constitutional revision as a vehicle for ideological reform may nonetheless pose a real danger to the stability of the communist regime: by repeatedly changing policy in professed accordance with existing ideology without clearly defining the characteristics of either, the CPC threatens to undermine its own legitimacy as the ruling party.⁹⁸ While the Chinese administration likes to attribute the success of economic reforms to Marxism-Leninism, Mao Zedong thought, and Deng Xiaoping Theory, the general public has begun to recognize such empty rationalizations for what they are.⁹⁹ Economic modernization and exposure to foreign values have thereby led to the erosion of the people’s faith in traditional communist ideology, a belief already undermined by the mass disillusionment that is the most lasting heritage of the Cultural Revolution.¹⁰⁰ Despite efforts to mobilize the enthusiasm of the people by calling for the creation of “spiritual civilization,” the Constitution is viewed as increasingly hollow, its amendments nothing more than “public relations for the current leaders.”¹⁰¹

The Chinese government’s search for a new legitimacy under both traditional socialist ideology and Western legal thought has engendered a fledgling legal system that ostensibly reigns supreme over all political

97. See *Qiao Shi Speech*, *supra* note 52.

98. See Lubman, *supra* note 10, at 404.

99. Fang Ning, deputy director of the Institute of Politics at the Chinese Academy of Social Sciences, discusses the ideological disillusionment of many Chinese as follows: “Marxism is about the elimination of private property. Today, we are going to turn around and recognize private ownership and protect [private] property. People feel very emotional about this, ‘So what was our revolution about? All that loss and sacrifice was about what?’” See Cheng, *supra* note 66.

100. According to one disillusioned Communist, China’s crisis of values has led to “widespread spiritual malaise among people from all walks of life, a growing mood of depression, even despair, a loss of hope for the future and of any sense of social responsibility.” See LIU BINYAN, *CHINA’S CRISIS, CHINA’S HOPE* 22 (1990).

101. See Sara Davis, *Laws with No Teeth*, S. CHINA MORNING POST, Mar. 20, 2004, available at <http://www.hrw.org/english/docs/2004/04/27/china8506.htm> (last visited June 1, 2005). See also Howard W. French, *A Party Girl Leads China’s Online Revolution*, N.Y. TIMES, Nov. 24, 2005, at A14 (recounting the increasingly forthright political and social satire by such online commentators as Wang Xiaofeng, whose blogger nickname, *Dai san ge biao* (“wears three watches”), is a patent mockery of Jiang Zemin’s “Three Represents”).

parties and institutions.¹⁰² One cannot help but notice, however, the CPC's tendency to profess its respect for constitutionalism in theory while blatantly ignoring it in practice.¹⁰³ If the 1982 PRC Constitution is the embodiment of this grudging acceptance of rule of law as a necessary condition for China's economic modernization and national prosperity, many of its amendments may represent a last-ditch effort to assert the legitimacy of China's socialist heritage.¹⁰⁴ The following section considers the implications of specific amendments with respect to the changing economic, political, and social agendas of the CPC.

III. CHINA'S CONSTITUTIONAL AGENDA: "SOCIALISM WITH CHINESE CHARACTERISTICS"

A. *The Socialist Market Economy*

Though some deal with ideological revision and political restructuring, the vast majority of the amendments since 1982 are best understood as milestones along China's road to privatization, building blocks for establishing "socialism with Chinese characteristics."¹⁰⁵ As with many Asian countries, China practices a form of managed capitalism in which technocratic bureaucracy determines industrial policy, corporatist relationships flourish between public officials and private businesses, and dispute resolution takes the form of informal administrative guidance as opposed to universally applicable laws.¹⁰⁶ Private companies are subject

102. See XIAN FA art. 5 (1982) ("The state upholds the uniformity and dignity of the socialist legal system").

103. See, e.g., *Concrete Action*, *supra* note 12 (noting that constitutional amendments must be followed by legal and institutional reforms in order to counteract current human rights abuses); Davis, *supra* note 101 (arguing that amendments are meaningless until the government passes legislation establishing clear standards).

104. See generally Subrahmanyam, *supra* note 7.

105. See XIAN FA pmbl. § 7 (1982) ("The basic task of the nation in the years to come is to concentrate its effort on socialist modernization"); see also Hu Jintao, *supra* note 7 (proclaiming that the "fundamental task of the state is to follow the path of building socialism with Chinese characteristics").

106. See Peerenboom, *supra* note 8, at 491-92. Downplaying the role of law in the economic development of Asian countries, some scholars have actually attributed their prosperity to relation-based contracting, the traditional *absence* of clear property rights, and the culture of corporatism itself. See Randall Peerenboom, *Asian Discourses of Rule of Law*, at xvii-xix (UCLA Sch. of Law Research Paper No. 03-15, Jan. 2004) [hereinafter Peerenboom, *Asian Discourses*], available at <http://ssrn.com/abstract=445820> (last visited June 1, 2005).

to the state's licensing power as well as its monopolistic control over access to loans and technology; in some cases, economic policy may even be influenced by government officials' financial interest in individual firms.¹⁰⁷ Although increasingly unstable, public ownership remains a pillar of Jiang Zemin's socialist state, and is manifest in everything from the central government's unilateral expropriation of private property to mandatory restrictions on loan grants, taxation, and types of stock available to private and foreign investors.¹⁰⁸ The socialist notion that rural land is collectively owned while urban land belongs to the state has provided a legal basis for governmental seizure of property without compensation so as to make room for the development of factories and malls.¹⁰⁹ Ever since China launched its stock markets in 1991, it has also insisted that companies maintain a certain amount of non-tradeable shares which may not be sold into private hands.¹¹⁰

Hailed as a sea-change in the ruling party thinking, the recent amendments bear witness to the country's increasingly pro-capitalist course.¹¹¹ On April 12, 1988, the First Session of the Seventh NPC amended Article 11, formally endorsing the existence and development of the private sector as a supplement to the public economy.¹¹² Appearing two years after the first draft of the General Principles of the Civil Law (GPCL),¹¹³ which already contained various provisions on private contract relations, this was the first official recognition of the private sector in

107. Some have suggested that China is experiencing the emergence of a "corporatist" state in which private actors "reflect state motives and state action" and corruption thrives on the "interpenetration" of government and business. See Lubman, *supra* note 10, at 400, 408; GORDON WHITE ET AL., *IN SEARCH OF CIVIL SOCIETY* 126 (1996).

108. See Peerenboom, *supra* note 8, at 492.

109. See Guangfei, *supra* note 79; Zhangfan, *supra* note 79 (discussing the case of a Chinese taxi driver forced to leave his apartment after it was expropriated by the government).

110. Beijing has since eased its regulation of the stock market several times: initially allowing only "small and medium-sized state firms" to engage in trading, it subsequently restricted "non-tradeable" state shares only to those firms of "strategic importance" to the Chinese economy, and recently allowed all companies to trade their "non-tradeable" shares so long as fifty percent of the tradeable shareholders consent. See Cheng, *supra* note 66.

111. For an official synopsis of the 1988, 1993, and 1999 amendments, see Shufeng et al., *supra* note 91.

112. See XIANFA art. 11 (1982) (amended 1998) ("[t]he State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy").

113. See Zhonghua Renmin Gonghe Guo Minfa Tongze [General Principles of the Civil Law of the P.R.C.], adopted Apr. 12, 1986 by the Fourth Session of the Sixth National People's Congress, translated in Whitmore Gray & Henry Ruiheng Zheng, *General Principles of the Civil Law of the P.R.C.*, 52 LAW & CONTEMP. PROBS. 27-87 (1989).

Communist China.¹¹⁴ A related amendment granted permission for the transfer of land-use rights.¹¹⁵

March 29, 1993 witnessed the ratification of no less than nine additional revisions, at least four of which were meant to clarify the position and role of nonpublic ownership in China.¹¹⁶ Article 15 introduced the idea of a "socialist market economy" (*shehui zhuyi shichang jingji*) into the official discourse to legitimate the full-scale restoration of capitalism that had already taken place several years before,¹¹⁷ Article 7 replaced prior references to the "state economy" with allusions to the "state-owned economy,"¹¹⁸ and Articles 16 and 17 eased restrictions on the decision-making authority of state enterprises and collective economic organizations.¹¹⁹

On March 15, 1999, the private sector was elevated once again from its supplementary status to become a "major component" of the socialist market economy.¹²⁰ Though public ownership of the means of production was to remain dominant, the inclusion of vague but suggestive references to the development of "diverse sectors of the economy" and the "coexistence of a variety of modes of distribution" reflects a pragmatic acceptance of the private sector in spite of China's legacy of antipathy and distrust towards private property rights.¹²¹

Critics have argued that by continuing to subordinate the protection of private property to that of public property, the 1999 amendments did not

114. See Subrahmanyam, *supra* note 7.

115. See XIAN FA art. 10 (1982) (amended 1998) ("The right to the use of land may be transferred according to law").

116. See *Eighth National People's Congress Work Report*, XINHUA NEWS AGENCY, Mar. 22, 1998.

117. XIAN FA art. 15 (1982) (amended 1993) ("The state has put into practice a socialist market economy"). For a discussion of the CPC's efforts to justify the introduction of capitalism into the socialist state, see *supra* text accompanying notes 82-87.

118. XIAN FA art. 7 (1982) (amended 1993) ("The State-owned economy . . . is the leading force in the national economy").

119. *Id.* art. 16 (1982) (amended 1993) (redacting the provision subjecting state enterprises' decision-making power to "unified leadership by the State" and the "fulfill[ment of] their obligations under the State plan"); *id.* art. 17 (removing the provision requiring collective economic organizations to "accept the guidance of the State plan").

120. *Id.* art. 11 (1982) (amended 1999) ("Individual, private and other non-public economies that exist within the limits prescribed by law are essential components of the socialist market economy").

121. *Id.* art. 6 (1982) (amended 1999) ("the State adheres to the basic economic system with the public ownership remaining dominant and diverse sectors of the economy developing side by side, and to the distribution system with the distribution according to work remaining dominant and the coexistence of a variety of modes of distribution").

go far enough.¹²² Provisions supporting the economic interests and property of capitalists have been present in China economic policy since the adoption of the Common Principles (*gongtong wangling*) in 1949, though most have been part of a larger scheme to gradually eliminate the private sector altogether.¹²³ The 1982 Constitution similarly guarantees the “right of citizens to own lawfully earned income, savings, houses and other lawful property.”¹²⁴ It does not, however, refer to private property as “sacred and inviolable,” nor does it provide for its protection as one of the “fundamental rights of citizens.”¹²⁵ This failure to endow private property with a legal inviolability similar to that of state property has given rise to various implicit conditions and limitations on its protection.¹²⁶ Chinese legal scholars argue that even the constitutions of developed countries like Italy and Japan impose restrictions on private property in the interests of the public good. They also point out that many, including the United States, provide for its lawful expropriation by the government.¹²⁷ In China, however, the unequal treatment of public and private property has particularly harsh consequences: private enterprises suffer discrimination in the form of unfair taxation and stringent loan qualifications, and individual property rights are wilfully trampled upon by the government in the interests of economic development.¹²⁸

This is why the 2004 amendments to Articles 11 and 13 have drawn such widespread interest. The proclamation that “[c]itizens’ lawful private

122. In fact, many legal scholars had initially appealed to put private assets of Chinese citizens on an equal footing with public property by adding an article on the inviolability of private property, but the proposal met with strong opposition within the CPC and was abandoned prior to the adoption of the 1999 amendments. See *Constitution to Clarify Private Rights*, *supra* note 64.

123. See Zhangfan, *supra* note 79. A provisional PRC Constitution drafted immediately following the establishment of the PRC in 1949, the Common Principles reflects the CPC’s belief that the temporary protection of private businesses was necessary to meet the challenge of economic recovery following decades of war. See Morikawa, *supra* note 31.

124. XIAN FA art. 13 (1982) (“The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property. The state protects by law the right of citizens to inherit private property”).

125. *Id.* art. 12 (1982) (“Socialist public property is sacred and inviolable”); see also *A Look Through Expert Eyes*, *supra* note 1 (arguing that the inclusion of private property rights under the “General Principles” section of the PRC Constitution rather than the section on “The Fundamental Rights of Citizens” has contributed to the unequal treatment of public and private property).

126. While the law is strictly enforced when state assets are infringed, the protection of private property is often ineffective. See *Short Commentary: Amending Constitution to Protect Private Property*, H.K. TA KUNG PAO (China), Aug. 12, 2003 [hereinafter *Short Commentary*] (advocating equal protection of public and private property in China), available at <http://www.takungpao.com>.

127. See *People to Get More Rights*, *supra* note 59.

128. For a discussion of some of the more rampant personal property infringements in China, see Zhangfan, *supra* note 79; see also *Short Commentary*, *supra* note 126.

property is inviolable" presumably places the protection of private property on par with that of public property.¹²⁹ The state's pledge to "protect the lawful rights and interests of the non-public sectors of the economy" as well as the "rights of citizens to private property"¹³⁰ has been hailed as the beginning of the end for the system of public ownership in China.¹³¹ Its potential impact on the development and protection of intangible capital such as intellectual property is also eagerly anticipated.¹³² Whereas the preceding draft of Article 11 called for China to "guide, supervise, and manage" the private sector, the revised version requires the state to take a more active role to "encourage and support" the development of the private sector, suggesting that many of the previous restrictions on its expansion will soon be revoked.¹³³ Finally, although the 1982 Constitution already allowed for eminent domain, the state's vow to "make compensation for any expropriation or requisition" of real or private property is expected to alleviate the growing discontent arising from forced relocation by the government.¹³⁴ The growing protection of private property in China is perhaps best articulated in an old Chinese proverb which has been enjoying increasing popularity on the mainland, roughly translated as, "The homes of the poor may be entered by the wind and rain, but not by the king."¹³⁵

129. See XIAN FA art. 13 (1982) (amended 2004).

130. See *id.* arts. 11(2), 13 (1982) (amended 2004). Jinguang argues that the change in Article 13 from the "right of citizens to own lawfully earned income, savings, houses, and other lawful property" to the "right of citizens to private property" indicates an expansion of personal property rights as well, since such rights may also include the right to possess, the right to use, and the right to profit. See *A Look Through Expert Eyes*, *supra* note 1; XIAN FA art. 13 (1982) (amended 2004).

131. See Li Wuzhou, *supra* note 2 (contending that the inclusion of private property protection in the PRC Constitution will help stimulate economic growth by liberalizing more productive forces and create job opportunities for the populace by providing protection for capitalists).

132. See Joseph, *supra* note 1.

133. XIANFA art. 11(2) (1982) (amended 2004) ("The State shall encourage, support and guide the development of the non-public sectors of the economy and shall, in accordance with law, exercise supervision and control over the non-public sectors of the economy"); see also *A Look Through Expert Eyes*, *supra* note 1.

134. XIAN FA art. 10(3) (1982) (amended 2004) ("The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for any land expropriated or requisitioned"); *id.* art. 13 (containing a similar provision for the expropriation of private property); see also *A Look Through Expert Eyes*, *supra* note 1 (arguing that protection of private property is incomplete without economic compensation).

135. See Xue Limai, *Xian fa Bu Jinjin Shi Yi Zhang "Zhi"* [*The Constitution is not just a "Piece of Paper"*], CHINA ECON. TIMES, June 4, 2004; see Zhangfan, *supra* note 79 ("*quiongren de hanshe feng neng jin, yu neng jin, guowang bu neng jin*").

B. Socialist Democracy and De Facto Federalism

Analysts tend to emphasize the role of privatization as a key component of China's economic reforms, and the majority of the constitutional amendments since 1982 have indeed focused on strengthening the private sector. What remains less evident, however, is exactly what effect China's economic restructuring plan will have on its system of socialist democracy. According to Chinese Communist ideology since the end of the Cultural Revolution, democracy is a prerequisite to socialism and the policy of "socialist modernization" as laid out by Deng Xiaoping.¹³⁶

The PRC Constitution itself proclaims that the authority of the CPC is derived from the people and exercised via the NPC and the various local congresses.¹³⁷ The promotion of democracy in China is also closely aligned with the improvement of its legal system and, more recently, the introduction of rule of law.¹³⁸ Given that socialism in China is characterized by restrictions on suffrage, suppression of subversive speech, and a lack of individual rights, however, it is difficult to reconcile the Chinese political apparatus with traditional Western notions of liberal democracy.¹³⁹ Democracy in the West requires certain fundamental civil and political rights which must be protected against the tyranny of the majority, as well as a system in which individual autonomy takes precedence over social solidarity.¹⁴⁰

Chinese democracy downplays the connection between political representation and the individual freedom of its citizens, and conceives of individual rights as positivist grants of the state that are necessarily

136. See, e.g., *Qiao Shi Speech*, *supra* note 52 ("People's democracy is the essence and core of things which are required by socialism. Without democracy, there will be no socialism and socialist modernization").

137. XIAN FA art. 2 (1982) ("All power in the People's Republic of China belongs to the people. The organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels").

138. See *Qiao Shi Speech*, *supra* note 52 (stating that the promotion of democracy must be combined with the improvement of the legal system).

139. Randall Peerenboom offers a provisional working definition of democracy as comprised of three distinct elements: the *electoral dimension* (requiring universal suffrage for the election of important political figures), the *participatory process dimension* (requiring sufficient freedom of association, speech, and press to ensure that candidates can compete effectively in the electoral process), and the *rule of law dimension* (requiring legal institutions to ensure that these freedoms are realized and that elections are carried out fairly). Peerenboom, *Asian Discourses*, *supra* note 106, at xix.

140. See Peerenboom, *supra* note 8, at 494.

trumped by the collective interests of the masses.¹⁴¹ If democracy is a form of government in which sovereignty is exercised by a collective body of free citizens, China cannot be a democratic nation since references to "the people," although increasingly broad, continues to exclude any opponent or critic of the government.¹⁴² This is the essence of the people democratic dictatorship: democracy by the people is applied to the people, while dictatorship by the people is applied to the opponents of the people, i.e. anyone critical of the socialist state.¹⁴³

The hegemony of China's ruling party as well as the supremacy of its parliament are also incompatible with conventional notions of democracy. As the only means for holding elected officials accountable for their collective actions, political parties lie at the heart of American politics.¹⁴⁴ According to E.E. Schattschneider, "political parties created democracy, and . . . democracy is unthinkable save in terms of parties."¹⁴⁵ Despite some of the misleading rhetoric of its leaders, however, China's democratic dictatorship remains a single-party state under the absolute authority of the CPC. Therefore, when Hu Jintao talks of perfecting the system of "multi-party cooperation" and "political consultation," he is actually referring to making the CPC more responsive to the public, not sharing power with opposition parties.¹⁴⁶ The Chinese political system is founded on the dual notions of democratic centralism (*minzhu jizhong zhi*) and parliamentary supremacy (*yihui zhishang*).¹⁴⁷ While the U.S. Constitution ensures that the authority of the federal government is derived

141. See *id.* at 494-95; Morikawa, *supra* note 31. The idea that the PRC Constitution protects preexisting fundamental rights, rather than merely endowing citizens with rights at the discretion of the state, has also gradually found its way into Chinese legal consciousness. See, e.g., Xue Limai, *supra* note 135 ("[c]itizen's rights as laid out in the PRC Constitution are fundamental rights that citizens should have at the outset, and not merely rights bestowed by the Constitution itself").

142. See *supra* text accompanying note 40; see also XIAN FA pmbl. (1982) ("The Chinese people must fight against those forces and elements, both at home and abroad, that are hostile to China's socialist system and try to undermine it").

143. See Morikawa, *supra* note 31.

144. See JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 3 (1995) (arguing that since government policy is typically determined by the collective action of many individual officeholders, political parties provide the only means for holding elected officials accountable for much of their actions).

145. *Id.* But see Peerenboom, *Asian Discourses*, *supra* note 106, at xix (maintaining that some measure of democratization may be possible even within a single-party state).

146. See Hu Jintao, *supra* note 7 (proclaiming that China has "adhered to and perfected the system of multi-party cooperation and political consultation under CCP leadership"); see also *China Embraces Property Rights*, *supra* note 2.

147. XIAN FA art. 3 (1982) ("[t]he state organs of the People's Republic of China apply the principle of democratic centralism").

from the consent of the individual states,¹⁴⁸ legislative powers enjoyed by localities in China are explicitly granted to them at the discretion of the central government.¹⁴⁹ Because the congress is the only governmental organ composed of representative of the “people,” socialist democracy also requires that local legislatures, as well as the courts, remain subordinate to the supreme leadership of the NPC and the NPCSC.¹⁵⁰ In this respect, Chinese constitutionalism is not unlike that of England, where the British parliament performs the dual role of both the executive and the legislature in the exercise of national sovereignty.¹⁵¹

It is ironic that the “fundamental task of the state” to promote economic reform would result in the gradual diffusion of the state’s economic and political decision-making authority, but this is what seems to be happening in China.¹⁵² Economic liberalization has put cracks into the edifice of the socialist state.¹⁵³ As privatization creates employment alternatives in the non-state sector, people enjoy greater personal freedom, and China’s civil and intellectual life distances itself from government and party control, individuals can now own their own homes, travel abroad, surf the Internet, and speak more freely than would have been deemed possible in 1979.¹⁵⁴ Aware of the positive effects of local administration on the productivity of both private and state-owned firms, the CPC has gradually shifted regulatory power over economic policy to local governments, a phenomenon sometimes referred to as “market-enhancing federalism.”¹⁵⁵ By offering tax breaks, reduced bureaucratic interference, and enhanced legal enforcement of property rights, local jurisdictions have been able to create regulatory environments more conducive to business and more

148. See U.S. CONST. amend. X (“[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”); see also Peerenboom, *supra* note 8, at 489.

149. See Li Yahong, *supra* note 45, at 125 (explaining why China may no longer be a unitary state).

150. Democratic centralism is the antithesis of the doctrine of separation of powers practiced in the United States. See Morikawa, *supra* note 31.

151. See Chen, *supra* note 11, at 427; see *supra* text accompanying notes 37-38. Under the doctrine of “Sovereignty of Parliament,” the Acts passed by the English Parliament are virtually unchallengeable before the courts of England. See George Wang & Priscilla Leung, *One Country, Two Systems: Theory into Practice*, 7 PAC. RIM L. & POL’Y J. 279, 308 (1998).

152. See Lubman, *supra* note 10, at 402.

153. See Dorn, *supra* note 17, at A16.

154. *Id.* Much of the relaxation of state intervention in the lives of the Chinese populace is attributable to the working conditions of private enterprises, which typically exercise much less control over their employees both within and outside the workplace. See Lubman, *supra* note 10, at 402-03. See also French, *supra* note 101.

155. See Dougherty & McGuckin, *supra* note 10.

attractive to foreign investors.¹⁵⁶ This is no doubt part of the rationale behind the government's decision to grant unprecedented legislative autonomy to the Special Economic Zones (SEZs).¹⁵⁷ At the same time, the state has also begun to channel public assistance programs such as housing, social security, and medical services through local governments, a trend indicated by the 2004 amendment of Article 14 calling for the establishment and improvement of the social security system.¹⁵⁸

Yet despite the increasing incompatibility of communist ideology, single-party rule and economic modernization, the CPC and the central government have nonetheless managed to retain a considerable amount of political authority. The party still appoints provincial governors, its control over non-fiscal matters such as bank credit continues to impose harsh budget constraints on many localities, and the list of legislative powers reserved exclusively to the central government is exhaustive.¹⁵⁹ Under the Legislative Procedure Law of 2000 (Law-Making Law),¹⁶⁰ the NPC and the NPCSC may legislate on matters concerning national sovereignty, congressional and judicial organization, the basic self-governance of citizens, crime and punishment, the appropriation of private property, the civil, economic, and judicial systems, as well as any other matters that must be legislated by the NPC and its Standing Committee.¹⁶¹ Specific legislative powers exercisable by localities are referred to only in the most general terms.¹⁶² In the absence of well-defined central legislation in a given area, local governments may enact their own laws under the long-standing practice of "advanced legislation," though such laws may be annulled if found to be inconsistent with subsequent national legislation.¹⁶³

156. *Id.*

157. Under the Law-Making Law, for example, only the State Council and the SEZs have the authority to legislate in areas reserved exclusively to the central government. *See* Law-Making Law arts. 9, 10, 11, 56 & 65 (2000); *see also* Li Yahong, *supra* note 45, at 129.

158. XIANFA art. 14(4) (1982) (amended 2004) ("[t]he State establishes a sound social security system compatible with the level of economic development"); *see also* Lubman, *supra* note 10, at 402-03. The fact that many of these social services were previously only available through public enterprises, offices, and organizations used to give the Chinese government enormous power over all public employees. *Id.*

159. *See* Dougherty & McGuckin, *supra* note 10.

160. *See* Law-Making Law art. 42 (2000).

161. *See id.* art. 8.

162. The Law-Making Law provides only that local legislatures may legislate on: implementing laws and administrative regulations; matters whose regulation must be based on local circumstances; and matters pertaining to local affairs. *See id.* art. 64; Li Yahong, *supra* note 45, at 128.

163. *See* Law-Making Law art 64(2) (2000).

In general, although there is no clear provision for the distribution of residuary legislative powers, the exclusive power of the NPC and NPCSC to enact laws on any matter that may be legislated by them seems to bestow on the central government unfettered discretion in this respect.¹⁶⁴

The CPC's policy of fiscal decentralization, coupled with its reluctance to relinquish political control, has led some to suggest the possibility of China pursuing a form of "economic rule of law," in which the legal system operates independently from political influence with respect to commercial matters while other areas of the law remain subject to varying degrees of politicization.¹⁶⁵ Another, perhaps more likely, prospect is that the post-Mao liberalization of the Chinese economy will eventually give rise to greater political decentralization as well.¹⁶⁶ As the state economy, and therefore the resources available to the central government, continues to contract, the CPC monopoly on power will inevitably deteriorate.¹⁶⁷ Some measure of voluntary political diffusion is already evident in the 2004 amendment of Article 98, which extends the term of office of grassroots congresses from three to five years.¹⁶⁸ In addition to facilitating consistency with respect to the timing of central and local elections, the

Except for matters enumerated in Article 8 hereof, in respect of any other matter for which the state has not enacted national law or administrative regulation, the People's Congress of a province, autonomous region, or municipality directly under the central government and the Standing Committee thereof may enact local decrees for the time being in light of its specific situations and actual needs. Where a national law or administrative regulation enacted by the state has come into force, any provision in the local decree which contravenes it shall be invalid, and the enacting body shall amend or repeal such provision on a timely basis.

Id. Note that residuary legislative powers in most federalist states cannot be annulled once they have been granted. See Li Yahong, *supra* note 45, at 130.

164. See Law-Making Law art. 8 (2000). This provision has been compared to the "necessary and proper" clause of the U.S. Constitution, though China has no independent judiciary to resolve potential conflicts between the center and localities. See Li Yahong, *supra* note 45, at 130.

165. See Peerenboom, *Asian Discourses*, *supra* note 106, at xviii-xix. Though such a system has arguably existed at some point in Taiwan, South Korea, and Singapore, most scholars agree that a mixed rule of law is not likely to be sustainable due to the spillover effects as institutional actors attempt to increase their autonomy and authority. See Peerenboom, *supra* note 8, at 517.

166. According to the evolutionary theses of modernization theorists, legal and economic reforms inevitably lead to political reforms and in particular the establishment of liberal democracies. See Peerenboom, *Asian Discourses*, *supra* note 106, at xix.

167. See Dorn, *supra* note 17, at A16 (arguing that the continued shrinkage of the public sector in China will eventually render the CPC obsolete).

168. XIAN FA art. 98 (1982) (amended 2004) ("[t]he term of office of people's congresses . . . is five years").

change is indicative of the party's desire to help local deputies play a more substantive role in determining economic policy.¹⁶⁹

Perhaps the most striking indication of China's emerging federalism has been the creation of "Special Autonomous Regions" (SARs) under Article 31 of the Constitution.¹⁷⁰ In many respects, the degree of political and economic autonomy currently enjoyed by the "Hong Kong Special Administrative Region" (HKSAR) is greater than the rights of individual states within federalist systems like the United States, and certainly more extensive than the rights previously granted it as a British colony.¹⁷¹ Although such incidents as the right of abode controversy in 1999 have generated concern over whether the PRC intends to fulfil its obligations under the Joint Declaration, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR's Basic Law) guarantees it legislative autonomy, judicial independence, and final adjudicative power.¹⁷² Hong Kong's continued use of British common law in accordance with Article 8 of the Basic Law reinforces this independence.¹⁷³ Some have likened Hong Kong to a type of "special political zone" whose continued prosperity, it is hoped, will help allay CPC fears that political liberalization is a dangerous course likely to result in the "Russian disease" of instability and secession.¹⁷⁴ As things stand, however, Hong Kong's autonomy has been conferred at the discretion of the central authorities and is therefore necessarily delimited by the Chinese

169. See *A Look Through Expert Eyes*, *supra* note 1.

170. XIAN FA art. 31 (1982) ("The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions").

171. See Jing Huang & Andrew Xuefeng Qian, "One Country, Two Systems," *Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Laws in China*, 5 DUKE J. COMP. & INT'L L. 289, 303-05 (1995).

172. See Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China art. 2 (1990) [hereinafter Basic Law] ("The National People's Congress authorizes the Hong Kong Special Administrative Region to . . . enjoy executive, legislative and independent judicial power, including that of final adjudication"), available at http://www.info.gov.hk/basic_law/fulltext/index.htm. For a discussion of the implications of the right of abode controversy for the development of rule of law in Hong Kong, see generally Joseph R. Crowley Program, *One Country, Two Legal Systems?*, 23 FORDHAM INT'L L.J. 1 (1999).

173. See Basic Law art. 8 ("The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained").

174. See Avery Goldstein, *The Hong Kong Experiment: A Peek into the Laboratory*, ASIA TIMES ONLINE, Jan. 28, 2000 (discussing the dynamic relationship between local and central governments in China), available at <http://www.atimes.com/china/BA28Ad02.html> (last visited June 2, 2005).

doctrine of democratic centralism.¹⁷⁵ In this respect, the PRC Constitution may arguably be as applicable to the HKSAR as to the rest of China.¹⁷⁶

Sean Dougherty and Robert McGuckin point out some interesting parallels between China's current experience with economic reform and the early development of the United States under the Articles of Confederation.¹⁷⁷ These are similarities which may offer some insight into the future development of China's political structure. Faced with a high degree of political decentralization and the federal government's uncertain reach over economic affairs, the Chinese government and the American confederacy have both been forced to concede to overwhelming objections from subordinate administrations at times, and both have struggled to preserve a common market by striking down interregional trade barriers inhibiting competition and discouraging foreign investment.¹⁷⁸ It is, of course, unlikely that China will ever evolve into a liberal democracy like the United States, even if it were to completely do away with its centrally-planned economy. This does not necessarily mean, however, that it may not become a federalist state. But for this to take place, Beijing will first have to convince itself that the diffusion of political power, implicit in the adoption of rule of law and increasingly indispensable for national prosperity within a market economy, will neither damage the legitimacy of the CPC nor undermine local allegiance to the motherland.¹⁷⁹

175. See Heng Loong Cheung, *Hong Kong SAR: Autonomy within Integration?*, 4 UCLA J. INT'L L. & FOREIGN AFF. 181, 184-85 (1999). In fact, the CPC has explicitly indicated that the SARs are not to be considered member states within a federalist nation, but rather local administrative regions under a unified central leadership. See *Establishing Special Administrative Regions is an Important Part of Chinese Policy Decision*, PEOPLE'S DAILY, Sept. 28, 1984; see also *supra* text accompanying notes 147-51.

176. Although there is no doubt that the PRC Constitution applies to Hong Kong in some respects, the scope of its applicability remains unclear since much of the HKSAR Basic Law is expressly intended to preclude many of its provisions. For a discussion of the applicability of the PRC Constitution to the HKSAR, see YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF SOVEREIGNTY AND THE BASIC LAW* 398 (1999); see also *Tegu Yu Zhongyang Guanxi Zui Zhong Kan Xian fa* [Relations Between Central Government and SARs Ultimately Based on PRC Constitution], CHINA ECON. TIMES, Feb. 25, 2004 ("[w]hen dealing with the relationship between mainland China and the HKSAR, the PRC Constitution cannot be left behind. The Constitution is not only a constitution for the mainland but a constitution for the entirety of China").

177. See Dougherty & McGuckin, *supra* note 10.

178. Under the federalist structure of the Articles of Confederation, the economies of individual states were actually protected from encroachment by the national government. *Id.*

179. See Goldstein, *supra* note 174. China has always treated national sovereignty and territorial integrity as a matter of principle which cannot be compromised. See, e.g., XIAN FA pmbl. (1982) ("[i]t is the lofty duty of the entire Chinese people . . . to accomplish the great task of reunifying the motherland").

C. A Rights-Based Approach to Constitutionalism?

Given the disparity between rights already provided for in the PRC Constitution and those currently exercisable by the Chinese populace, it is not surprising that the 2004 amendment to Article 33, calling for the state to "respect and safeguard human rights," has met with the most skepticism from the international community.¹⁸⁰ The 1982 Constitution ostensibly grants equality before the law, universal suffrage to those over the age of 18, freedom of speech, of the press and of association, freedom of religion, and even the right to criticize and seek reparations from the government.¹⁸¹ In practice, however, those brave enough to exercise these rights — even those who do so to advocate for a stronger constitution — are routinely censured or jailed.

The ironies have not gone unnoticed by the foreign press: a housing rights activist who painted the words "Protect the Constitution" on his clothes and then marched in front of the government offices was promptly arrested for demonstrating; a popular writer who criticized the proposed application of a state subversion law to Hong Kong was jailed on charges of state subversion, but only after the government shelved the proposed law.¹⁸² Perhaps the most disconcerting instance of China's constitutional shortcomings took place during the NPC's deliberations over the 2004 human rights amendment itself, as hundreds of peaceful demonstrators were imprisoned for "disrupting" the NPC with appeals for the guarantee of rights purportedly protected by the Constitution.¹⁸³ Welcoming the amendments as an important first step, Amnesty International recognized these disparities when it emphasized the need for China to adopt more practical measures by reviewing the constitutionality of existing legislation and by drafting new laws in accordance with China's obligations under applicable international human rights treaties.¹⁸⁴

180. XIAN FA art. 33 (1982) (amended 2004) ("[t]he state respects and preserves human rights").

181. See XIAN FA arts. 33-35, 41 (1982).

182. For a description of the highly publicized cases of *Liu Jincheng* and *Du Daobin*, see Davis, *supra* note 101.

183. See *Concrete Action*, *supra* note 12.

184. See Amnesty International Press Release, *supra* note 13. To date, China has signed twenty-one international human rights agreements, including the International Covenant on Civil and Political Rights (ICCPR), and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture (CAT), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), though it has yet to implement many of their provisions. *Id.*

When confronted with international censure of its human rights practices, China invariably responds by appealing to notions of national sovereignty, cultural imperialism, and "Asian Values."¹⁸⁵ Though typically invoked by authoritarian regimes as justification for domestic human rights abuses, such arguments are not altogether groundless in China's case.¹⁸⁶ One of the most enduring features of Chinese constitutionalism since 1949 has been its collectivist rights orientation, under which the suppression of dissidents exercising their right to free speech may be warranted by the need to defend the more important interests of the state.¹⁸⁷ The notion of collectivist rights is manifest in the language of the 1982 Constitution itself, which refers to human rights as "citizen's rights and freedoms" and subjects them to certain restrictions in the interests of promoting national welfare.¹⁸⁸ As with many developing nations, China has also consistently prioritized social and economic rights over civil and political liberties, based on the belief that entitlement to subsistence and development is a prerequisite to the enjoyment of other rights and therefore essential for people living in less developed regions.¹⁸⁹ In its rejection of the notion of individual rights as superior to the interests of the state, the PRC has thus remained somewhat of a conscientious objector to

185. See Peerenboom, *supra* note 8, at 494-96 (comparing various alternative conceptions of human rights). Against the backdrop of the Iraqi prisoner abuse scandal in early 2004, China has recently condemned the U.S. report on human rights abuses around the world as hypocrisy. See *U.S. Human Rights Hypocrisy Attacked*, PEOPLE'S DAILY, May 22, 2004, available at <http://english.peopledaily.com.cn/other/archive.html>.

186. Although the Chinese government tends to justify its rejection of the universal human rights model as a consequence of traditional Chinese values, Davis traces its official rights orientation back to the structural imperatives of its authoritarian regimes since the 1930s. See Davis, *supra* note 15, at 146.

187. *Id.* at 145. Once characterized as counterrevolutionary, dissenting voices on fundamental issues of freedom and democracy are now suppressed in the interests of "national security." See XIANFA art. 28 (1982) (amended 1999) (revising "[t]he State maintains public order and suppresses treasonable and other counter-revolutionary activities" to "[t]he State maintains public order and suppresses treasonable and other criminal activities that endanger State security."); see also *Whose Security? State Security in China's New Criminal Code*, HUMAN RIGHTS IN CHINA/HUMAN RIGHTS WATCH/ASIA REPORT, Apr. 1997, at IV, available at <http://www.hrw.org/reports/1997/china5>.

188. Constitutional restrictions clauses can be found in both the 1982 PRC Constitution and the 1946 ROC Constitution. See, e.g., XIAN FA art. 51 (1982) ("[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens"). See Davis, *supra* note 15, at 146.

189. See *Human Rights to be Protected by Constitution*, *supra* note 15 (pointing out that "different nations will focus on different aspects of human rights in their different development phases").

the European human rights tradition.¹⁹⁰ Without the requisite degree of rights-consciousness in China, it is easy to see how the very idea of human rights has come to be regarded by many Chinese as a heavy-handed and moralistic slogan allowing no room for differences in history, traditions and culture.¹⁹¹

Notably, the CPC has since reconsidered the issue and is now in the practice of issuing periodic reports on human rights developments both in China and around the world.¹⁹² As the name suggests, however, "citizen's rights" in China derives from statutory rather than natural law and therefore may not infringe upon the legislative power of the PRC government.¹⁹³ Furthermore, since the scope of citizen's rights is not specified in the Constitution,¹⁹⁴ the meaning of any constitutional provision calling for its protection will necessarily depend on subsequent legislation.¹⁹⁵ While it may therefore have no direct effect on ongoing human rights abuses in China, the Article 33 amendment is important precisely because it represents the first instance in which explicit reference is made to the protection of human rights as opposed to citizen's rights. This suggests that the CPC has finally acknowledged the Western notion of universal rights as existing beyond the scope of domestic legislation.¹⁹⁶ The legal basis for this extended protection is not clearly indicated, though it can be inferred that the applicable standards should include existing constitutional provisions as well as various international human rights instruments to which China is a party.¹⁹⁷

190. See Peerenboom, *supra* note 8, at 494.

191. See Lubman, *supra* note 10, at 413-14 (arguing that China's human rights record will not improve in response to foreign pressure unless accompanied by a more widespread awareness of the Western concept of legal rights).

192. A White Paper entitled "Human Rights in China" and issued on November 1, 1991 was the first official document confirming the status of human rights in China, though the promotion of human rights as a major focus of development under the leadership of the party did not come about until the first major congressional report on the subject was presented to the Fifteenth NPC in September 1997. See *Inclusion of Human Rights*, *supra* note 4.

193. See Morikawa, *supra* note 31 (contrasting the notion of "citizen's rights" in China with the Western idea of "human rights").

194. Article 33 of the PRC Constitution merely states that "[e]very citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law." XIAN FA art. 33(4) (1982) (amended 2004).

195. See Morikawa, *supra* note 31.

196. See Ji Weidong, *From Emphasizing Private Property Rights to Improving Governance: Interpreting the Draft of the Fourth Amendment to the Constitution*, CAIJING MAG., May 1, 2004, available at <http://www.caijing.com.cn/english/2004/0105/0105jiweidong.htm> (last visited July 28, 2004); see also Li Wuzhou, *supra* note 2.

197. Li Wuzhou, *supra* note 2; see also *supra* text accompanying note 184.

Fifteen years after former Chinese premier Li Peng invoked martial law to put down the unarmed pro-democracy protesters in Tiananmen Square, a related amendment has now struck all references to martial law from the PRC Constitution and replaced them with the term "state of emergency."¹⁹⁸ At the time, many considered Li's crackdown unconstitutional on account of his failure to seek NPC approval beforehand.¹⁹⁹ The NPC recognized as much the following year when it decided to pass legislation laying out specific conditions under which martial law could be declared.²⁰⁰ In this context, the most immediate effect of the 2004 amendment would be to render the 1990 Law on Martial Law moot while laying a constitutional foundation for China's first Emergency Law.²⁰¹ Indicative of China transition towards rule of law in general, the amendment was also in large part a response to the government's mishandling of the Severe Acute Respiratory Syndrome (SARS) epidemic in spring 2003.²⁰²

According to mainland legal experts, the revision is more than semantic. While martial law is enforced where severe turbulence or social turmoil threatens the nation's stability or the safety of life and property, the domain of an emergency law is presumably broader in that it can apply to war, natural disasters, public sanitation, and economic crises as well as social turbulence.²⁰³ The enforcement of martial law typically conjures up brutal images of military crackdowns and gross violations of human rights; the enforcement of emergency law involves administrative measures under which the scope of temporary restrictions on citizens' freedom is defined in accordance with explicit regulations.²⁰⁴ Some have also suggested that the amendment may be an attempt to rectify the growing incongruity between martial law and the socialist market economy, under which the

198. See XIAN FA arts. 67(20), 80, 89(16) (1982) (amended 2004) (authorizing the President of the PRC to declare a "state of emergency" pursuant to NPCSC approval); see also *China to Drop "Martial Law" 15 Years After Tiananmen Crackdown*, CHANNELNEWSASIA.COM, Jan. 7, 2004 [hereinafter *China to Drop Martial Law*], available at http://www.channelnewsasia.com/stories/afp_asiapacific/view/65245/1/.html (last visited June 2, 2005).

199. See *China to Drop Martial Law*, *supra* note 198.

200. See *id.*

201. See *id.*; *Constitutional Amendment Paves Way for Emergency Law*, CHINA DAILY, July 1, 2004 [hereinafter *Constitutional Amendment Paves Way*] ("[a]lthough China now has a . . . National Defense Law and Flood Control Law, as well as an Earthquake Control and Disaster Relief Law, . . . the country still lacks a comprehensive Emergency Law"), available at http://www2.chinadaily.com.cn/en/doc/2004-01/07/content_296344.htm.

202. See *China to Drop Martial Law*, *supra* note 198.

203. See *Constitutional Amendment Paves Way*, *supra* note 201.

204. *Id.*; see also *A Look Through Expert Eyes*, *supra* note 1.

government should no longer be allowed to arbitrarily allocate social and natural resources in times of emergency.²⁰⁵

As is the case with most constitutional revisions in China, the human rights and "state of emergency" amendments represent yet another attempt by the Communist Party to adapt to historical conditions while reinforcing its own legitimacy in the eyes of the populace and the world.²⁰⁶ Judging by the dubious reaction of most Western commentators, however, it is going to require a good deal more than "fine words" for China to gain any international recognition and praise for its efforts.²⁰⁷ The CPC must first stop arresting Chinese Catholics like Wei Jingyi for leading nongovernment-sanctioned church services in people's homes, torturing Falun Gong practitioners like James Ouyang for practicing their spiritual beliefs, and detaining outspoken advocates like Du Daobin for questioning government policy on the Internet.²⁰⁸ As one Human Rights Watch researcher has pointed out, although the PRC Constitution amply respects and safeguards human rights, those in power have shown little inclination to respect and safeguard the PRC Constitution.²⁰⁹

IV. CONCLUSION: ENFORCING "PAPER LIBERTY"

In a December 4, 2002 speech celebrating its twentieth anniversary, then Vice-President Hu Jintao extolled the 1982 Constitution as providing the "general charter for governing the country," the "legal basis for maintaining national unity, ethnic solidarity [and] economic development," and the "legal guarantee for the CPC in exercising power and rejuvenating the country."²¹⁰ The text of the 1982 PRC Constitution contains a veritable laundry list of rights, their numbers growing with each year; yet without any democratic check on government, Chinese people do

205. See *Constitutional Amendment Paves Way*, *supra* note 201.

206. See, e.g., Lilun Dongtai: Jiekai Wo Guo Renquan Baozhang Xin Pianzhang [*Theoretical Trends: Uncovering a New Chapter in China's Protection of Human Rights*], CHINA ECON. TIMES (China), Mar. 16, 2004 ("The recent round of amendments . . . once again demonstrates the Chinese government's ability to adapt to historical trends . . . and should win high praise from the international community"), available at <http://www.cet.com.cn>.

207. See Amnesty International Press Release, *supra* note 13 (responding to the 2004 amendment on human rights by proclaiming that "fine words are not enough" and that constitutional revisions "must be backed by concrete action").

208. See *Concrete Action*, *supra* note 12; John Pomfret & Philip P. Pan, *Torture is Breaking Falun Gong, China Systematically Eradicating Group*, WASH. POST, Aug. 5, 2001; see Davis, *supra* note 101.

209. Davis, *supra* note 101.

210. See Hu Jintao, *supra* note 7.

not have the opportunity to enjoy them.²¹¹ This is a common sentiment among those who dismiss the idea of a growing constitutionalism in China despite strong evidence to the contrary.

Those who deny the Chinese legal system the label rule of law and therefore reject the possibility of any form of constitutionalism in the PRC, are invariably referring to its liberal democratic manifestation.²¹² Skeptics assert that rule of law, and therefore true constitutionalism, requires meaningful judicial protection of fundamental human rights, the dispersion of political power and authority, and free and open elections for national office, all of which they say are nonexistent in China.²¹³ Critics also tend to point out the fact that the right to speak out on fundamental issues of freedom and democracy, considered essential for maintaining productive dialogue within the marketplace of ideas, is suppressed in China as counterrevolutionary or more recently, against the interests of national security.²¹⁴

Part of the problem is that although the CPC and its individual members are ostensibly obligated to follow the law under the 1999 amendments to Article 5 of the PRC Constitution, the role of the party itself remains undefined in law.²¹⁵ Given the scope of the CPC's intervention in both the legislative and judicial branches of government, this is a serious failing. Under China's system of legislative supremacy, the NPC, by the very act of passing laws, certifies their constitutionality thereby rendering all legislation immune to judicial review.²¹⁶ Unlike most Western countries, judicial interpretation in China is limited to problems arising during the application of the law, with the power to declare the unconstitutionality of a given law vested exclusively in the NPCSC.²¹⁷ Yet,

211. See, e.g., Ramirez, *supra* note 12 (arguing that without the implementation of practical measures to implement both the 2004 constitutional amendment and the international human rights instruments ratified by the PRC, China's official acceptance of human rights standards is meaningless).

212. See Peerenboom, *supra* note 8, at 473.

213. See Dowdle, *supra* note 18, at 6-7.

214. See XIANFA art. 28 (1982) (amended 1999); see also *supra* text accompanying note 187. The "marketplace of ideas" metaphor, intended to encapsulate a conception of freedom of speech in which truth inevitably prevails from the open competition of ideas, was coined in 1919 in a dissenting opinion by Justice Holmes. Charles Levendosky, *Marketplace Keeps Speech Free of Government Controls*, CASPER-STAR TRIB., July 17, 1997, available at <http://fact.trib.com/1st.lev.internet.marketplace.html>.

215. See Peerenboom, *supra* note 8, at 516.

216. See Davis, *supra* note 15, at 145.

217. See Li Yahong, *supra* note 44, at 134-36, 138; see also Law-Making Law art. 42 (2000). In the history of the PRC, there have only been three occasions in which the NPCSC has exercised its power of interpreting laws, the most recent of which involved its interpretation of the HKSAR

NPC and NPCSC delegates are not elected directly and must operate within the bounds of the CPC's limited political tolerance.²¹⁸ Since the party makes all final decisions, what has been dubbed the rubber-stamp parliament of the NPC and its Standing Committee is dismissed as nothing more than a legitimizing facade for the communist dictatorship.²¹⁹ Although the CPC does not typically interfere in specific cases, courts in China are still subject to the supervision of the NPC and the legal profession as a whole is governed by the Ministry of Justice.²²⁰ Whether politically sensitive cases are handled according to law is generally a useful indicator of whether a legal system meets the requirements of rule of law, since such a system would most likely handle other less controversial cases in a similar way. In China, however, political dissidents are regularly denied a procedurally fair trial while senior government officials are rarely held accountable without the implicit support of the party.²²¹

To be sure, China's legal system suffers from a number of deficiencies, many of them institutional in nature. As recent developments have shown, however, there are real indications that the PRC is cultivating a genuine, albeit flawed, brand of constitutionalism.²²² The growth of the NPC into a potent constitutional force capable of influencing the activities of more politically endowed actors clearly reflects this development. While the NPC rarely votes down a formal submission, public officials take the threat of delegate dissent seriously to the point where the NPC has developed a sort of pocket veto over draft bills submitted to it.²²³ The

Basic Law during the "right of abode" controversy. Its power of constitutional interpretation, however, has never been expressly exercised. *See* Chen, *supra* note 11, at 413.

218. *See* Dowdle, *supra* note 18, at 6.

219. *See* Cheng, *supra* note 66; *see also* JEAN-PIERRE CABESTAN, THE RELATIONSHIP BETWEEN THE NATIONAL PEOPLE'S CONGRESS AND THE STATE COUNCIL IN THE PEOPLE'S REPUBLIC OF CHINA: A FEW CHECKS BUT NO BALANCES (CEFC, Working Paper No. 1, July 2000). Such skepticism is based on a conception of the NPC as merely another *loci* of power where CPC factions argue and reach compromise on certain issues outside the authority of the executive or judiciary, rather than as an independent institution designed to balance the powers of the State Council and the CPC. *See id.*

220. *See* Peerenboom, *supra* note 8, at 502-03.

221. As Peerenboom points out, however, senior officials in the United States are rarely held accountable for their actions while procedural fairness does not necessarily prevent political dissidents from going to jail under repressive U.S. laws criminalizing "subversive advocacy." *See id.* at 514, 518.

222. *See generally* Dowdle, *supra* note 18.

223. Low approval rates for both the 1994 National Education Law as well as the CPC's nominees for public office, for instance, have compelled the State Council to devote more of the national budget to education and the CPC to revise its nomination procedures. *See id.* at 2-3.

recent series of parliamentary investigations into matters of social and economic importance overlooked by the State Council constitutes further evidence of the NPC's pivotal role in China's emerging system of political accountability.²²⁴

Finally, with the proliferation of new laws in the PRC, Chinese legislators have begun to realize the importance of establishing some kind of supervisory organ to ascertain the constitutionality of a given law when a conflict between laws occurs. As early as 1994, the establishment of a PRC Constitution Committee was proposed, in which the power of legislative review would be transferred from the exclusive control of the NPCSC to a quasi-constitutional court composed of independent and neutral legal scholars.²²⁵ The proposition was subsequently abandoned in favor of dispersing the supervisory power among various "relevant special committees" of the NPCSC, though the NPC more recently announced the establishment of a legislative review panel (*fagui shencha bei an shi*) under its Legal Affairs Committee to investigate conflicts between the PRC Constitution, as amended, and existing laws and regulations.²²⁶ Though the PRC Constitution itself remains non-justiciable, the introduction of such radical changes is a sure sign of the growing importance of constitutional implementation and enforcement in China.²²⁷

What impact have the amendments themselves had on the changing constitutional dynamics of the PRC? Absent the right to sue for violations of human rights or private property, the amendments are of little practical value for individual members of society.²²⁸ Their impact may be further restricted by the extent to which they merely serve to legitimize existing rights and interests instead of creating new ones.²²⁹ Still, it may be helpful

224. NPC investigations into the State Council's neglect of rising unemployment, inadequate educational funding, and growing crime rates in China have instigated greater attention to social security, gradual increases in education funding, as well as the recent "strike hard" anticrime campaign. *See id.* at 4.

225. Some saw the proposal as "one of the most revolutionary and far-reaching reforms ever introduced into the PRC legal system." *See* Li Yahong, *supra* note 45, at 133-34.

226. *See id.* at 134-36; *see also* Xiao Yang, *Legislative Review Panel to Smooth Legal Bumps*, CHINA DAILY, June 21, 2004, at 6; Yue Jianguo, *Zhi De Qidai De "Yi Xiao Bu" [A "Small Step" Worth Waiting For]*, CHINA ECON. TIMES, June 22, 2004.

227. *See* Yue Jianguo, *supra* note 226 ("[a]lthough the legislative review panel does not have the power to feasibly eliminate laws and regulations which violate the Constitution, the fact that it has been established is at least a step in the right direction"). Even while emphasizing the importance of adhering to party leadership when interpreting the PRC Constitution, Hu Jintao himself has talked of developing the PRC Constitution into a "legal weapon for ensuring civil rights." *See* Hu Jintao, *supra* note 7.

228. *See supra* notes 17-19 and accompanying text.

229. *See supra* text accompanying notes 88-92.

to see constitutional revisionism in China as part of an ongoing process of institutional development in which the introduction of each new amendment puts pressure on the state to draft more comprehensive legislation in a given area.²³⁰ According to Donald Clarke, the amendments offer social advocates and private enterprises a powerful rhetorical weapon in their struggle with government policy for further reforms and protection, while the NPC offers a convenient forum for the expression of those interests that have been emboldened by the amendments.²³¹ Of course, the legitimacy of such a theory necessarily depends on the political activism of the various interest groups and, perhaps more importantly, the central government's willingness to respond to these varying interests. Given the growing importance of rule of law for the legitimacy of the CPC as well as China's increasing rights awareness, one thing is certain: Chinese constitutionalism, as it exists today, represents much more than mere "paper liberty."

230. See Subrahmanyam, *supra* note 7.

231. Clarke likes to characterize the constitutional amendments as declarations of upcoming legislative agendas. See *id.*

