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China and Neo-liberal Constitutionalism

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Abstract

This article discusses the probability of growth of neo-liberalism in modern China and its implications for Chinese constitutionalism. A China polity under the vision of a neo-liberal regime engenders problems of prescribing a legal system and identifying constitutional ethos. The genesis of this article is a February 21, 2003, symposium of Chinese neo-liberals, who proffer Chinese neo-liberalism in answer to issues of reforms and Chinese constitutionalism. A Chinese neo-liberal constitutional coterie desiderates immediate democracy and a governmental model that mirrors a United States constitutional government, replete with separation of powers and independent judicial review. Such urgings are arguably a denial of both the historicity of Western liberalism and China's ontological base in tradition, being Confucianism. The historic excesses and abuses of liberalism should serve to frustrate a transplant of neo-liberal constitutionalism in China.

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I. INTRODUCTION

*I don't know exactly what democracy is, but we need more of it.*¹

During the past twenty years, China enacts a wealth of legislation in an attempt to keep pace with a rapidly developing economy.² China watchers now marvel at on-going legal reform and economic development.³ Despite such progress, a Chinese neo-liberal constitutional coterie desiderates immediate democracy and transformation of China's government into a model that mirrors a United States constitutional government, replete with separate of powers and independent judicial review.⁴

This article discusses the probabilities of a neo-liberal (*xin ziyou zhuyi*) regime in modern China and its implications for Chinese constitutionalism. In addition, this article contemplates a search for a constitutional ethos under the vision of a China polity invoking a neo-liberal constitutional regime.⁵ The genesis of this article is a February 21, 2003 symposium of Chinese neo-liberals, *xin ziyou*, or *xin ziyou pai*, who offer Chinese neo-liberalism in answer to the issues of reform and constitutionalism.⁶ “As part of a great debate among Chinese intellectuals and thinkers that has been unfolding over the past two decades on the question of China's future, the UCLA Asia Institute on February 21 sponsored a symposium of four noted Chinese ‘neo-Liberals’ who presented their

¹ Anonymous Chinese Student, during protests in Tiananmen Square, Beijing, 1989, *available* at www.elliottsamazing.com/demo.html.

² Peng Yibing, director of the bills Affairs Office, of the 10th NPC, reports that it is the third straight year that the number of bills legislators had submitted exceeded the 1,000-mark, (Xinhua News Agency March 12, 2003), *available* at <http://www.china-embassy.ch/eng/44402.html>.

³ Randall Peerenboom, *China's Legal System: A Bum Rap?*, 1/6/2003, UCLA Center for Chinese Studies, *available* at <http://www.isop.ucla.edu/article.asp?parentid=2878>.

⁴ Richard Gunde, Distinguished Chinese Political Activists Discuss Constitutionalism & Political Reform, 2/2003, UCLA Asian Institute, *available* at <http://www.isop.ucla.edu/article.asp?parentid=3243>.

⁵ *Id.*, The panelists refer to themselves as “neo-liberal constitutionalist.”

⁶ *Id.*

answers to the question ‘Where does China go now?’.”⁷ The Chinese neo-liberals in attendance are Liu Junning,⁸ Wang Juntao,⁹ Yu Haocheng,¹⁰ and Wang Dan.¹¹ The fact that panelists are Chinese neo-liberals is important, because following the end of cold war the West perceives China as a hurdle to reconstructing a neo-liberal world order, or new global economy.¹² Contrarily, these panelists, who may represent of the future of China, fully embrace Chinese neo-liberalism as the proper course for reforms and the future of China. The 1989 tragedy of Tiananmen Square is also a commonality for this Chinese neo-liberal coterie that inexplicably links them.

A Chinese neo-liberal coterie ponders the choices facing China.¹³ During the symposium, issues of China’s future are subject to a myopic perspective, because of exclusivity in a neo-liberal coterie, as opposed to perspectives that are more diverse. Assuming Chinese neo-liberal constitutionalism finds its root in Western liberalism; one can arguably predict the underlying forces that may drive Chinese neo-liberalism, at least in terms of understanding neo-liberal constitutionalism under a proposed Chinese neo-liberal constitutional regime. A prospect of neo-liberalism in China calls into the question the similarities or dissimilarities between Western liberalism and Chinese neo-liberalism, which, necessitates grappling with understanding the meaning of neo-

⁷ *Id.*

⁸ *Id.*, In 1999 Liu Junning he was among the liberal thinkers and writers blacklisted.

⁹ *Id.*, Wang Juntao authored the most famous of the movement’s protest poems, *The Tiananmen Poems*, Xiao Lan, (ed.) and (trans.), Beijing Foreign Languages Press (1979), Wang was subsequently sentenced to thirteen years in jail. The fall of the Gang led to his release after seven months.

¹⁰ *Id.*, “Following the 1989 crackdown, Yu was detained for a year and for the next four years was not permitted to leave China.”

¹¹ *Id.*, Wang Dan was one of the student leaders of the pro-democracy demonstrations in Tiananmen Square in 1989. Following the suppression of the demonstrations, he was arrested and sentenced to four years in prison. Subsequent in 1996, he was arrested and convicted of attempting to subvert China’s government and was sentenced to eleven years in prison.

¹² Scott Burchell, *Liberal Internationalism*, Scott Burchill and Andrew Linklater (eds.), *Theories of International Relations*, New York: St. Martin’s Press (1966), at 28-66.

¹³ Gunde, *supra* note 4.

liberalism and pragmatic neo-liberalism, or pragmatic economic liberalism, in modern China, if not, a China in post-modernity.¹⁴ The article briefly examines a historicity of both Western liberalism and neo-liberalism, because neo-liberalism and pragmatic neo-liberalism, or pragmatic economic liberalism, arguably evolve from classical liberalism.

Moreover, Western liberalism's underpinning philosophical foundation likewise arguably attributes to problems of its transplant or integration into China's legal system. From Hugo Grotius (1583-1645)¹⁵ to H.L.A. (Herbert) Hart (1907-1992),¹⁶ and other jurists and philosophers, one consistently discovers an inherent coercive proclivity in liberal democratic constitutionalism. Although there are several branches and sub-branches of jurisprudence, especially in American jurisprudence, such as legal realism, sociological jurisprudence, critical legal studies, postmodernism, and others, this article will focus on three general Western philosophies of law, which are historical jurisprudence, legal positivism, and natural law theory,¹⁷ for purposes of contemplating jurisprudence for a Chinese neo-liberal regime. This article directs emphasis towards older schools of natural law and positivism, because these theories are still with us and

¹⁴ See Paul Harris, *The Birth of the Postmodern, the Rebirth of the Tribe: Contradiction and Change in Contemporary New Zealand*, University of New Zealand, University of Waikato, Hamilton, New Zealand, ("Postmodernity is a 'purportedly new state of world affairs' which has been emerging since the 1960's . . . ; For some analysts, postmodernity is but the latest phase of capitalism."), available at <http://employees.csbsju.edu/jmakepeace/perspectives2001/Harris2001.jmm.html>.

¹⁵ Charles S. Edwards, *Hugo Grotius: The Miracle of Holland*, Chicago: Nelson-Hall (1981), at 37, Contrary to *juris prudence* in modernity, especially positivist, for Grotius, the state was a composite of individuals, as oppose to an abstract entity with a personality of its own.

¹⁶ H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983); *Positivism and the Separation of Law and Morals*, Vol. 71, No. 4 Harvard Law Review 593 (1958), H.L.A. Hart, a renowned positivist, emphasized institutional legitimacy in his approach to legal system.

¹⁷ Harold Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 Yale L.J. 1651, 1651-1653, (1994).

continue to influence the basis of mainstream thinking in contemporary international law.¹⁸

Historic issues of morals and politics are especially keen for China and its ontological base in tradition.¹⁹ One questions what significance Chinese neo-liberalism attributes to China's historical particularity, because a failure to attribute any role of historical particularity leaves one thinking that attributes of culture, communal integration, or in-place societal ethos, play a minim role in modern legal reforms. Nonetheless, as always the case of moral and political dilemma surrounding the integration of legal systems, the issue ultimately resolves to one of choice for China. After all, arguably, a *sine qua non* of a successful resolve of these competing institutions is conflict.

II. HISTORICITY OF LIBERALISM AND NEO-LIBERALISM

A. Classical Liberalism

Generally, classical liberalism characterizes Western notions of individual liberty, limited government, and rule of law, and further, embodies Western values such as "profit", "free-market", "private property", and "economic initiative."²⁰ Liberalism is a political theory of rights that attempts to forge a social theory focusing on establishing the equality of all men before law. A problem of liberalism is that its excesses and abuses have historically contributed to various revolutions, anti-clericalism, the rejection of legitimate authority, and other such tragedies. It is an attempt to end the social

¹⁸ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, at 32, 7 rev. ed., (Routledge 1997).

¹⁹ A. Charles Muller, *Essence, Function and Interpenetration Early Chinese Origins and Manifestations*, Vol. 7 Bulletin of Tokyo Gakuen University (1999), available at <http://www.human.toyogakuen-u.ac.jp/~acmuller/articles/tyung-earlyorigins.htm>.

²⁰ See Michel Therrien, *John Paul II's Use of the Term Neo-Liberalism in Ecclesia in America*, Based on a paper delivered at the Pontifical College Josephinum April 8, 2000, Action Institute for the Study of Religion and Liberty, available at <http://www.acton.org/research/pubs/papers/neoliberalism.html>.

intolerance strife that plagues Europe after the Reformation. Success of liberalism is contingent on establishing a culture founded on idea of a civil liberty secured by a doctrine of pluralism. Its gist in formulating this idea of civil liberty is respect for civil liberty and individual human rights.²¹

Western classical liberalism achieves little success in terms of its historic manifestations, however. In France, at the close of the French Revolution (1789-1799),²² and in other parts of Europe, liberal ideals are subverted for revolutionary purposes and the promotion of moral license on the part of secular humanists. In time, counter deviancies develop in opposition to the original liberal agenda, because they lack practical continuity with the elemental principles of classical liberalism. A French Revolution that initially hails itself as the liberal revolution, antithetically, becomes a pillar of religious intolerance.²³

B. Neo-Liberalism

In the late nineteenth century, international trade is primarily contingent on liberal national legislation, bilateral trade agreements, and Treaties of Friendship, Commerce, and Navigation. World War I ensues and causes collapse of this earlier trading system, and protectionism and currency instability follow in the inter-war period. In 1944, today's global international economic regulations are founded upon the multilateral system created by the Bretton Woods Conference. Its objectives are two folds: "First, to advance the reduction of tariffs and other barriers to international trade," and, Secondly, "to create a global economic framework to minimize the economic conflicts among

²¹ *Id.*

²² Gwynne Lewis, *The French Revolution 1787-1799 The People and the French Revolution*, available at <http://www.warwick.ac.uk/fac/arts/History/teaching/french-rev/people.html>.

²³ Therrien, *supra* note 20.

nations, which, at least in part, were held to have been responsible for the outbreak of the Second World War.”²⁴ The result of the Bretton Woods Conference in 1944 is the creation of three basic international economic institutions regulating money and trade, which are the International Monetary Fund (“IMF”), the International Bank for Reconstruction and Development (“IBRD”), or (“World Bank”), and the General Agreement on Tariffs and Trade (“GATT”).²⁵

In the 1980’s, neo-liberalism emerges with the debt crises in developing countries.²⁶ Neo-liberalism is the name often given to the political-economic restructuring or reform program proposed for developing countries by developed country economists, IMF, and the World Bank.²⁷ Neo-liberal reforms are sometimes referred to as structural adjustment programs.²⁸

Western classical liberalism stems from the eighteenth and nineteenth century liberal movements for individual freedom from restrictions by the state on individual human, civil, and property rights. Comparatively, neo-liberalism arguably extends the same individual rights to corporations and banks, and moves the rights of property from the status of a social right to that of a fundamental right. The result being that Western neo-liberalism treats transnational banks and corporate entities as equal, for instance, to a small farmer in China. While neo-liberalism grants significantly more freedom to

²⁴ Malanczuk, *supra* note 18, at 223.

²⁵ *Id.*

²⁶ Russ Kleinbach, *Sustainable Development and Neo-Liberalism*, Presented at The University Conference, Philadelphia University, The American University in Kyrgyzstan, May 30, 1999, updated 12/21/2000, available at <http://faculty.philau.edu/kleinbachr/neo-liberalism.htm>.

²⁷ World Bank Documents, <http://www.worldbank.org>, The World Bank comprises five institutions: International Bank for Reconstruction and Development; International Development Association; International Finance Corporation; Multilateral Investment Guarantees Agency; International Centre for Settlement of Investment Disputes, and regional development banks, such as the Inter-American Development Bank.

²⁸ NACLA REPORT ON THE AMERICAS, Vol. XXX, No 4, p. 20 Jan/Feb, 1997, Report on Mexico.

corporate entities, a problem of neo-liberalism is that, historically, it does not extend the same freedoms to indigents and working people.²⁹

The origin of Western neo-liberalism in the 1970's and 1980's evolves from the IMF and World Bank providing economic assistance to developing countries contingent on implementation of neo-liberal reforms.³⁰ The neo-liberal reforms encompass privatization, free markets, de-regulation, austerity, and comparative advantage.³¹

C. Pragmatic Neo-Liberalism

Globalization, or the pursuit of a new global economy, results in the need for neo-liberal policies. Generally, because of failed neo-liberal reform policies of the Bretton Woods Institutions, being the IMF and World Bank, economic liberalism is given a new nomenclature of pragmatic neo-liberalism. In this context, pragmatic is an adjective that is intended to change the face of neo-liberalism (economic liberalism).

It is the strategy of the Bretton Woods Institutions to present a kinder and gentler image of globalization, or the new global economy, to the world, especially developing countries and economies. The rhetoric of pragmatic neo-liberalism is people-friendly, but remains in identity neo-liberalism.³² Sometime after 1990, the World Bank and the IMF adopt this gentler approach, or political rhetoric, because of first decade failures in an earlier development philosophy. In the early 1980s, because of criticisms, from the right and left, the Bretton Woods institutions reposition and reinvent themselves as

²⁹ Kleinbach, *supra* note 26.

³⁰ *Id.*

³¹ *Id.*

³² Dickson Eyoh and Richard Sandbrook, *Pragmatic Neo-liberalism and Just Development in Africa*, University of Toronto, CIS Working Paper 2001-1, available at www.utoronto.ca/cis/working_papers/2001-1.pdf.

champions of the world's poor.³³ The IMF follows suit, that is, reinvents itself after bungling the 1997-98 East Asian financial crisis³⁴ and Mexico crisis.³⁵ In early 2000, an illustrative case occurs when the IMF's Enhanced Structural Adjustment Facility reinvents itself as a friendlier Poverty Reduction and Growth Facility ("PRGF").³⁶ The World Bank IMF initiates effort to build partnerships with recipient governments, non-governmental organizations ("NGO"), enhance participation of recipient governments in the design of adjustment programs, augmentation of human capital, and address problems of governance, corruption and human rights.³⁷

However, despite these efforts at repositioning and reinventing, there is maintenance of elemental principles of a core policy, especially in terms of an American consensus,³⁸ that assumes "adjusting firms, governments, employees, farmers, and citizens serve the greater good in general to the exigencies of competition within increasingly deregulated and global markets."³⁹ The pragmatic extensions of neo-liberalism, therefore, supplements this core notion, in that, they present neo-liberalism with a more human face.⁴⁰

Neo-liberalism is now a pragmatic neo-liberalism representing new policies of the Bretton Woods Institutions as pertains to developing economies. Arguably, the Bretton

³³ Quaker United Nations Office, New York, QUNO Briefing Paper, August 2000, No. 2/00, *Convergence or Surrender on Development? The UN and Bretton Woods Institutions*, available at <http://www.afsc.org/quno/Resources/BP200008.htm>.

³⁴ *Id.*

³⁵ See Robert Dahlberg and Marc Uzan, *The Future of the Bretton Woods Institutions: The European Contribution to the Debate on the New Financial Architecture*, American Council on Germany Reinventing Bretton Woods Committee, Paris, September 12-13, 2000, Draft Report, available at <http://www.dt.tesoro.it/Aree-Docum/Relazioni-/Conferenze/From-Naple/Documents/The-future/Robert-Dahlberg-an d-Marc-Uzan-.pdf>.

³⁶ Quaker United Nations Office, *supra* note 33.

³⁷ Eyoh, *supra* note 32.

³⁸ Dahlberg, *supra* note 35.

³⁹ Eyoh, *supra* note 32.

⁴⁰ *Id.*

Woods Institutions overemphasizes marketing its reform policies, in the purest sense of business marketing, as oppose to the marketing philosophy of a less harsh societal marketing.⁴¹ The latter necessarily engenders questions of what is in society's long-term best interests, what will produce international social welfare maximization, and whether pragmatic neo-liberalists and the Bretton Woods Institutions are marketing what is in society's long-term best interest.

D. Globalization, Liberalism, and Constitutionalism

In terms of multilateralism, during the fifth Ministerial Conference of WTO in Cancun, 10-14 September 2003, there is a collapse of much-needed trade negotiations, because the Cancun conference ends without consensus.⁴² The Bretton Woods Institutions, and their development policies for developing countries and economies, serves as one of many causes nearly bringing a collapse to the Doha Development Agenda. Chairperson Luis Ernesto Derbez attributes lack of consensus to members remaining entrenched, particularly on the "Singapore issues,"⁴³ which are issues of trade and investment, trade and competition policy, trade facilitation, and transparency of government procurement.⁴⁴

These "new" or "Singapore" issues, so called because they first entered the WTO agenda at the 1996 Singapore ministerial conference, were included in 2001 in the agenda of the Doha round of trade talks only after tense negotiations between the European Union, which for years has been demanding a WTO treaty on foreign investment, and India, which has been leading the resistance to an expansion of the role of the WTO. A

⁴¹ Charles Lamb, Jr., Joseph F. Hair, Jr., and Carl Daniel, *Marketing*, 6th ed., South-West Publishing 2000, at 9.

⁴² WTO News, Summary of 14 September 2003, Day 4: Conference ends without consensus, *available* at http://www.wto.org/english/thewto_e/minis_e/min03_14sept_e.htm.

⁴³ *Id.*

⁴⁴ WTO news: 2002 news items, 16 January 2002, International Conference on Financing for Development, Statement by Mr. Ouedraogo, WTO Deputy Director-General to the final Preparatory Committee, 14-25 January 2002, New York, USA, *available* at http://www.wto.org/english/news_e/news02_e/ouedraogo_stat_fin%26dev_conf_e.htm.

compromise then pushed a final decision to the Cancun WTO conference. According to the Doha ministerial declaration, which has now become the subject of differing legal interpretation, “negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations”.⁴⁵

What is important about the “Singapore issues” is a resulting division between developed countries and economies, and developing countries and economies. This division is partly attributable to policies in international trade, which are subject to influence of the Bretton Woods Institutions, and their policies of neo-liberalism, if not pragmatic neo-liberalism. In addition, there is the problem of cultural divergence that results in equally biased cultural perceptions, which ultimately affects, albeit indirectly, multilateral negotiations.

In terms of China, one must understand that China is transitioning to a socialist market economy, or more accurately, China is also a developing country and economy that is amidst on-going legal reforms and economic development. In terms of Chinese constitutionalism, especially in terms of the political economy of constitutionalism or transition economics, one must also understand that Constitutional order will reflect economic reforms.⁴⁶ For China, the question remains what will be the affect of on-going legal reforms, economic development, globalization, and especially the influence, if any, of Western liberalism, or one of its modern economic variants, on Chinese constitutionalism. One intimates that a supposed Western universalizing cosmopolitanism, or a Western liberal agenda, may well be the primary, if not, one of

⁴⁵ C. Rammanohar Reddy, Decision time on Singapore issues at WTO, *The Hindu*, Online Edition of India’s National Newspaper, Monday, Jul 28, 2003, available at <http://www.hinduonnet.com/thehindu/2003/07/28/stories/2003072803001200.htm>.

⁴⁶ See Jeffrey Sachs, Wing Thye Woo, and Xiaokai Yang, *Economic Reforms and Constitutional Transition*, *Inframarginal Economics* (October 2000), at 12-15, available at <http://www.inframarginal.com/column/xkyang/yangs-papers/constitution4.htm>.

many causes at the root of the division on “Singapore issues,” and equally so, serves as a source of policy contentions in Sinic-West relations. All of which present problems for a neo-liberal coterie.

III. NEO-LIBERAL CONSTITUTIONALISM

A. Chinese Neo-liberalism (*xin ziyou zhuyi*)

A Chinese neo-liberal coterie strongly intimates that neo-liberalism offers the best approach to reforms in China. A summary of their contentions follow.

1. China today has but three choices: democracy, totalitarianism, or constitutionalism.
2. The New Left in China advocates an alternative, but one that in some respects seeks to restore what in some eyes were the strengths of the Mao, pre-reform era. It favors a strong state that will act vigorously to counter what leftists see as the unacceptable inequalities and injustices created by the past twenty years of market-oriented reform. In short, what they advocate is, in Wang Dan’s words, soft totalitarianism. . . . The neo-Liberal constitutionalist, by contrast, favor a state that is strictly limited and governed by the rule of law.
3. A genuine, viable constitution must have two indispensable features: protection of the freedom and rights of citizens, and restriction of the power of government. In fact, the present constitution of the PRC places no restrictions on the exercise of governmental power. This is mainly because the CCP opposes separation of powers. . . . Second, the chair of the Central Military Commission (which ultimately controls China’s armed forces) is not appointed to a set term, unlike the general-secretary of the CCP and the president of the National People’s Congress (NPC). . . . Third, there is no effective method for revising the constitution. Now the National People’s Congress and its Standing Committee are empowered to revise the constitution. But such a large body cannot be expected to in effect make its own laws unconstitutional.
4. To address the inadequacies of the current constitution, Yu advocates (1) a fundamental reform of the election system to make it fair and open (now the CCP essentially controls the nomination process); (2) elimination of references to Marxism-Leninism, Mao Zedong Thought, and Deng Xiaoping Theory in the preamble of the constitution; (3) transformation of the NPC from the “highest organ of the state” into a full legislative body, along the lines of the U.S. Senate; and (4) creation of an independent judiciary.

5. Many of the old guard in China say they favor constitutionalism, but, according to Wang Juntao, what they mean by constitutionalism is different from what the neo-Liberals mean. Many of the old elite do not support immediate democratization, although they support the rule of law.
6. New elites — lawyers, journalists, and so on — play an important role by introducing and fostering liberal, Western norms. Fourth, liberal activists take the rule of law as the basis for their strategy for fostering constitutional government.
7. What is needed now, he argued, is to develop ideas that will persuade the Chinese people that the rule of law and constitutionalism will meet their needs.⁴⁷

It is difficult to ascertain where a Chinese neo-liberal coterie may fit in China's political environment. The Chinese neo-liberal coterie politically align themselves with the "new elites" of China, which obviously does not include the "new left" (*xin zuo pai*), who, interestingly, are deemed "radicals." The language of Chinese interprets the actors in China's political environment as follows. In mandarin or *putonghua* (the common language),⁴⁸ neo-liberals who want change *now* are also radicals, *ji jin pai* or *ji jin fen zi*. In the opposite corner of China's political environment, one finds the conservative elements of society, the "conservatives," or *bao shou pai*, which manifest a "hold it, do not change it" sort of philosophy. Conservatives may also fit under category of "rightist" (*you pai*). One assumes a neo-liberal coterie will be even farther left of center than the "new left" in China's political environment. The latter conjecture is important when seeking to ascertain constitutional values for neo-liberal constitutionalism, because it, ultimately, engenders questions of a sort of metaconstitutional source of order that will actually enable a neo-liberal constitution to work in China.⁴⁹

⁴⁷ Gunde, *supra* note 4.

⁴⁸ Li Dejin and Cheng Meizhen, *A Practical Chinese Grammar for Foreigners*, Beijing: Sinolingua 4th ed. (1998), at 1.

⁴⁹ John S. Dryzek, *Constitutionalism and its Alternatives*, Social and Political Theory Program, Research School of Social Sciences, Australian National University, Canberra, ACT, Prepared for presentation at the

One questions how liberalism can portend Western universal values for constitutionalism, if the political environment of China positions liberalism farther left of center, or extremely far left of conventionalism, than even the “new left” or radicals. A China polity, the Chinese Communist Party (“CCP”), still perceives liberalism, and its intended consequence of Western democracy, as threat to its internal security.⁵⁰ In China, as recent as March 30, 2003, cyber-dissidents from a group known as the New Youth Society are subject to arrest and detention. Earlier in April of 2001, members of the same group are also subject to arrest for posting a manifesto on the Internet pledging to build a civil society in China based on democracy and law.⁵¹ The New Youth Society is a manifestation of the new vanguard of cyber-democracy,⁵² which uses the internet as a mechanism for change. However, in China, dichotomies of internet access remain a problem for cyber-democracy and other pro-democracy factions seeking to use the internet as means of empowerment, because legal reforms are promulgating laws designed to maintain a strong control over access to the Internet for individuals and corporations.⁵³ A problem for liberalism and cyber-democracy are external or macroeconomic forces, such as September 11, 2001, geopolitical changes in world politics, pro-democracy movements, War on Iraq, and North Korea,⁵⁴ and other external forces that China perceives as a threat to internal security, which are threats that may

Social and Political Theory Program Workshop on “Democratic Theory: The Canberra Papers”, 27 March, 2002, at 2, available at http://socopol.anu.edu.au/pdf-files/democracy_dryzek.pdf.

⁵⁰ M. Ulric Killion, *China Internet Tax: Issues of Particularism, Liberalization, and Integration*, forthcoming vol. 11 MSU-DCL J. International Law Journal (Summer 2003).

⁵¹ *Id.*, citing Al Santoli, (ed.), *China Reform Monitor* No. 490, April 1, 2003

American Foreign Policy Council, Washington, DC, <http://www.afpc.org>.

⁵² *Id.*, citing London, Scott, *Teledemocracy vs. Deliberate Democracy: A Comparative Look at the Two Model of Public Talk*, vol. 3, no. 2 *Journal of Interpersonal Computing and Technology*, at 33-35 (1995), (“Teledemocracy [literally ‘democracy at a distance’], <http://www.scottlondon.com/reports/tele.html>).

⁵³ *Id.*, citing Liu Junhai and Timothy L. Fort, *Chinese Business and the Internet: The infrastructure for trust*, vol. 35, no. 5 *Vand. J. Transnat’l L.* 1545, at 1568 (October 2002).

⁵⁴ *Id.*, citing Wang, Jianwei, *Tough Road Ahead for China’s Foreign Minister*, April 2, 2003, *Online Asian Times*, available at <http://www.atimes.com/atimes/China/ED02Ad01.html>.

affect on-going legal reforms and economic development. China's describes a new threat to internal security as U.S. neo-imperialism,⁵⁵ a name that its polity may see fit to borrow in reference to neo-liberalism.

In China, a badge of neo-imperialism⁵⁶ offers little hope for a successful transplant of neo-liberalism. The latter scenario reminds one of a recent article that analyzes the U.S. war against Iraq, which reads, "Overwhelming force is counterproductive when applied against popular resistance because it inevitably increases the very resolve of popular resistance it aims to awe into submission."⁵⁷ Nonetheless, despite such political economic gestations, it is the historicism of Western imperialism, U.S. inclusive, that serves as one of many sources of contention making Sinic-West relations tenuous. Globalization bears a striking resemblance to historical imperialism, in that, it will often creatively manifest itself under the guise of benign intervention or commercial relations, such as strategies of economic, technological, and cultural domination that either accompany, or serve as alternatives to the acquisition of land.⁵⁸ The identification of neo-liberalism with neo-imperialism offers virtually nil hope for the aspirations of a Chinese neo-liberal constitutional coterie.

Assuming a political position farther left than even the "new left," there is little prospect for the citizenry or polity to reflect on the tenets of liberalism. Assuming the political position of liberalism in China is akin to radicalism, if not anarchy in terms of a China polity, arguably an attempt to transplant liberalism in China's legal system will not

⁵⁵ *Id.*

⁵⁶ John Carlos Rowe, *Literary Culture and U.S. Imperialism: From Revolution to World War II*, Oxford, Oxford UP (2002), Discounting notions of American exceptionalism, Rowe sees American imperialism as developing along lines similar to its eastern Europe counter-part.

⁵⁷ Henry C.K. Liu, *The War may end the age of the Superpower*, Commentary, Online Asia Times, April 5, 2003, available at http://www.atimes.com/atimes/Middle_East/ED05Ak01.html.

⁵⁸ Rowe, *supra* note 56.

fair well. All of which brings one to the issue of how a country, like China, selects a legal system; i.e. positivism, natural law theory, or naturalist,⁵⁹ as a mechanism for transplanting neo-liberal constitutionalism. A concomitant issue is the role of culture or tradition in the selection and construct of a legal system.

The nomenclature of neo-liberal also begs the question of whether a Chinese neo-liberal coterie, implicitly, adopt a more modern nuance of pragmatic neo-liberalism, as oppose to Western classical liberalism. Another question is the extent to which Chinese neo-liberalism embodies Western classical liberalism or Western neo-liberalism. A neo-liberal coterie urges that the Chinese people must be persuaded that rule of law (*fa zhi*) and neo-liberal constitutionalism will address their needs.⁶⁰ Given a contention that the “new elite” will foster liberal Western norms,⁶¹ one reasonably assumes the panelists borrow notions of rule of law and neo-liberalism from Western universalism⁶² and norms.

Assuming liberalism enjoy a political position of radicalism in the political environment of China, the concept of legal borrowing⁶³ may explain the transmutation, as oppose to transplant or integration into a legal system, of Western liberalism to notions of Chinese liberalism. In mandarin or *putonghua* (the common language),⁶⁴ the Chinese

⁵⁹ Berman, *supra* note 17.

⁶⁰ Gunde, *supra* note 4.

⁶¹ *Id.*

⁶² See Bill Ashcroft, Gareth Griffiths, and Helen Tiffin, *Key Concepts in Post Colonial Studies*, London: Routledge, 1988, at 235, (Universalism is “the assumption that there are irreducible features of human life and experience that exist beyond the constitutive effects of local cultural conditions...a hegemonic view of existence by which the experiences, values and expectations of a dominant culture are held to be true for all humanity.”).

⁶³ Katharina Pistor & Philip A. Wellons, eds., *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995*, New York, Oxford University Press (1998), Report and conclusion of study prepared for the Asian Development Bank, at 33.

⁶⁴ Li Dejin and Cheng Meizhen, *A Practical Chinese Grammar for Foreigners*, Beijing: Sinolingua 4th ed. (1998), at 1.

characters *zi you* primarily translates into the English words of “liberty” and “freedom,”⁶⁵ and then “liberal,” which may be suggestive of an artificial, as oppose to natural transmutation. The character *zi* translates into “oneself” or “one’s own.” The character of *you* translates into “cause,” “reason,” “because of,” or “due to.” The character (*you*) standing alone is a function word constituting an adverb, which is without concrete meaning. However, *zi* when combined with *you* produces *zi you* and results in formation of a notional word that has concrete meaning as a noun,⁶⁶ in this instance, a concrete meaning or etymology of liberal (*xin ziyou pai*).

In this respect, one can reasonably deduce that Chinese neo-liberalism is too some extent linguistically rooted in Western liberalism. Although not necessarily importing an effective transplant of liberalism itself, the latter lends credence, too some extent, to legal borrowing and the dynamics of legal borrowing.⁶⁷ Whether cultural borrowing occurs, during legal borrowing from an original Western donor country,⁶⁸ as a sort of reverse-cultural assimilation or acculturation, is perhaps a matter of degree and extent.

Western philosophers, scholars of law, sociology, anthropology, and economics, identify three core theories on legal borrowing that address the process of converging law and socioeconomic development. First, there is an evolutionary theory that predicts that law develops over time and in interaction with changes in a socioeconomic environment.⁶⁹ Secondly, there is a cultural theory, which suggest that,

Law and legal evolution are part of the idiosyncratic historical development of a country, and that they are determined by multiple factors,

⁶⁵ *Zui Xin Han-Ying Ci Dian, Guangdong: Guangdong Shi Jie Tu Shu Chu Ban Gong Si* (The New Chinese-English Dictionary), (6th ed.) 2002.

⁶⁶ Dejin, *supra* note 64, at 1-6.

⁶⁷ Pistor, *supra* note 63.

⁶⁸ *Id.*, at 34-35

⁶⁹ *Id.*, at 34-35, its classic proponents are Adam Smith, Henry Maine, Max Weber and Emile Durkheim.

including culture, geography, climate, and religion. Although law is by no means static, legal evolution in each country is distinct and will produce vastly different outcomes. Far from converging over time, legal institutions remain different.⁷⁰

Thirdly, there is a utilitarian theory that views law as an instrument to be used to promote economic development. The utilitarian theory assumes that legal change directly affects the behavior of economic agents, and thus, subsequently affects economic development.⁷¹

A problem of the previously mentioned theories is that they are Western models and taxonomies, especially the evolutionary theory,⁷² and do not account for dissimilarities between Western concepts of authority and Sinic concepts of authority (Confucianism).⁷³ In addition, the theories, evolutionary, cultural, and utilitarian, are not mutually exclusive, in that different areas may develop along different paths. While some theories may converge in form and substance and lead to similar legal practices between nation-states, other theories may be more path dependent and slow to change.⁷⁴

The process of legal borrowing presents a dilemma for Chinese neo-liberalism, however. In 1996, the Asian Development Bank (“ADB”) commissions a 35 year study examining the role which legal systems played in six Asian economies, being China, India, Japan, Republic of Korea, Malaysia, and Taipei, China.⁷⁵ The reception of Western law by these countries took place in the second half of the nineteenth and the first half of the twentieth centuries.⁷⁶ Although the contents of substantive economic

⁷⁰ *Id.*, at 34-35. This theory is also associated with the theories of Montesquieu. The concept of Asian values that views cultural differences as the cause of Asia’s path to economic success also represents this view.

⁷¹ *Id.*, at 34-35. A major proponent of this theory is John Stuart Mill.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*, at Foreword.

⁷⁶ *Id.*, at 38.

laws and legal processes are determined initially by the source of these transplants,⁷⁷ the influence of the original donor country becomes less important as countries begin to borrow from multiple sources.⁷⁸ China also makes substantial use of laws and legal concepts of various countries with different legal systems,⁷⁹ including civil law and common law systems.⁸⁰ For this reason, one can only assume that Chinese neo-liberalism proposes the maintenance of a high degree of influence of original donor countries, which is typically Western culture. In this context, Chinese neo-liberalism proposes an institutionalization of Western universalism and norms that are antithetic to a historicity of legal borrowing in Asiatic nation-states, as the previously mentioned study suggest.⁸¹ Moreover, there remains the additional problem of the dynamics of the “transplant effect,” which ultimately determines the level and degree of integration of law and legal processes into a given culture.⁸²

In addition, a problem of Chinese neo-liberalism may be a denial of the dynamics of culture.⁸³ Admittedly, there are those who prescribe a minimal role of culture, or, China’s historical particularity,⁸⁴ in on-going legal reforms in China.⁸⁵ In this context,

⁷⁷ Id., at 40.

⁷⁸ Id., at 38.

⁷⁹ Id., at Table 3A.6.

⁸⁰ Id., at 40.

⁸¹ Id.

⁸² Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, CID Working Paper No. 39 (March 2000), Law and Development Paper No. 1, Working Papers, Center for International Development at Harvard University.

⁸³ Talbot, Damien, *Institutional Dynamics and Localised Inter-firm Relations: The case of Aerospatiale and the Toulousian Subcontractors*, In *European Urban and Regional Studies*, July 2000, vol. 3, pp. 223-236, available at <http://www.univ-tlse1.fr/lereps/publi/teleload/talbot072000.pdf>.

⁸⁴ See Daniel A. Farber and Suzanna Sherry, *Beyond All Reason, The Basic Assault on Truth in American Law*, Oxford Press (1997), at 16, particularism pertains to particularistic multiculturalism, which holds that no common culture is possible or even desirable.

⁸⁵ See William P. Alford and Chien-Chang Wu, *Qing China and the Treatment of Mental Infirmity: A Preliminary Sketch in Tribute to Professor William C. Jones*, Vol. 2, No. 1, Wash. U.Global Stud.L.Rev. 187, Winter 2003, at 187-88; See also John S. Dryzek, *Constitutionalism and its Alternatives*, Social and Political Theory Program, Research School of Social Sciences, Australian National University, Canberra, ACT, Prepared for presentation at the Social and Political Theory Program Workshop on “Democratic

the dynamics of culture may be the handmaiden of tradition (Confucianism). Cultural determinism posits that cultural values ultimately condition modes of cultural relationships; e.g. socioeconomic, polity, and especially legal.⁸⁶ In China, cultural determinism,⁸⁷ arguably, prophesizes entrenched institutional or foundational values; i.e. polity, socio-economic, and legal, reflective of a systemic culture, which, in philosophy of law (*juris prudential*)⁸⁸ parlance, translates into an ontological base in tradition (Confucianism). Law and the evolution of legal systems are part of the idiosyncratic historicity of a nation-state, such as China, and are products of multiple factors, especially culture.⁸⁹ The conception of social order as historically contingent and evolving, which conceptually embodies an ontological Confucianism, may also explain this phenomenon.⁹⁰ An ontological Confucianism prophesizes a distinctively Sinic infrastructure; i.e. polity, socio-economic, and legal, that perhaps constitutes a blend of both non-Western and Western models and taxonomies,⁹¹ if not simply distinctive Chinese models and taxonomies.⁹²

Theory: The Canberra Papers”, 27 March, 2002, at 2, available at http://socopol.anu.edu.au/pdf-files/democracy_dryzek.pdf., at footnote 1.

⁸⁶ Cultural determinism is, “The conviction that the accumulated knowledge, the organized beliefs, and the way of life prescribed by a culture determine not only all other aspects of human cognition and social behavior but also the dynamics of the culture itself. Such a conviction sees culture as an autonomous cultural system,” Klaus Krippendorff, A Dictionary of Cybernetics, unpublished report (Feb. 2, 1986), available at http://pespmc1.vmb.ac.be/ASC/CULTUR_DETER.html.

⁸⁷ *Id.*

⁸⁸ Robert L. Hayman, Jr. & Nancy Levitt, eds., *Jurisprudence Contemporary Readings, Problems, and Narratives*, West Publishing (1995), at 5-6, “The linguistic definition of *juris prudential* is knowledge of or skill in law alludes to the enormous scope of its inquiry”. “Jurisprudence encompasses the study of a legal system’s scope, function, methodology, and guiding precepts”.

⁸⁹ Pistor, *supra* note 63, at 35.

⁹⁰ R. P. Peerenboom, *What’s Wrong with Chinese Rights-Towards a Theory of Rights with Chinese Characteristics*, 6 Harvard Human Rts. Journal 29, 52 (1993).

⁹¹ *Id.*

⁹² Killion, *supra* note 50.

Chinese neo-liberalism, arguably, must ignore the advent and institutional dynamics of culture, which involves tradition, or what many deem to be Asian values.⁹³ A consideration of constitutional ethos for constitutionalism necessitates consideration of culture. Chinese neo-liberalism arguably predicts an extension of legal borrowing to a concept of cultural borrowing, because Chinese neo-liberalism must deny, in its search for validity in terms of communal integration,⁹⁴ that Confucianism is systemic in modern China.

There are two aspects to the problem of a Confucian culture and Chinese neo-liberalism. First, the historicity of Western culture and its Western universalism is distinctively different from the historicity of Chinese culture or Confucianism. China's historical particularity is grounded in 5,000 years or more of Chinese civilization. Comparatively, Western culture, in the limiting sense of classical liberalism, is grounded in the intellectual history of 18th century Europe. Liberalism is a political philosophy with intellectual roots in Renaissance humanism that gains considerable momentum as a cultural movement after the Reformation. For challenging social presuppositions of medieval Europe, liberal thinkers contend that each human being is a repository of certain God-ordained inalienable rights that ought to be safeguarded.⁹⁵

Secondly, in a discourse concerning Chinese constitutionalism, especially constitutional ethos, neo-liberalism arguably deserves minimal attention, because its origins are a response of Western developed nation-states to the 1978-79 Asian financial

⁹³ Alice Erh-Soon Tay, *Asian Value and the Rule of Law*, Jura Gentium: Centre for Philosophy of International Law and Global Politics, available at <http://dex1.tsd.unifi.it/jg/en/index.htm?surveys/rol/tay.htm>.

⁹⁴ Dworkin, Ronald M., *Liberal Community*, 77 Calif. L. Rev. 479, 480 (1989).

⁹⁵ Therrien, *supra* note 20.

crisis,⁹⁶ and in part, Mexico financial crisis.⁹⁷ Such origins of neo-liberalism make suspect its roots as a viable source of ethos, as opposed to more indigenous values evolving from China's ontological base in tradition (Confucianism), which are requisite for constitutionalism. Constitutional values are a requisite for constitutionalism.⁹⁸ Comparatively, a problem of Western constitutionalism is that it is a European-American concept of relatively recent provenance.⁹⁹

Conversely, Chinese neo-liberals may argue that requisite constitutional ethos will emanate from policies in economics and neo-liberalism. Peerenboom writes,

Marxism's emphasis on historical materialism coincides with Confucianism's sensitivity to the particular conditions of society, reinforcing the view of rights as contingent. Even some scholars who argue for an expansive theory of human rights based on the commonality (*gongtongxing*) of all people reflect the influence of Marxism in maintaining that rights are a product of the particular historical, economic, and material conditions of a society.¹⁰⁰

Nonetheless, a problem of neo-liberalism is that it must dismiss the importance of historical particularity, which creates additional problems for neo-liberalism because Chinese rights, in the sense of Chinese constitutionalism, are historically contingent.¹⁰¹ A core problem for a Chinese neo-liberal constitutional coterie, when facing China's ontological base in tradition (Confucianism), is the construct of a legal system that will manifest a genuinely indigenous constitutional ethos for Chinese constitutionalism. Rawls contends that a society characterized by reasonable pluralism political stability is

⁹⁶ Quaker United Nations Office, *supra* note 33.

⁹⁷ Dahlberg, *supra* note 35.

⁹⁸ Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. Legal Educ. 167 (1987).

⁹⁹ Wm. Theodore De Bray, *The Constitutional Tradition in China*, 9 J Chin L 7 (Journal of Chinese Law) spring (1995).

¹⁰⁰ Peerenboom, *supra* note 90, at 52, note 8.

¹⁰¹ *Id.*

contingent on gaining the reasoned support of a citizenry who are committed to reasonable and conflicting doctrines,¹⁰² and there lies the crux of the problem.

B. Chinese Neo-liberalism and Historical Jurisprudence

**We are what we pretend to be, so we must be careful
about what we pretend to be.¹⁰³**

Historical jurisprudence (historical school)¹⁰⁴ emanates from one of Lord Coke's greatest contributions to English jurisprudence, which is an identification of fundamental law (unwritten constitution) with the common law itself.¹⁰⁵

Thus Coke's answer to the free monarchists' general theory of government and law was -- no theory at all! He did not deny the validity of King James' version of natural law theory, that law is founded on Reason. Nor did he deny the validity of the King's version of what later came to be called legal positivism, that law is founded on Will, the will of the sovereign. He merely shifted the jurisprudential focus from law in general to English law, and more especially the English common law, which he then defined in historical terms. His answer to James was History, which he saw largely in terms of Tradition and Precedent. He could get away with this just because it was not -- at the time -- a theory, and because English monarchists themselves, and above all King James, continually insisted that the English precedents -- which they interpreted quite differently -- should be respected. For they, too, felt the need for an historical basis for the legitimacy of the monarchy.¹⁰⁶

Lord Coke's groundbreaking non-theory evolves into the legal philosophy of historical jurisprudence. In many cases of his time, Lord Coke asserts the supremacy of the common law courts. Implicitly, Lord Coke's historicism advances a theory that common law, as a body of principles, concepts, rules, and procedures, originates in a remote past, which is, in effect, the fundamental law of the English people (the ancient

¹⁰² J. Rawls, *Political Liberalism*, Columbia University Press (1993).

¹⁰³ See Richard S. Kay, *Preconstitutional Rules*, vol. 42, no. 1, *Ohio State Law Journal*, 187-207 (1981), quotes K. Vonnegut, *Mother Night v* (1979).

¹⁰⁴ Berman, *supra* note 17, at 1651-1653.

¹⁰⁵ *Id.*, at 1681.

¹⁰⁶ *Id.*

common law) or the unwritten English Constitution, to which other English law is subordinate.¹⁰⁷

Lord Coke's historicism relies on history not only as a check against the arbitrary exercise of power, but also as a guide to determining the limits and channels of political and legal authority.¹⁰⁸ Lord Coke's historicism arguably recognizes preconstitutional rules and pursues a sort of state-centered or domestic metaconstitutionalism.¹⁰⁹ In this context, preconstitutional rules serve as a normative guide for how constitutions operate, and further, emanate in a gradual Burkean fashion, reflecting a complex of social factors, especially culture.¹¹⁰ One source considers preconstitutional rules analogous to lower-case usage of a constitution, which is commonly used to refer to fundamental governmental principles. Joseph deMaistre writes in reference to British constitution,

Certainly it has not been made a priori. Never have statesmen gathered together and said: *Let us create these powers*, balance them in such and such a manner, and so on: No one has thought this. The Constitution is the work of circumstances, and the number of circumstances is infinite.¹¹¹

The nature, the sources, and the purposes of law are definable in terms of the historical experience of the English people. Coke's theory of artificial reasoning identifies, in at least one of its aspects, with the historical development of national tradition, and, more particularly, with the tradition of the English common law. Moreover, Coke's concept of artificial reason is applicable to other types of law, such as,

¹⁰⁷ Berman, *supra* note 17, at 1686-87.

¹⁰⁸ *Id.*, at 1689.

¹⁰⁹ See Walker, Neil, *Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe*, Harvard Law School, Seminar and Workshop on Advanced Issues in Law and Policy of the European Union, NAFTA and the WTO, Harvard Jean Monnet Working Paper 12/99, This paper is to be published in G. de Burca and J. Scott (eds), *The Changing Constitution of the EU: From Uniformity to Flexibility* (Hart Publishing, 2000), available at <http://www.jeanmonnetprogram.org/papers/99/991201.html>.

¹¹⁰ Kay, *supra* note 103, at 187-207.

¹¹¹ *Id.*, at 192, citing J. DeMaistre, *Essay on the Generative Principles of Political Contributions*, in THE WORKS OF JOSEPH J. DeMAISTER 147, 152 (J. Lively ed. 1965) (emphasis on original).

canon law, Roman law, natural law and divine law, since in such subjects the trained expert, the person of learning and experience is better able to understand its inherent reason, logic, sense, and purposes.¹¹²

Coke views legislation within the historical context of the precedents of English common law and the historical common law statutes of Parliament, such as the Magna Carta. Coke is not an antiquarian viewing the past in static terms; rather, he perceives English law as based on immemorial custom. It is the understanding of Coke that while law in this large sense, that is, legal institutions and legal systems generally, possesses both a moral character (its purpose is to do legal justice) and a political character (its purpose is to maintain legal order), it also possesses a historical character (its purpose is to preserve and develop the legal traditions of the people whose law it is). It is all-important that his emphasis on the historical character of law required a certain particularization, since the universal characteristics of legal morality and legal politics will manifest in quite different ways in different nation-states with different legal histories.¹¹³

In terms of China, an ontological base in tradition (Confucianism) poses an imposing barrier for invocation of a new polity, at least in terms of altering its quintessential values and culture. A successful invocation of a Chinese neo-liberal regime, reflexive of Western neo-liberalism, is contingent on its successful blending with China's ontological base in tradition. However, one speculates that an invocation of neo-liberalism under the auspices of *juris prudential* in modernity will result in a shock to

¹¹² Berman, *supra* note 17, at 1688-1691.

¹¹³ *Id.*, at 1693-94, 1731-32.

China's infrastructure, and ultimately, creates a crisis of irreversible political and economic instability.¹¹⁴

For China, rational institutions are governmental organizations representing public interest, which are associated with Confucianism.¹¹⁵ The nomenclature or characters for institution, *zhi du*,¹¹⁶ unlike in the West, enjoys an intrinsic Confucian value. In terms of Western norms, institutions constitute established practices, laws, or customs that are a material and persistent element in the life and culture of an organized social group. However, for China, the nomenclature of institution, *zhi du*, possesses an intrinsic Confucian value, which is the English equivalent of more elevated and value-laden rational institution.¹¹⁷ It is for this reason, and other reasons, that China's ontological base in tradition and its Confucian values predict foundational morals, and as a result, institutions in China are reflexive of Confucian values,¹¹⁸ or China's ontological base in tradition.

Historical characteristics of law, which for China represents a traditional Chinese jurisprudence that is reflexive of an ontological base in tradition (Confucianism),¹¹⁹ allows for a particularization that reflects distinctive Chinese legal morals and legal politics, as oppose to Western universalism's presumption of universal characteristics for legal morality and legal politics. It is also for this reason, and other reasons, that historical jurisprudence, arguably, is not a viable legal system for a neo-liberal coterie.

¹¹⁴ Killion, *supra* note 50.

¹¹⁵ Ch'ien Mu, (Qian Mu), *Traditional Government in Imperial China A Critical Analysis*, Chu-tu Hsueh and George O. Totten (transl.), The Chinese University of Hong Kong (1982), at 121.

¹¹⁶ Dictionary, *supra* note 64.

¹¹⁷ Ch'ien Mu, *supra* note 114.

¹¹⁸ Killion, *supra* note 50.

¹¹⁹ *Id.*

For China, neo-liberalism, or pragmatic neo-liberalism, and Western *juris prudential* in modernity, are not the exclusive or best means for integrating both a check against the arbitrary exercise of power and providing for a more independent judiciary. It is arguable that, even without the advent of pragmatic neo-liberalism in China, historical jurisprudence in and of itself offers a more viable Western jurisprudence, as oppose to *juris prudential* in modernity, which will serve as both a check against the arbitrary exercise of power and provide a jurisprudence allowing for a more independent Chinese judiciary.

C. Chinese Neo-liberalism and Legal Positivism

In terms of how best a Chinese neo-liberal regime blends a distinctively different non-Western culture with Western jurisprudence,¹²⁰ two competing Western theories of legal systems, legal positivism and natural law theory,¹²¹ produce respective theoretical or moral advantages, or both.¹²² One suspects that natural law theory does not provide a proper mechanism for transplanting liberalism in China, because of its' normative aspects and inclinations to search for a moral and political purpose in analyzing and interpreting legal norms.¹²³ In terms of natural law theory, the actions of a Chinese polity, and an ontological tradition (Confucianism), challenges and contradicts Western fundamental principles of justice.¹²⁴ In such instance, China's ontological base in tradition proposes problems for liberalism.

¹²⁰ Hayman, *supra* note 88.

¹²¹ Berman, *supra* note 17, at 1652.

¹²² See Hart, H. L. A., *The Concept of Law*, Oxford: Clarendon Press (1961), at 204 – 205; *see also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, Vol. 71, No. 4 Harvard Law Review 593 (1958).

¹²³ Berman, *supra* note 17, at 1652.

¹²⁴ *Id.*, at 1652.

For transplanting liberalism, legal positivism arguably proposes a universal theory that is more appealing to a neo-liberal regime,¹²⁵ because legal positivism offers a viewpoint minimizing the concept of community as instrumental in the enforcement of ethics.¹²⁶ The collective life of a political community includes its official political acts; i.e. legislation, adjudication, enforcement, and other executive governmental functions.¹²⁷ Dworkin writes, “The liberal view of integration I describe takes a limited view of the dimensions of a political community’s communal life.”¹²⁸

However, a transplant of liberalism via legal positivism to a Confucian society is still, nonetheless, arguably contingent on its ability to respond adequately to the unique jurisprudential experiences and needs of a modern Confucian culture. If modern China represents an ontological base in tradition (Confucian values), liberalism fosters new problems and conflicts for China and its political community communal life. Nonetheless, in terms of Chinese neo-liberalism, legal positivism and its universalism is, no doubt, preferably in the construct of a Chinese legal system and constitutionalism.

Legal positivism also engenders criticism of being anti-democratic. Dworkin uses the U.S. Supreme Court decision of *Bowers vs. Hardwick*,¹²⁹ to illustrate such contention. “In *Bowers*,¹³⁰ Justice White suggests that the community has a right to use the law to support its vision of ethical decency: it has a right to impose its views about ethics just because it is the majority.”¹³¹ The problem of morals and politics, which are arguably inherent conflicts of positivism, serves as an additional source of criticism,

¹²⁵ *Id.*

¹²⁶ Dworkin, *supra* note 94, at 479-80.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Dworkin, *supra* note 94, at 479-80, in *Bowers v. Hardwick*, (1986) 478 U.S. 186, the United States Supreme Court upholds a Georgia law making sodomy a crime against constitutional challenge.

¹³⁰ *Id.*

¹³¹ *Id.*

“because mainstream international law positivism in the tradition of Lassa Oppenheim (1858-1919) has sought to separate law from morals and from politics, many critics have dismissed this positivism as amoral, apolitical, and atheoretical.”¹³²

The most current version of legal positivism, without undertaking a historical journey of legal positivism, that is, from the imperative positivism of John Austin¹³³ to the legal realism of Oliver Wendell Holmes, Jr.,¹³⁴ are the writings of Herbert Hart,¹³⁵ and Hans Kelsen,¹³⁶ on normative legal positivism or normative positivist analysis of the concept of law. In particular, the concept of conceiving law as a set of social rules is all-important to Hart. On liberalism and legal positivism, Hart writes,

It is not, I think, uncharitable to say that we can see in his argument that he has only half digested the spiritual message of liberalism which he is seeking to convey to the legal profession. For everything that he says is really dependent upon an enormous evaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: ‘Ought this rule of law to be obeyed?’ Surely the truly liberal answer to any sinister use of the slogan ‘law is law’ or of the distinction between law and morals is ‘Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality.’¹³⁷

Hart sees the separation of law and morals as essential to the meaning of legal positivism.¹³⁸ The ideological underpinning of Hart keeps faith with the insistence of the great Utilitarians, Bentham and Austin, “on the separation of law as it is and law as it

¹³² See Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law*, Vol. 13, No. 2 European Journal of International Law, at 1, 45.

¹³³ See Austin, John, *The Province of Jurisprudence Determined* (1832), Prometheus Books (2000).

¹³⁴ See Holmes, Oliver Wendell, Jr., *The Path of the Law*, Vol. 10 Harvard Law Review 457 – 478 (1897).

¹³⁵ See Hart, H.L.A., *The Concept of Law*, Oxford: Clarendon Press (1961).

¹³⁶ Hans Kelsen, *The Pure Theory of Law*, translated by Max Knight, Berkeley & Los Angeles: University of California Press (1967).

¹³⁷ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, Vol. 71, No. 4 Harvard Law Review 593, 612-21 (1958).

¹³⁸ *Id.*

ought to be.”¹³⁹ In contrast with modern China, a distinguishing feature of this philosophical thought is the fact of origins stemming from intellectual architects of great reform, or Utilitarians, addressing legal and social problems in England, at the close of the eighteenth century and beginning of the nineteenth century.¹⁴⁰

Issues of morality and law are arguably different for China, as opposed to the West, especially the United States, and its pluralistic society, because China is a comparatively monolithic society with a strongly entrenched ontological base in tradition (Confucianism). In this context, morals and foundational ethos are reflective of a systemic Confucianism. In terms of Chinese constitutional ethos, assuming modern Chinese ethos are reflective of an ontological base in tradition (Confucianism), the issue may simply resolve into whether what is legally wrong, for instance, according to rule of law, is also morally wrong in the sense of Confucianism. The typical intellectual trappings of positivism do not readily dismiss the latter ethical dilemma, because of a distinctive Chinese ontology, as compared to the ontology of Western culture and nation-states.

A persistent problem with issues in constitutionalism for modern China is a Sinic uniqueness that evolves from a Chinese ontology. It is a problem further exasperated by institutional dynamics, in that, Chinese institutions; i.e. politics, socio-economic, and legal, are also arguably reflective of a distinctive Chinese ontology (Confucianism). Admittedly, the latter contention is necessarily based on an assumption of both the reality

¹³⁹ *Id.*, at 594-95.

¹⁴⁰ *Id.*

of an ontological base in tradition (Confucianism) and the existence of a genuine traditional Chinese jurisprudence.¹⁴¹

Antithetically, in terms of ascertaining foundation ethos for Chinese institutions and constitutionalism, a neo-liberal coterie may argue that concepts of legal borrowing and cultural borrowing present contrary arguments to this idea of Confucianism serving as an ontological base for individuals, society, institutions, and especially constitutional ethos. Assuming a past of cultural borrowing, or mono-directional cultural exchange; i.e. West to Sinic, an argument based on irredentism is plausible.¹⁴² Moreover, a neo-liberal coterie may make a plausible argument that electing legal positivism, as a legal system, is not contingent on societal morals. Philip Soper posits that the choice of a legal theory is not contingent on moral considerations.¹⁴³ Further arguing, a neo-liberal coterie can point to the fact Confucianism in and of itself is arguably an unfit source of constitutional ethos, because it is a concept somewhat aloft and seemingly notional.¹⁴⁴

Nonetheless, notwithstanding issues of separability thesis and historic excesses and abuses, an inherent problem of liberalism and legal positivism as pertains to a Chinese ontology is lack of a meaningful role assigned to political community communal life in such a legal system. Moreover, a minimal assignment of a role to political community communal life, in terms of a soft positivism,¹⁴⁵ still, does not alleviate the

¹⁴¹ David A. Funk, *Traditional Chinese Jurisprudence: Justifying Li and Fa*, 17 So. U. L. Rev. 1 (1990).

¹⁴² Irredentism is "a political principle or policy directed toward the incorporation of irredentas within the boundaries of their historically or ethnically related political unit." Merriam-Webster's Collegiate Dictionary.

¹⁴³ Philip Soper, *Choosing a Legal Theory on Moral Grounds*, Vol. 4, Issue 1, Social Philosophy and Policy, (1987), at 33 – 48.

¹⁴⁴ Wm. Theodore de Bray and Tu Weiming, (eds.), *Confucianism and Human Rights*, New York: Columbia Press, 1988, at 255, note 10.

¹⁴⁵ Hart's *Concept of Law* Lecture 8, 2000, available at <http://users.ox.ac.uk/~lawf0013/Hart%20Lecture%208%202001.htm>.

inherent problems of legal positivism.¹⁴⁶ The search for a source of constitutional ethos for liberal constitutional reforms must necessarily focus on legal positivism as the only viable legal system, because legal positivism arguably provides a requisite authoritarian state for implementing Western rule of law,¹⁴⁷ while also allowing for efficient mono-directional cultural exchanges that are more capable of responding to a Confucian ontology. Comparatively, natural law theory and its denial of the separability thesis, which is essential to legal positivism, poses problems for liberalism, especially in terms of constitutional ethos being reflective of a Confucian ontology. Arguably, an ontological Confucianism remains a barrier to mono-directional cultural borrowing when in search of Western constitutional values, while, also, providing the only viable source of genuinely indigenous constitutional ethos for Chinese constitutionalism.¹⁴⁸

D. China Democracy and Western Democracy

A Chinese neo-liberal constitutional coterie essentially urges a constitutional convention that adopts a discursive model of constitutionalism that exactly mirrors American constitutionalism. The panelists urge a separation of powers and independent judiciary that mirrors the in-place governmental model of the United States.¹⁴⁹ Initially, the neo-liberal coterie urges a constitutionalism that is seemingly over-simplistic and fails to recognize the real inner-workings of Western constitutionalism. In Western jurisprudence, constitutional models diverge on issues of constitutional review versus constitutional courts, and centralized constitutional review versus decentralized

¹⁴⁶ *Supra* notes 125-127, 131, 137-140.

¹⁴⁷ See Pierre Manet, *An Intellectual History of Liberalism*, Princeton University 1996.

¹⁴⁸ Pitkin, *supra* note 98.

¹⁴⁹ Gunde, *supra* note 4.

constitutional review.¹⁵⁰ Notwithstanding a commonality grounded in the theories and philosophies of the intellectual European Enlightenment thinkers, there are contrasting models of constitutions and constitutionalism. The independent judicial review and activism of the United States judiciary is actually atypical to Western jurisprudence. There are liberal democracies, such as Great Britain, that actually have not had a written constitution for a substantial period. In addition, Great Britain and its parliamentary supremacy do not have constitutional provisions on both separation of powers and independent judicial review (constitutional review). Moreover, despite such dissimilarities, democracy in Great Britain is no less than that of the U.S.¹⁵¹

The panelists also seemingly fail to recognize the shortcomings of the United States judicial model, which is a judicial model subject to criticism because of its failings in many respects. One source even proclaims that the problem with America is an excess in democracy.¹⁵² The United States Constitution is not a full embodiment of democracy, at least not in the purest sense of democracy; rather, it is more accurately a republican form of government. In terms of democracy, the United States model and its constitution provides for indirect, as oppose to direct, democracy or representation.¹⁵³ However, the Chinese neo-liberal constitutional coterie fails to discern between direct and indirect democracy. Nonetheless, given urgings for a United States model of constitutionalism, it

¹⁵⁰ Susan Newman, *Comparing Courts*, Comments on Washington University School of Law, Conference on Constitutional Courts sponsored by the Institute for Global Legal Studies, held November 1-3, 2001, available at http://law.wustl.edu/Geninfo/Magazine/Sp2002/03_comparing_courts.pdf.

¹⁵¹ Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.L.Rev. 1, 16 (April 2001).

¹⁵² Bookchin, Murray, *New Perspective in Libertarian Thought*, Vol. 1, No. 5 Comment April 15, 1980, available at http://dwardmac.pitzer.edu/anarchist_archives/bookchin/commentv1_5.html.

¹⁵³ Abrams, Elliott, (ed.) *Democracy: How Direct? Views from the Founding era and Polling era*, Altamira Pr; (October 2002), at Elliott Abrams, Preface.

is reasonable to deduce that the neo-liberal coterie urges an indirect democracy, as oppose to direct democracy for China.

In August of 2000, the Ethics and Public Policy Center convenes a conference to examine a two-century-old debate concerning direct and indirect democracy, and its contemporary ramifications.¹⁵⁴ The elemental concerns of this conference follow.

Given the Founders' beliefs, our representative political institutions, modern telecommunications technology, and the current understandings of the American people about democracy and public opinion, does direct democracy or representation better reflect public opinion? Do we see today, in this profusion of initiatives and referendums at the state level, a flowering of direct democracy? A failure of state governments to represent voters' views on critical issues?¹⁵⁵

An on going debate over direct as oppose to indirect democracy appears to be a fixture of United States political culture. The Founding Fathers wanted calm deliberation rather than passion in the handling of public affairs. Hamilton's greatest fear is "the turbulence and follies of democracy." Madison calls for "the total exclusion of the people in their collective capacity" from governing, and the founding fathers, the framers of the U.S. Constitution, agree that the very democratic state governments are ineffective. Comparatively, state constitutions of the U.S. grant greater degrees of direct democracy than that of the U.S. constitution; i.e. voter referendums, recalls, initiatives, and town meetings.¹⁵⁶

Nonetheless, a Chinese neo-liberal constitutional coterie demands democracy, or perhaps indirect democracy, now.¹⁵⁷ However, the pursuit of pure democracy remains an

¹⁵⁴ *Id.*, at Preface.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*, at Preface.

¹⁵⁷ Gunde, *supra* note 4.

exercise in futility, because Western societies that embody democracy in its purest form are non-existent, the United States Constitution, inclusive.

As regards direct and indirect democracy, an additional concern is whether the neo-liberal coterie has considered traditional Chinese government as a historic source of democracy in China. Although not resembling democracy in its purest form, as also true of Western liberal democratic governments, there are arguably traces of history in traditional Chinese government and traditional Chinese political theory that evidence vestiges of democratic government. In China, democracy in its purest form, that is, direct government by all the people concerned, remains an impractical idea, which also holds true for early colonial and modern America.

There are similarities between representation in modern Western democratic governments and traditional Chinese history. In China, a group or class of people, such as intellectuals who serve as representatives of a majoritarian interest, usually conduct actual governing. Analogously, the same holds true for both traditional and modern Chinese government, because communists even advocate government should be conducted exclusively a by group or class of people, or proletariat class. Although democracy in its purest form remains an ideal, representative democracy, arguably, is a reality in both modern Western democratic governments and traditional Chinese government. Traditional political theory in China requires scholars prepare for governmental service by thorough study of the work of sages and by diligently practicing Confucian principles. In this context, or pursuant to Chinese traditional political theory,

the opinions of scholars are assumedly representative of well thought-out intelligent opinions of the general populace.¹⁵⁸

In terms of indirect democracy, there are other similarities between Chinese traditional government and U.S. constitutionalism. Under a democratic form of government such as the U.S., there is an equally compelling philosophical struggle between man and law, which arguably shares an academic kinship to scholarly discourses grounded in the debate between Confucianism and Legalism.¹⁵⁹ One can draw a correlative argument in similarity when one collimates the U.S. judicial selection process with traditional Chinese political theory. The U.S. judiciary selection process for appointment of justices to the U.S. Supreme Court exhibits a proclivity towards selection of the sort of wise and benevolent man sought after under the principles of Confucianism.¹⁶⁰ Girardeau A. Spann in consideration of what he deems to be a socialized judiciary writes the following.

Judges, of course, are not selected at random. However, the judicial selection procedures that we customarily utilize may exacerbate matters by effectively making judges more majoritarian than if they were selected at random. For reasons of checks and balances, federal judges are selected through a process that is intentionally political. They are appointed by the most majoritarian official in the government and confirmed by the upper house of the legislature after public hearings in which their political preferences are thoroughly explored. Although judicial temperament and legal competence play some role in the appointment and confirmation process, the acceptability of a candidate's political inclinations is likely to be dispositive at both stages. . . . The political nature of our judicial selection procedures has the effect of reducing the range of attitudes that will be reflected in our judicial population. Only mainstream political preferences will survive the appointment and confirmation process.¹⁶¹

¹⁵⁸ Qian Mu, *supra* note 114, at 125.

¹⁵⁹ Funk, *supra* note 141.

¹⁶⁰ Cai Xiqin (transl.), *Analects of Confucius*, Beijing: Sinolingua (1994).

¹⁶¹ Girardeau A. Spann, *Race Against the Court, The Supreme Court and Minorities in Contemporary America*, New York University Press 1993, at 21.

This phenomenon is blatant in the refusal of United State Senate to confirm President Ronald Reagan's Supreme Court nomination of Judge Robert Bork. Comparatively, Douglas Ginsberg, the successor to Judge Bork, withdrew his nomination, because past recreational drug use was not within the mainstream of contemporary America. In marked contrast, the nomination of now presiding Justice Clarence Thomas is not outside of mainstream American views, because of recreational drug use.¹⁶²

It is also arguably that there is evidence of sovereignty in China, in the Western sense of sovereignty. Historically, given the vast size of China, it is a practical impossibility to vest political power and authority in the hands of one person. It is for this reason political power and authority vest with a collective rule of a large number of persons, as oppose to the practical constraints of a single ruler struggling to maintain control over a vast China. In an analogy, modern Communist and Western countries evidence rule by groups of persons.¹⁶³ As previously mentioned, for China, this historically means that a group of persons, such as intellectuals who serve as representatives of a majoritarian interest, usually conducts actual governing. Chinese traditional political theory requires rigorous preparation for governmental service, and the opinions of these scholars after entering public service, are assumedly representative of well thought-out intelligent opinions of the general populace.¹⁶⁴ In this context, Chinese traditional political theory evidences a history of both sovereignty and indirect democracy, in the Western sense of sovereignty and indirect democracy.

In terms of a sovereignty representative of an electorate, the same analogy holds true. Direct democracy is not in place in modern China or Western countries. In both

¹⁶² *Id.*, at 180.

¹⁶³ Qian Mu, *supra* note 114, at 122-23.

¹⁶⁴ *Id.*, at 125.

China and Western countries, the primary concern is selecting the best persons to serve in government. In Western countries, there is an emphasis on popular elections for public office. In traditional China, the same goal pursued by Western countries via elections, is undertaken by public offices that are open to the general public through an examination system.¹⁶⁵ Comparatively, in modern China, one does witness the advent of direct popular vote for local electorate, a county level people's congress, by enactment of the Organic Law of Village Committees of China (*Zhong Hua Ren Min Gong He Gou Cun Min Wei Yuan Hui Zu Zhi Fa*).¹⁶⁶

E. A Neo-liberal Constitution for China

The issue of transplanting liberal constitutionalism in China resolves to a question of the ability to integrate Western models and taxonomies with Chinese institutions. Practically speaking, and more accurately stated, it may simply be a question of whether China will become what Boaventura de Santos describes as “the successful globalization of a given localism.”¹⁶⁷ In this context, localism pertains to China's ontological base in tradition (Confucianism).

The viability of Western classical liberalism in modern China is contingent on liberalism divorcing itself from its historic excesses and abuses,¹⁶⁸ which weighs against its successful transplant in modern China, because China's ontological base in tradition arguably stands as a ubiquitous barrier to Western liberalism. Moreover, in terms of the liberalism of John Rawls, the success of liberal constitutionalism is contingent on a social

¹⁶⁵ *Id.*

¹⁶⁶ *Zhong Hua Ren Min Gong He Gou Cun Min Wei Yuan Hui Zu Zhi Fa* (Organic Law of the Villagers Committees of the People's Republic of China), Adopted at the Fifth Session of the Ninth NPC on November 4, 1998.

¹⁶⁷ Boaventura de Santos, *Towards a New Common Sense: Law, Science and Politics in Paradigmatic Transition*, 262 (1995).

¹⁶⁸ Therrien, *supra* note 20.

unity and concord that requires agreement on a general and comprehensive religious, philosophical, or moral doctrine. Timothy Samuel Shah summarizes the Rawlsian analysis on liberalism's inherent conflict with diversity and uncommon religious beliefs, as viewing containment of religious pluralism and diversity as necessary to its success, and writes,

Rawls thus demonstrates his agreement with Grotius (as well as Rousseau, interestingly) that certain religious beliefs stand in the way of liberalism and, whether by direct persuasion or gradual attenuation, have to be overcome “to clear the way for liberal institutions.” Note that Rawls's example is not of a belief that is political as such or in any definite way runs counter to liberal ideals: contra Rawls (and Rousseau, whom he is implicitly following here), it hardly follows from one's believing in the doctrine of eternal damnation that one can be expected to molest, harass, or coerce, or in any way fail to cooperate politically with, those one supposes will be damned. Embedded in Rawls's historical account is evidently a set of psychological and sociological assumptions about the relationship between religious belief and political behavior, according to which some religious beliefs are considered congruent with liberal citizenship, others not. This set of assumptions leads Rawls to conclude that there is a conflict, perhaps absolute—note the phrase “if not impossible” above—between a traditional and not uncommon religious belief (damnation), on the one hand, and liberal citizenship, on the other.¹⁶⁹

Shah more clearly states his cases as follows, “Rawls believes that the disappearance or attenuation of some religious beliefs was good and even necessary for liberalism.”¹⁷⁰ Shah's view of Rawlsianism perceives Rawls as anticipating Grotius's theory of overlapping consensus as a creative solution to the liberal problem. The abuse of this creative solution, or Rawlsian analysis, is that its success is contingent on constraining diversity and religious pluralism.¹⁷¹

¹⁶⁹ Elliott Abrams, (ed.), *Democracy: How Direct? Views from the Founding era and Polling era*, Altamira Pr; (October 2002), at Timothy Samuel Shah, *Making the Christian World Safe for Liberalism*.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

The issue of transplanting neo-liberal constitutionalism may turn on definitional meanings. Political liberalism supposes that a reasonable comprehensive doctrine will not reject the essentials of a democratic regime. In a world divorced from the existentiality of China citizenry, arguably, China's ontological base in tradition (Confucianism) will only survive an inevitable conflict with liberalism if it can be contained within the confines of what Rawls deems the democratic essentials, which are burdens of judgment that displace firm religious faith.¹⁷² Issues of blending liberalism and Confucianism, ultimately, resolve to two issues. Is liberalism's center of gravity a set of purely political principles and institutions formulated and justified independently of moral, philosophical, and religious doctrines? Is Confucianism, like Grotius's proposed reduction of *Christian* dogmas to those necessary for ethics,¹⁷³ amendable to a reduction to Western ethos?

In terms of scrutinizing Chinese constitutional ethos, assuming a neo-liberal constitutional coterie recognizes a need for constitutional ethos, one must necessarily be wary of aquarianism or the trap of a discourse perceiving such ethos as if they were motionless, static, compartmentalized, and even predictable.¹⁷⁴ Nonetheless, a discourse in constitutional ethos cannot ignore the existentiality of a Chinese citizenry, and like wise, it cannot proceed in a void divorced from the reality of an ontological base in tradition (Confucianism).

The issue may simply resolve to one of a purposeful choice, which is reflexive of societal morals and values, for China's polity or citizenry, because, arguably, a *sine qua*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Henry Giroux and David Purpel, (eds.), *The Hidden Curriculum and Moral Education*, Paul Freire, *The Banking Concept of Education*, Berkeley: McCutcheon Publishing (1983), at 283.

non of a successful resolve of these competing institutions is conflict. Choice is ultimately the critical basis of values, in that, “Value implies a code or a standard which has some persistence through time, or, more broadly put, which organizes a system of action. Value, conveniently and in accordance with the received usage, places things, acts, ways of behaving, and goals of action on the approval-disapproval continuum.”¹⁷⁵

IV. POST-TIANANMEN SQUARE AND LIBERALISM

Tiananmen for a China citizenry is the quintessential symbol of China, and, arguably, serves as an inexplicable link for groups and factions advocating a new democracy for China, such as neo-liberalism, pro-democracy, teledemocracy, cyber-democracy, and others.¹⁷⁶ The tragedy surrounding June 4, 1989, or the democracy movement and Tiananmen Square,¹⁷⁷ is also a commonality, and seemingly inexplicable link, among the Chinese neo-liberal coterie.¹⁷⁸ The tragedy at Tiananmen Square represents the closing in a chapter of the pro-democracy movement. The historian J. A. G. Roberts writes,

In broader terms the tragic events of 3-4 June 1989 have been explained as a failure of China’s political system. The economic reforms which began in 1978 might have been accompanied by the development of institutions which would have promoted further grounds for dispute between reformers and conservatives. Because of this rift there was no agreement within the leadership on how to deal with the democracy movement, and policy see-sawed between concession and violent suppression.¹⁷⁹

In 1992, in the aftermath of the Tiananmen Square tragedy, the Fifth Session of the Fifth National People’s Congress (“NPC”) affirms Deng Xiaoping’s Four Cardinal

¹⁷⁵ See Barrett, Donald M., (ed.), *Values in America*, William L. Koib, *Values Determinism and Abstraction*, Notre Dame: University of Notre Dame Press (1961), at 52.

¹⁷⁶ Killion, *supra* note 50.

¹⁷⁷ See J.A.G. Roberts, *A Concise History of China*, Harvard University Press, Cambridge, Massachusetts 1999, at 298.

¹⁷⁸ Gunde, *supra* note 4.

¹⁷⁹ Roberts, *supra* note 177, at 298-99.

Principles (*Si Xiang Ji Ben Yuan Ze*),¹⁸⁰ and China adopts a policy of a socialist market economy,¹⁸¹ which signals the end of price controls and encourages development of private enterprise.¹⁸² The NPC adds the words, “developing a socialist market economy,” to the preamble of the 1982 Constitution of the People’s Republic of China (*Zhong Hua Ren Min Gong He Guo Xian Fa*),¹⁸³ which elevates these words to constitutional stature. This constitutional amendment is important, because of its relation to both the tragedy of June 4, 1989, or Tiananmen Square,¹⁸⁴ and China’s 2002 election of the National People’s Congress (“NPC”). On November 16, 2002, there is a changing of the guard, and its new leadership, in ranking order, is Hu Jintao, Wu Bangguo, Wen Jiabao, Jia Qinglin, Zeng Qinghong, Huang Ju, Wu Guanzheng, Li Changchun, and Luo Gan.¹⁸⁵ It is the hope of the new leadership, as they headed towards the January election of the Tenth NPC¹⁸⁶ and the March 2003 Tenth NPC,¹⁸⁷ to avoid another Tiananmen Square tragedy.¹⁸⁸ Because of post-Tiananmen sentiment, changing of guard, post-WTO reforms, and other reasons, the Tenth NPC will arguably represent a watershed event in the history of China.

¹⁸⁰ *Id.*

¹⁸¹ Jian Yang, Book Review: *China since Tiananmen: The Politics of Transition*, New Zealand International Review, July-August 2002 v27 i4 p29(3), (Joseph Fewsmith, *China since Tiananmen: The Politics of Transition*, Cambridge University Press 2001), available at <http://www.nzia.auckland.ac.nz/docs/Yang-5.doc>.

¹⁸² Roberts, *supra* note 177, at 299.

¹⁸³ *Zhong Hua Ren Min Gong He Gou Xian Fa Xiu Zheng An* (Amendment to the Constitution of the People’s Republic of China), Adopted at the Second Session of the Ninth National People’s Congress on March 15, 1999, and promulgated by the Announcement of the National People’s Congress on March 15, 1999), The amendment to preamble adds Deng Xiaoping’s theory and the words “developing a socialist market economy.”

¹⁸⁴ Roberts, *supra* note 177, at 299.

¹⁸⁵ Francesco Sisci, *Hu Steps up but Jiang Stays on Top*, November 16, 2002 Asia Times Online, available at <http://www.atimes.com/atimes/China/DK16Ad03.html>.

¹⁸⁶ China Internet Information Center, Chinese People’s Political Consultative Conference, available at <http://www.china.org.cn/english/archiveen/28406.htm>.

¹⁸⁷ *Id.*

¹⁸⁸ Sisci, *supra* note 185.

In 1989, an anonymous student at Tiananmen Square proclaims, “I don't know exactly what democracy is, but we need more of it.”¹⁸⁹ One ponders whether the new vanguard truly understands democracy, constitutionalism, and independent judicial review, because historic excesses, abuses, and conflicts of liberalism serve as arguable impediments to the transplant or integration of neo-liberalism in China. In light of the February 21, 2003 symposium of Chinese neo-liberals, several thoughts come to mind. The words of the anonymous Chinese Student, in Beijing of 1989,¹⁹⁰ may speak to a problem of advocacy for democratic change in China. Nonetheless, the protest at Tiananmen Square is rightly described as a tragedy. There is little excuse for the violence, deaths estimated at 400 to 800 people,¹⁹¹ and political retributions, especially of the variety the panelist are forced to endure, that succeed this tragedy.¹⁹²

The events at Tiananmen Square speak to a lack of consistency in purpose and goal, if not ideology, in this historic protest. A history of Tiananmen Square reveals seemingly diverse purposes and ideology as the foundation for the tragedy of 1989. J.A.G. Roberts aptly describes the diversity in people and ideology of the protestors and writes,

At first this was not primarily a movement of intellectuals, its main participants being state-employed manual workers and technicians, who later joined by former Red Guards who had drifted back to the cities. The first manifestation of the movement was the appearance of posters on a wall along Chang'an Avenue in Beijing. Among the contributions was a poster headed 'Democracy, the Fifth Modernization' by Wei Jingsheng, a man in his forties who worked as an electrician at Beijing Zoo while at the same time studying at Beijing University. Wei Jingsheng argued that free enterprise was the only economic system compatible with democracy. Other contributors to the democracy movement remained committed to

¹⁸⁹ *Supra* note 1.

¹⁹⁰ *Id.*

¹⁹¹ Roberts, *supra* note 177, at 298.

¹⁹² Gunde, *supra* note 4.

socialism and argued that China's problems stemmed from the shortcomings of its bureaucracy.¹⁹³

The anonymous Chinese student seeks democracy, but knows not its true meaning. The anonymous student, who does not know what democracy is, still participates, while, yet, lacking a foundational understanding of democracy and its implications for Chinese society.¹⁹⁴ All of which leads one to ponder the rightness of Chinese neo-liberalism as a cure-all for modern China and question whether those who urge Chinese neo-liberalism equally know the true meaning of democracy and its implications for modern China.

A historicity of Western classical liberalism stems from a search for alternative governmental form to replace the political authority of Christianity, which when undermined had to be replaced. The theological-political problem is the name that Pierre Manent gives to the question of the political role of revealed religion, being Christianity.¹⁹⁵ Moreover, Manent identifies Thomas Hobbes as the father of classical liberalism, the champion of absolute political authority, and as the founding and paradigmatic liberal.¹⁹⁶ Contrarily, Manent notes that modern liberals, while very ready to accept this unflattering and one-dimensional portrait of Thomas Hobbes, generally deny that Hobbes is any sort of liberal at all.¹⁹⁷ The latter illustrates a problem of modern liberals in understanding liberalism in its purest sense, or its historic essence, and further leads one to question the rightness of Chinese neo-liberalism as a proper course for reform in China.

¹⁹³ Roberts, *supra* note 177, at 296.

¹⁹⁴ *Supra* note 1.

¹⁹⁵ Manent, *supra* note 147.

¹⁹⁶ Thomas Hobbes, *Leviathan*, Chapter XIV of the First and Second Natural Laws, and of Contracts (1651), available at <http://www.uoregon.edu/~rbear/hobbes/leviathan.html>.

¹⁹⁷ Manent, *supra* note 147.

A question of clarity in thought, purpose, and ideology, in terms of neo-liberalism, reminds one of the words of the late eminent scholar Qian Mu (*Ch'ien Mu*) (1895-1990), a translation follows.

Today, we seem to take an experimental attitude toward whatever system we happen to know of. We must remember, however, that if we experiment with a theory or a system which has been initiated by a handful of people or has been practiced merely for a short time in other countries, without establishing confidence among the people, the consequences of such experimentation will be very unpredictable. It is impossible to build up a political system without concern for the traditions of a country. For, if we insist that Chinese history be rewritten and the society overhauled, then we will have confused political systems with revolutions, and shouted 'down with the past!' without paying due respect to historical facts. If this were to happen, we would not be changing government or institutions and reforming society but would be tearing to pieces all of Chinese culture. Because of this interrelationship, no conclusions on any theory can be drawn without careful considerations or long experimentation.¹⁹⁸

The words of Qian Mu begs one to question of the rightness of Chinese neo-liberalism for modern China, or any other alternative political economic theories that may threaten the very fabric of Chinese culture. In light of the words of Qian Mu, and his hope of preserving Chinese history and culture amidst political experimentation, one hopes that a Chinese neo-liberal coterie engages a discourse in neo-liberalism in earnest, as oppose to the seduction of intellectual fashion.¹⁹⁹ It is the same hope that one has for other pro-democracy movements, such as The New York Society, and other vanguard teledemocracy and cyber-democracy forms of protest.²⁰⁰ It is a hope of sincerity in effort and recognition of a reality that change in any polity is a serious venture, especially for a modern China amidst on-going legal reforms and economic development. For China, a

¹⁹⁸ Qian Mu, *supra* note 114, at 142.

¹⁹⁹ Eisuke Suzuki, Deputy General Counsel of the Asian Development Bank, *Building freedom of trade on basis of fairness*, March 19, 2002, *citing* Business Weekly, March 19, 2002, *available at* <http://www1.chinadaily.com.cn/bw/2002-03-12/61647.html>.

²⁰⁰ *Supra* notes 58-63.

need for stability results in a steady, yet gradual, approach to modernity, lest China suffer setbacks in its reforms and development.²⁰¹

V. CONCLUSION

A failure of Western liberal constitutionalism in the nation-states of Africa, Russia, and other nation-states,²⁰² warrants serious consideration. A neo-liberal coterie desiderates a constitution that mirrors a United States Constitution, which they deem a model liberal constitution. However, a vision of a China polity under a pragmatic neo-liberal regime begs the question of how a Chinese neo-liberal coterie will define a source of order that will enable neo-liberal constitutionalism to work. In this context, until liberalism, neo-liberalism, or pragmatic neo-liberalism, rids itself of its historic excesses and abuses, China's ontological base in tradition (Confucianism) will arguably remain a ubiquitous barrier to invocation of Western pragmatic neo-liberal constitutionalism and *juris prudential* in modernity.

A successful transplant of Western neo-liberalism necessitates a regime of *juris prudential* in modernity, because neo-liberalism, a handmaiden of globalization, arguably requires a statist regime²⁰³ for purposes of confusing China's ontological base in tradition (Confucianism) with Western values and globalizing a given localism, being China. A problem of Western neo-liberalism is its contingency on Western *juris prudential* in modernity, as oppose to a neglected Western historical jurisprudence. Neo-liberals in a quest to transplant a United States model of separation of powers and independent judicial review ignore the more viable alternative for transplanting a Western constitutional design in China, which is the nationalist historicism of historical

²⁰¹ Killion, *supra* note 50.

²⁰² Dryzek, *supra* note 49.

²⁰³ Murray Bookchin, *New Perspective in Libertarian Thought*, vol. 1, no. 5 Comment (April 15, 1980).

jurisprudence. Arguably, for a China polity, a more viable alternative of Western historical jurisprudence and nationalist historicism could serve as a check against the arbitrary exercise of power and provide a *juris prudential* allowing for a more independent judiciary, in the sense of Western constitutionalism, as oppose to Western pragmatic neo-liberalism and *juris prudential* in modernity. Western historical jurisprudence presents a more viable alternative, because it will arguably recognize a traditional Chinese jurisprudence evolving amidst on-going legal reforms and economic development, which is reflective of the particularity of China's ontological base in tradition (Confucianism).²⁰⁴

On modernizing China, former President Jiang Zemin stresses the importance of morality (Confucianism), the core of Chinese culture, as governing every aspect of national life.

Chinese President Jiang Zemin recently stressed that, in the process of building socialism with Chinese characteristics and developing a socialist market economy, the nation needed to unremittingly strengthen socialist legal system construction, and ensure China was a country ruled by law. At the same time, every Chinese should untiringly strengthen socialist morality construction and ensure that morality governed every part of national life.²⁰⁵

There are similarities and dissimilarities in the respective culture and values of the West and China, all of which serves as source of policy contentions in Sinic-West relations. The nomenclature of neo-liberalism exemplifies problem of cultural divergence and equally biased cultural perceptions in Sinic-West relations, because

²⁰⁴ Michel Foucault, Paul Rabinow (ed), *The Foucault Reader*, Random House (April 1984), at 50, "The critical ontology of ourselves has to be considered not, certainly, as a theory, a doctrine, nor even as a permanent body of knowledge that is accumulating: it has to be conceived as an attitude, an ethos, a philosophical life in which the critique of what we are is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them."

²⁰⁵ *Modernizing Country by law and morality*, available at <http://www.china.org.cn/english/8585.htm>.

liberalism, and its variants, serves as a source of policy contention in Sinic-West relations. Samuel Huntington contends that the post-Cold war world will divide into civilizations marked by fundamental cultural differences.²⁰⁶ Notwithstanding a need for fairness and objectivity in multilateral policies and relations, cultural divergence influences genuine discourses in legal reforms, economic development, and especially liberal democratic constitutional reforms.

Contrarily, neo-liberal constitutionalists proffer a prophecy of post-cold war civilizations that are predominately neo-liberal governments, which, ultimately, manifest liberal democratic political constitutions. There are several problems with this contention.

First, such prophecy bears striking resemblance to an earlier thesis of Francis Fukuyama, which has yet to materialize, that history is at an end, in that post-cold war civilizations will naturally evolve to liberal democratic governments.²⁰⁷ In terms of China, a problem of Fukuyama's prophecy is China's historical particularity and ontological base in tradition (Confucianism). In this respect, China serves as a reminder that history is not at an end, in that China, and its Sinic uniqueness, challenges a new world order shrouded in Western culture and taxonomies.

Secondly, a post-cold war history evidences a contrary historicism of neo-liberalism. Neo-liberals deny a post-cold war, directional historicism of world constitutionalism. There are many who advocate that United States Constitutionalism, and its concepts of popular sovereignty, separation of powers and independent judicial

²⁰⁶ Huntington, Samuel, *The Clash of Civilizations and the Remaking of the World Order*, New York: Simon and Schuster (1966).

²⁰⁷ Francis Fukuyama, *The End of History and The Last Man*, Canada: The Free Press (1992).

review, in the post-cold war era serves as a model for world constitutionalism,²⁰⁸ a contention, no doubt, shared by neo-liberal constitutionalists. However, a reality of world constitutionalism is constitution-writing nation states adopting variants attributable to cultural and economic forces. A latter result attributable to recent failures of developing nation-states attempting to adopt a United State Constitutional model, or liberal constitutional political economy design, such as the failures of Russia, British ex-colonies in Africa, and other nation-states, intending to promote a Western market system. A further justification for constitution writing nation-states to develop variants, or what Heinz Klug refers to as anti-models,²⁰⁹ of a U.S. Constitutional model is empirical evidence intimating that we can get similar outcomes across constitutionalized and non-constitutionalized situations.²¹⁰

Differing interpretations, subject to forces of culture and economics, of what constitutes liberalism, neo-liberalism or pragmatic liberalism, are demonstrative of problems in cultural divergence, which, ultimately, affects, albeit indirectly, genuine discourses in multilateralism, rule of law and constitutionalism. In terms of China and cultural divergence, the most serious flaw of neo-liberal constitutionalism is a proposed invocation of Western universal cosmopolitanism, or Western values and norms, as a source of constitutional ethos for Chinese constitutionalism. For China, Confucianism and China's ontological base in tradition, as oppose to Western universal values, provide the only genuinely viable source of constitutional ethos for Chinese constitutionalism.

²⁰⁸ Heinz Klug, *Model and Anti-Model: The United States Constitution and the Rise of the World Constitutionalism*, 2000 Wis. L. Rev. 597, 604-13, (2000).

²⁰⁹ *Id.*, at 604-13.

²¹⁰ Dryzek, *supra* note 49.