China, a Sui Generis Case for the Western Rule-of-Law Model

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INTRODUCTION

The social role of law came to the forefront of scholarly discussions outside American-European jurisprudence during the first wave of international development in the 1960s. Western development assistance programs to the governments and legal institutions in developing countries led to active law and development studies that were built upon the Weberian foundation that economic development was the result of rational legal systems. Scholar-reformers, comparative legal theorists, legal anthropologists and social scientists began to study the role of law in development, and the rule-of-law governance model was promoted as a path to freedom for the recipient countries. However, the law and development movement faded into “self-estrangement” because of critical scrutiny of the social utility of aid efforts and the disagreement over the common interests that might justify such a distinct field of inquiry.

The 1990s witnessed a rule-of-law revival. During the post-Communist transition, the rule of law became the catchphrase for political and economic reforms in much of the economically underdeveloped world. The rule of law has achieved almost universal consensus among nations, a rare accomplishment for a concept in a world of controversies. It implies a sense of rationality over arbitrariness, predictability over uncertainty, and fairness over partiality. Assistance in the rule-of-law reform has become a major category of international aid. The World Bank and other development organizations

2. See id. at 1063; Encyclopedia of International Development 404 (Tim Forsyth ed., 2004).
3. See Trubek & Galanter, supra note 1, at 1067, 1086.
4. Id. at 1064.
7. See id. at 51.
8. See Thomas Carothers, The Rule of Law Revival, 77 Foreign Aff. 95, 103 (1998) (“Russia’s legal and judicial reforms, for example, have been supported by a variety of U.S. assistance projects, extensive German aid, a $58 million World Bank loan, and numerous smaller World
apply the rule-of-law model both to ensure the proper use of financial aid and “to build more business-friendly and investment-friendly legal systems that presumably help spur economic growth and reduce poverty.” The reform often promotes implementation of established legal rules premised upon Western liberal democratic principles.

But China has always been a sui generis case in the rule-of-law discussion. The assertion that China has no rule of law contradicts the well-documented Chinese history that does not remotely resemble a state of anarchy or a society without justice. On the other hand, the evaluation of the Chinese rule of law based on the Western model produces obvious mismatches.

This article studies in depth the mismatches between Chinese and Western rule-of-law models. Both the deficiency in the Western model and the uniqueness of Chinese jurisprudence contribute to the discrepancy. Part I surveys the Western theoretical frameworks for the rule of law. Part II illustrates the deficiencies in the Western rule-of-law theories in the context of American jurisprudence, which shows the complexity of the seemingly straightforward concepts of judicial independence and equal application of justice. Part III explains the theoretical foundations of the Chinese rule of law, and summarizes the fundamental principles of Chinese jurisprudence. Although the Chinese rule of law is a sui generis case for Western legal ontology, a comparison of the two models suggests universal value of democracy and republic governance transcending cultural boundaries.

I. Western Theories of the Rule of Law

The rule-of-law concept has ancient roots. Plato’s ideal ruler is a philosopher king: “the best thing of all is not that the law should rule, but that a man should rule, supposing him to have wisdom and royal

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power.”12 However, law is necessary as a practical matter because “the State is not like a beehive, and has no natural head who is at once recognized to be the superior both in body and in mind, mankind are obliged to meet and make laws, and endeavor to approach as nearly as they can to the true form of government.”13 Not agreeable to the rule of men, Aristotle advocated for the rule of law in *The Politics*:

> [T]he rule of the law, it is argued, is preferable to that of any individual. . . . [H]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.14

A. *The Origin of Anglo-American Rule of Law, Rechtsstaat and État de droit*

The English phrase “rule of law” was first used by Albert Dicey, who proudly viewed “the supremacy of law” as “a characteristic of the English constitution.”15 Dicey saw “three distinct though kindred conceptions” under the expression.16 First, no one can be punished “except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.”17 Second, no one is above the law, and “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”18 Third, “the general principles of the constitution . . . [are] the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.”19 Based on the British political system, Dicey’s definition aptly embodied

13. 4 *Plato*, supra note 12, at 505.
16. *Id.*
17. *Id.* at 183–84.
18. *Id.* at 189.
19. *Id.* at 191.
the essence that marked the difference between a monarchy and a populist parliamentary system of government.20

The founding fathers of the United States drew inspiration from English traditions, but “paid much more attention to the need . . . to avoid the threat represented by parliamentary majorities to individual liberties” under the English rule.21 The unwritten English constitution is “not a legal act or a legal custom,” but “a set of legal traditions, normative acts, social conventions, and practices concurring in limiting and controlling the executive power.”22 In contrast, the United States Constitution delineates boundaries of power for the legislative, executive and judicial branches to prevent Congressional omnipotence or executive power abuse, and to protect individual rights.23

The German concept of Rechtsstaat originated from the philosophy of the Enlightenment.24 Following the 1848 revolts, Rechtsstaat “epitomized a compromise between liberal doctrine, supported by the bourgeois, and the authoritarian ideology supported by conservative forces.”25 Fundamental rights such as freedom of the press or freedom of profession and trade were no longer constitutional principles, but rights guaranteed by ordinary legislation in positive legal terms.26 Rechtsstaat proposed two theories.27 The first theory of “subjective public rights” views the legislative power of the state as “the only original and positive source of law.”28 The second theory—the primacy of law—posits that the executive and judicial powers must follow the set of rules established by the legislative body to gain legitimacy for their acts.29 The power structure under Rechtsstaat was considered to be “both the most effective defense against any political misuse of powers and the supreme guarantee for the protection of individual rights,” but the theory “failed to take into account the potential arbitrary use of

22. Id. at 15.
23. See id. at 10–11.
25. Zolo, supra note 21, at 11.
26. Grote, supra note 24, at 278.
27. Zolo, supra note 21, at 11–12.
28. Id. at 12.
29. Id.
legislative power.”

In France, Raimond Carré de Malberg formulated the theory of the État de droit under the influence of American and German experiences. In order to protect “individual rights against the state’s potential arbitrariness,” the theory of État de droit limits the “sovereign power by binding it to respect general and erga omnes (towards everybody) valid rules.” Carré de Malberg argued for “a clear distinction between the constitution and the ordinary laws.” Under his theory, it was necessary to place the constitution above the ordinary laws, and “compel Parliament to respect all legal limits laid down by the constitution.”

The origin of the rule of law indicates that the concept is uniquely stamped with national history and cultural preference. The term can be described in different shades based on the theorists’ particular vision of the “ideal” or “just” state. As a result, it “belongs to the category of open-ended concepts which are subject to permanent debate and have to be constantly redefined to meet the needs of an ever-changing political and legal environment.” Substantive theory and formal theory are the two main analytical approaches to the Western rule-of-law model, tracking the debate between realism and formalism on the boundaries of law, and the debate between natural law theorists and positivists on the relationship between law and morality.

B. Substantive Theory

The concept of equal justice as a natural extension of the rule of law captured the imagination of later legal scholars and the scope of the term started to expand from its original “descriptive account” into the “prescriptive territory.” According to the substantive theory, the Rule of law implies the intelligibility of law as a morally authoritative guide to human conduct. In this view, the forms of

30. Id.
31. Id. at 13.
32. Id.
33. Id. at 15.
34. Id.
36. Grote, supra note 24, at 271.
37. See Trebilcock & Daniels, supra note 20, at 16.
law—which may encompass rules, conventions of legal reasoning, and processes of legal deliberation—are unintelligible as legal forms in the absence of rationally cognizable purposes that possess reasonable claims to moral allegiance.

Although there are few consistent adherents of substantive conceptions of the Rule of Law, the substantive ideal type is at least approximated by a good deal of contemporary scholarship positing an internal or conceptual link between law (or some particular body of law) on the one hand and substantive political theory on the other. Once this view is adopted, it is impossible to achieve consistency with the Rule of law unless the law that is enforced by officials satisfies a substantive test of moral correctness or at least acceptability.38

Friedrich Hayek views the law as “the basis of freedom”: “The conception of freedom under the law . . . rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free.”39

American constitutionalism seems to imply the substantive theory. There is contention between the premise of collective self-governing and the premise of government “by laws and not men,” and Frank Michelman argues that “there must be some sense in which we think of self-rule and law-rule as amounting to the same thing.”40 “Self-government” is premised on “the people’s determination for themselves of the norms that are to govern their social life,” while a “government of laws” implies independent authority that protects the people against power abuse.41 Reconciliation of the two premises “requires the legislative product to have a ‘sense of validity’ as ‘our’ law.”42

The principal objection to the substantive theory is that it turns the rule of law into a value-laden ideal based on the substantive conceptions of what the law ought to be.43 The more moral values packed into

39. FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 148, 153 (Univ. of Chicago Press 1960); see also TREBILCOCK & DANIELS, supra note 20, at 16.
41. Id. at 1501.
42. Id. at 1502.
43. Fallon, supra note 38, at 23.
the ideal, the more controversial the model is likely to be. Joseph Raz, the leading positivist since H.L.A. Hart, takes the position that “the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged.”\textsuperscript{44} It is distinct from “democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.”\textsuperscript{45}

C. Formal Theory

Justice Antonin Scalia famously described the rule of law “as a law of rules.”\textsuperscript{46} The formal theory assumes that rational people will choose a predictable system to minimize the transaction cost from unnecessary conflicts among individuals.\textsuperscript{47} When the rules and their applications are clearly prescribed, the legal consequences of the actions are predictable.\textsuperscript{48} Rules offer “maximally effective guides” and ensure that everyone, including rulers, officials and judges, is bound by law.\textsuperscript{49} Raz summarizes some normatively unobjectionable principles of the formal concept of the rule of law:

1. All laws should be prospective, open, and clear.
2. Laws should be relatively stable.
3. The making of particular laws (particularly legal orders) should be guided by open, stable, clear and general rules.
4. The independence of the judiciary must be guaranteed.
5. The principles of natural justice must be observed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. The discretion of the crime-preventing agencies should not be allowed to pervert the law.\textsuperscript{50}

As a natural law proponent, Lon Fuller was the philosophical opposite of the positivists such as Raz. However, his vision of the ideal

\textsuperscript{45} Id.
\textsuperscript{46} See generally Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989) (“explor[ing] the dichotomy between general rules and personal discretion within the narrow context of law that is made by the courts”).
\textsuperscript{47} See Trebilcock & Daniels, supra note 20, at 20.
\textsuperscript{48} See Landgraf v. USI Film Products, 511 U.S. 244, 266 (1994); see also Fallon, supra note 38, at 14–15.
\textsuperscript{49} See Fallon, supra note 38, at 14–15.
\textsuperscript{50} Raz, supra note 44, at 214–18.
rule-of-law model almost overlaps with Raz’s concept. Fuller illustrated “eight distinct routes” to achieve a proper legal system: (1) disfavored approach of ad hoc decision-making, (2) rules being public, (3) limited use of retroactive legislation, (4) rules being understandable, (5) no contradictory rules, (6) no requirement to act “beyond the powers of the affected party,” (7) no frequent changes in the rules, and (8) “congruence between the rules as announced and their actual administration.”

The formal approach appears to be a neutral framework without the underlying controversial moral and ideological values. However, it is also subject to some potent criticism. An objection from legal realism is that “legal rules—abstracted from human assumptions, conventions, aims, and biases—neither do nor could determine legal outcomes.” A rule by itself cannot answer the questions of whether it applies in a specific situation or how it applies to particular facts. When someone applies a rule, the human factor becomes part of the decision-making process. The choice is “culturally contingent” and “politically biased,” and correctness of the decision is in the eyes of the beholder.

A variation of the formal theory of the rule of law is the legal process school that was the legal realist’s response to perceived inadequacies of the formal theory. The legal process school emphasized procedural aspects and institutional roles, and included underlying purposes as the basis for statutory interpretation.

The tension between law and morality fashions another strand of criticism. Any conception of the rule of law will not be completely insulated from moral elements. The relationship between “the ideal of the Rule of law” and “moral premises” is a matter of degree about the extent of association. Much as the substantive theory comes under

52. Fallon, supra note 38, at 16.
53. Id.
54. Id.
55. Id. at 19.
56. Joseph William Singer, Legal Realism Now, 76 Cal. L. Rev. 465, 519 (1988) (reviewing Laura Kalman, Legal Realism at Yale: 1927–1960 (1986)); see also Henry M. Hart & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1374, 1378 (1994) (“In interpreting a statute a court should . . . [d]ecide what purpose ought to be attributed to the statute . . . and then . . . [i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can . . . . It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”).
57. Fallon, supra note 38, at 23.
58. Id. at 24.
criticism for sweeping “justice’ with dense moral content” under the rug of the rule of law, the formal theory “can plausibly be accused of doing the same thing with ‘fairness’ when it treats the rule of law as the rule of fairly implemented law.”

D. Practical Definitions of the Rule of Law

The actual implementation of the rule-of-law projects tends to include both the formal and substantive aspects of the concept. According to the United Nations Security Council, the rule of law refers to “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.” It requires “measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” The term’s definition by the United States Agency for International Development, built upon the proposed United Nations definition, fleshes out the essential elements of the rule of law: (1) order and security, (2) legitimacy, (3) checks and balances, (4) fairness, (5) effective application, and (6) efficiency and integrity. The United Nations definition includes most of the formal requirements such as public promulgation, equal enforcement and independent adjudication. The requirement that the laws are “consistent with international human rights norms and standards” is based on the substantive theory but falls short of an express endorsement of liberal democratic principles.

The Worldwide Governance Indicators research project sponsored by the World Bank measures a particular country’s effectiveness of governance with six dimensions. “Rule of Law,” in the term’s narrow

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59. Trebilcock & Daniels, supra note 20, at 22.
61. Id.
sense of administration and observance of law, is listed as a distinct category, but all of the six dimensions are within the scope of the general discussion of the rule-of-law model. The six dimensions of governance are:

1. Voice and Accountability (VA)—measuring perceptions of the extent to which a country’s citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media.

2. Political Stability and Absence of Violence (PV)—measuring perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically-motivated violence and terrorism.

3. Government Effectiveness (GE)—measuring perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government’s commitment to such policies.

4. Regulatory Quality (RQ)—measuring perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.

5. Rule of Law (RL)—measuring perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.

6. Control of Corruption (CC)—measuring perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as “capture” of the state by elites and private interests.\(^6^3\)

The project evaluates the independence of civil service from political pressures in the Government Effectiveness dimension, a formal characteristic of the rule of law. The Voice and Accountability dimension has more of a substantive flavor with its characteristic traits of liberal democracy, such as freedom of speech.

The mix of the theoretical approaches comes as no surprise for the rule-of-law projects. The formal theory alone is not practically useful because of its abstract nature, and the substantive theory cannot

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produce a universally accepted standard because of the variations in liberal democratic concepts themselves. Some compromise between the two is inevitable. More than mere intellectual exercises, the projects attempt to achieve social progress with corresponding economic gains. However, sometimes the scientific aspect of the projects is overplayed. The language and methodology in the rule-of-law prescriptions often give a sense of accuracy more suitable for science. For example, in the World Bank’s project, government accountability and effectiveness receive numeric measurements for a specific country. Both the numeric assignment and the measurement system itself are vulnerable to skepticism: it is casting an inherently subjective matter into an objective mold. How is it possible to design a truly objective measurement for a concept such as freedom of speech that has a fluid and ever-evolving boundary?64

II. A Realist’s Evaluation of the Western Rule-of-Law Model

A motto for technological design is: keep it simple, but not simplistic.65 In the process of theoretical abstraction, it is inevitable to oversimplify the legal history of rich human experience. This section discusses the gloss which life has put upon the core concepts of the rule of law.66 American experience is used to show the gaps between the Western rule-of-law theories and actual practices for two reasons: (1) founded as a republic on a written constitution in 1776, the United States has maintained reliable historical records of nation building and judicial interpretation, and (2) the vast geographic expansion and the complexity of the social dynamics make the United States a more comparable reference for the later discussion of Chinese jurisprudence.

A. The Complexity of Judicial Independence

Laws are made, interpreted and enforced by human beings. The human factor makes the rule of law irreducibly complex. Simplification

64. See, e.g., Jess Bravin, 10 Commandments vs. 7 Aphorisms: A New Religion Covets Legitimacy, WALL ST. J., Nov. 13, 2008, at A14.
65. This expression is widely attributed to Albert Einstein. The original text is: “It can scarcely be denied that the supreme goal of all theory is to make the irreducible basic elements as simple and as few as possible without having to surrender the adequate representation of a single datum of experience.” Albert Einstein, On the Method of Theoretical Physics, 1 PHILO. OF SCIENCE 163, 165 (1934).
66. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”).
is a necessary component of theorization. However, if the omitted factors affect the very foundation of the premises, the theory will most likely not work in the real world. Contrary to what lay people often believe, judicial independence is not equivalent to being apolitical. Both the federal and state judiciaries are subject to political influences that constrain independence in decision making.

1. Federal Judges—Independent but Not Apolitical

Chief Justice John Marshall said in the Virginia State Convention of 1829: “The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary.”67 Chief Justice William Rehnquist extolled independent judiciary as “one of the crown jewels” of the system of the United States government.68 The rhetoric embodies the common perception about the court—an institution above politics. The United States Constitution vests the judicial power in the courts,69 and builds in institutional guards to protect judges from extra-judicial influences.70 Federal judges have life tenure and are expected to rule independently from the executive and legislative branches. In reality, however, there is no insulation from politics. The appointment process is political and partisan. The candidates are carefully evaluated during the vetting process, and their views on a wide range of issues are thoroughly examined in the Senate hearings to ensure ideological conformity with the supporting party. The occasional Earl Warren or more recently David Souter notwithstanding, federal judges rarely abandon their political preferences in their decisions.71

Surprising as it may sound to a layperson, the United States Constitution imposes no “above-the-politics” requirement for the judiciary. The framers of the Constitution envisioned a judiciary independent from “the legislature and the Executive,” not politics:

69. U.S. CONST. art. III, § 1, cl. 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).
70. Id. at art. III, § 1, cl. 2 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).
It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.\footnote{72. The Federalist No. 78 (Alexander Hamilton), available at http://www.constitution.org/fed/federa78.htm.}

Political ideology does not necessarily work into the judicial decision-making process in a patent partisan way. The more subtle and sophisticated form of influence is through the adoption of certain sets of legal doctrines and principles that align with a political ideology, but not necessarily with a particular party’s agenda. Justice Benjamin Cardozo acutely observes “in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action,” and “judges cannot escape that current any more than other mortals.”\footnote{73. Benjamin N. Cardozo, The Nature of the Judicial Process 12 (1921).} An empirical study of Justice Felix Frankfurter’s voting pattern in the first seven terms of the Warren Court suggests that judicial restraint is “subordinated to the attitudes of the justices toward business and labor.”\footnote{74. Harold J. Spaeth, The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality, 8 Midwest J. Pol. Sci. 22, 38 (1964).} In American jurisprudence, independence means nonpartisanship, not insulation from politics.
2. More Politicized State Courts

In the American state court systems, judges are often elected by popular votes and accountable to their voters. In Powell v. Alabama, where two alleged white female victims claimed that a group of black men raped them, the state court had no trouble staging a quick trial and convicting all the defendants. Under the prevailing social norms of the 1930s in the South, when a white woman accused a black man of rape, “guilt or innocence often mattered little.” A speedy trial and subsequent conviction were all but assured. In the recent Supreme Court case Caperton v. A.T. Massey Coal Co., the chief executive of Massey Energy donated $3 million to help elect Brent Benjamin to West Virginia’s Supreme Court. Refusing to recuse himself, Justice Benjamin voted to reverse a $50 million judgment against Massey in 2007. The political contributions were not illegal. The petitioner argued that the scale and timing of the spending “created a constitutionally intolerable probability of actual bias.” Justice Benjamin carefully reviewed the recusal motions, and “found no basis for recusal because Caperton failed to provide ‘objective evidence’ or ‘objective information,’ but merely ‘subjective belief’ of bias.” The closely divided Supreme Court produced a narrow holding that “the probability of actual bias rises to an unconstitutional level” based on “these extreme facts.” But Chief Justice John Roberts challenges the majority’s standard for its lack of clarity and presents a list of forty “fundamental questions” to illustrate “only a few uncertainties that quickly come to mind.” The law does not seem to be settled on this issue yet, and the majority ruling turned out to be no more than a Pyrrhic victory for the winning party.

75. 287 U.S. 45 (1932).
77. See id. at 2–3.
79. Id. at 2258.
80. Id. at 2262.
81. Id.
82. Id. at 2265.
83. Id. at 2269–72 (Roberts, C.J., dissenting).
3. The Court Before a “Notoriously Superior Power”

Alexander Hamilton recognized that “the judiciary is beyond comparison the weakest of the three departments of power.” Hamilton, supra note 72. The early history of the Republic indeed showed an inferior third government branch. The Supreme Court of the United States was not even on an equal footing with the state courts. John Marshall became the Chief Justice only after John Jay declined the appointment because Jay concluded that the Court lacked “the energy, weight, and dignity which was essential to its affording due support to the national government.” Charles A. Beard, American Government and Politics 428 (new and rev. ed. 1917).

The celebrated case that established judicial review, Marbury v. Madison, was the result of a treacherous political battle. The growing influence of the Court was built upon Chief Justice Marshall’s extraordinary political acumen and his extended length of service in office, rather than the simple proclamation that “it is emphatically the province and duty of the judicial department to say what the law is.”

The status of the judiciary was at its lowest point on the eve of the Civil War. On April 27, 1861, five weeks into his presidency, President Abraham Lincoln authorized General Winfield Scott to suspend the writ of habeas corpus after a mob of 20,000 Southern sympathizers attacked the Sixth Massachusetts Regiment in Baltimore. On May 25, John Merryman was arrested for “various acts of treason, and . . . being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government.” He was a prominent politician with personal ties to Chief Justice Roger Taney. Merryman petitioned to the Chief Justice, who was sitting as a Circuit Judge, for a writ of habeas corpus. On May 26, Taney issued a writ directing General George Cadwalader, the com-

85. Hamilton, supra note 72.
86. CHARLES A. BEARD, AMERICAN GOVERNMENT AND POLITICS 428 (new and rev. ed. 1917).
89. Marbury, 5 U.S. at 177.
91. Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (General Cadwalader’s return to the writ); see also BREST ET AL., supra note 90, at 276.
92. Merryman’s father and Chief Justice Taney attended Dickinson College together. BREST ET AL., supra note 90, at 276.
93. Id.
manding officer at Fort McHenry where Merryman was confined, to bring Merryman to the court hearing. Rather than appearing in person, General Cadwalader sent a military officer to convey his return to the writ explaining that he was authorized by the President to suspend the writ of habeas corpus at his discretion. After Taney learned that the marshal carrying the second order to General Cadwalader “was not permitted to enter the gate,” he had to come to terms with the reality that “the power refusing obedience was so notoriously superior to any the marshal could command,” although the Chief Justice noted that “the marshal had the power to summon the posse comitatus to aid him in seizing and bringing [General Cadwalader] before the court.” He proceeded to issue an extended ruling holding that the President could not “authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen.” Lincoln responded with silence.

On August 6, 1861, a Republican controlled Congress gave a retroactive approval of “all the acts, proclamations, and orders of the President . . . respecting the army and navy of the United States,” but it did not expressly refer to the suspension of the writ of habeas corpus. On March 3, 1863, the Republican Congress passed the Habeas Corpus Indemnity Act providing that “during the present rebellion the president of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States or any part thereof.” These later events appeared to suggest that the initial order on April 27, 1861 to suspend habeas corpus was not authorized by the Congress. Lincoln’s stance against judicial supremacy represented a proposition that “the judiciary may not issue judgments that bind the independent constitutional judgment of elected officials.”

The Court reached a similarly low point when President Franklin D. Roosevelt tried to pass his “Court-Packing” bill in 1937, after having been frustrated by the uncooperative Court on economic policies. The

96. *Id.* at 144–46.
97. *Id.* at 149; see also Paulsen, *supra* note 94, at 1287.
98. See Paulsen, *supra* note 94, at 1289.
100. *Id*.; see also GEORGE S. MCGOVERN, *ABRAHAM LINCOLN* 60 (2009).
bill never passed, but it certainly got the attention of the Court. In *West Coast Hotel Co. v. Parrish*, Justice Owen J. Roberts switched his vote to side with the progressive wing of the Court, and the Court began to uphold Roosevelt’s new economic regulations. It was the famous “switch in time that saved the nine.” Under tremendous pressure from the public and the other two branches, the Court made the political concession that judicial independence was supposed to shield it from.

B. Equal Application of Justice

Equal application of law is an indispensable principle of the rule of law. Is it an aspirational goal or a touchstone to determine whether the legal system is under the rule of law? American jurisprudence again gives a complicated answer. The right to counsel is closely related to the ability to protect an individual’s rights in an adversarial judicial system and assures equal application of law. The right to counsel is a constitutional right under the Sixth Amendment to the United States Constitution and a line of Supreme Court cases delineated the scope of such right. In *Douglas v. California*, the Court touched upon the relevance of poverty to access to justice. A Californian rule allowed the court to decide whether an indigent defendant receives appointed counsel on appeal. The Supreme Court found the rule in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution and affirmed the right to appointed counsel on the first appeal. However, an indigent defendant with a court-appointed counsel on appeal is not on an equal footing with a wealthy defendant who can afford the best defense lawyer money can buy. For example, Ronald K. Williamson was sent to death row and came within five days of execution for a murder he did not commit. His conviction was the result of questionable police work and ineffective legal representation. He was exonerated by DNA testing after more than sixteen years.

102. 300 U.S. 379 (1937).
107. Id.
108. Id.
Money is not the only barrier to justice. The Court may not want to be an arbiter of the dispute for non-judicial reasons. *Naim v. Naim*\(^{109}\) was a leading example of such “lawlessness.” The case occurred between *Brown II* and *Cooper v. Aaron* when the desegregation effort was hanging by a thin thread.\(^{110}\) A white woman sued to have her marriage to a Chinese sailor annulled on the ground that the marriage, which occurred in North Carolina, violated the Virginia miscegenation statute.\(^{111}\) The 1925 Judiciary Act “requires obligatory review of state court judgments” by the Supreme Court “where the validity of a state statute was unsuccessfully challenged on federal constitutional grounds.”\(^{112}\) The justices had something else on their mind:

> [T]he moving force behind the Court’s non-decision was Mr. Justice Frankfurter. During the discussion of *Naim*, Frankfurter read a prepared statement to the Conference urging that the case not be decided, if at all possible. For Frankfurter, the “technical considerations” of the Court’s obligatory jurisdiction were out-weighed by the “moral considerations,” namely, “the Court’s responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases.” Frankfurter said that he assumed “serious division on the merits,” and he feared that a decision overturning the law would “very seriously . . . embarrass the carrying-out of the Court’s decree of last May [Brown decision].” . . . [H]is reading of the record suggested that the “main issue” in the case was not “free from subsidiary or preliminary questions.”\(^{113}\)

The Court adopted Frankfurter’s suggestion in the per curiam opinion: “The inadequacy of the record . . . prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered ‘in clean-cut and concrete form, unclouded’ by such problems.”\(^{114}\) The Court’s approach was appreciable as a decision

\(^{109}\) 350 U.S. 891 (1955) (mem.) (per curiam).


\(^{112}\) DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* 13 (1980).

\(^{113}\) Hutchinson, supra note 111, at 64–65.

\(^{114}\) *Naim*, 350 U.S. at 891, remanded to 90 S.E.2d 849 (Va. 1956), motion to recall mandate denied per curiam, 350 U.S. 985 (1956) (mem.).
not to derail the racial desegregation effort, but the Court shunned its constitutional duty on the miscegenation issue at the same time. The Court could get away with this “lawlessness” only because from here there was no appeal.115

III. CHINESE THEORIES OF THE RULE OF LAW

The Western rule-of-law framework shows that neither the formal nor the substantive approach captures the raw politics of a realistic judicial system on the key issues of judicial independence and equal application of law. China is a *sui generis* case for either the formal theory or the substantive theory of the Western model. Exploring Chinese jurisprudence in its historical context may help explain the uniqueness of the Chinese model.

A. Reasons for the Misconception of “Lawless” China

China is an ancient country with a relatively new government. The People’s Republic of China was founded in 1949, much later than the United States; at the same time China has “the longest unbroken history of self-government in the world,” a span of thousands of years.116 In the discussion of law and development, commentators often treat China’s economic success as an example of “lawless” growth.117 The misconception of “lawless” China is not new. Plenty of works gave erroneous descriptions of the Chinese legal system to justify the extra-territoriality granted by a slew of unequal treaties, beginning with the Treaty of Nanking (1842) as the direct consequence of the First Opium War.118

115. See Mark V. Tushnet, The Warren Court in Historical and Political Perspective 12 (1996) (“More generally, the later Warren Court had a policy agenda that its members strove mightily to advance. They were not, however, lawless—certainly not lawless in the way that the Naim Court had been.”).


117. See, e.g., Upham, *supra* note 10, at 82. Carothers stated this in a more qualified way, characterizing China as “a country notorious for its lack of Western-style rule of law.” Carothers, *supra* note 11, at 17.

Pretextual excuses aside, several legitimate reasons also contribute to this view. First, people tend to study a new phenomenon based on their existing knowledge and analytical frameworks. Cultural differences impose further barriers to an in-depth understanding. If the Western rule-of-law model were the only available analytical tool, it would be a valid choice. Second, language barriers exist not only between Chinese and English, but also in Chinese itself. The Chinese language has evolved with the Chinese people over thousands of years. The written characters and the use of expressions have gone through significant changes since the time of Confucius. Without specialized training, even a native Chinese legal scholar may not be able to properly interpret the original Confucian texts, just as an American scholar would have similar difficulty understanding Aristotle’s writings in his original Greek text. The English translation further obfuscates the original meaning to most non-Chinese-speaking Western scholars outside the small circle of sinologists. Later discussion about Confucian thoughts will illustrate the translation problem. Third, the interpretation of the classical texts and historical records is not fixed. The situation is quite analogous to the interpretation of the United States Constitution. New archeological findings and historical research continuously improve the understanding of Chinese history and may change the views on issues previously considered to have been settled. For example, recent scholarship based on the excavation of ancient sites and artifacts increasingly shows that the harshness of the rule under the Qin dynasty (221–206 BCE) was probably exaggerated, and that “a more balanced appraisal based on original documents” is necessary.

B. Twin Pillars of the Chinese Rule of Law—Confucianism and Legalism

The governance in ancient and modern China is sometimes described as “rule by law,” as opposed to “rule of law,” according to the conceptual distinction in the purpose of law—whether law is “a tool of her government denied the fundamental assumptions upon which international law is based.”). But see William P. Alford, Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law, 23 MOD. CHINA 398, 405 (1997) (referring to the skill that the Chinese imperial official Commissioner Lin Zexu displayed “in his utilization of Chinese law, British law, international law, and general principles of morality in his futile efforts to persuade Queen Victoria to bar her subjects from selling opium in South China” during the late nineteenth century).


the ruling regime” or law is meant to be supreme and binding on the government officials. However, the intertwining of reason and fiat in Chinese jurisprudence defies such simplistic labeling. Law as merely a governing tool may describe certain periods of Chinese history, but an overarching use of the term seems to be a cherry-picking exercise to “prove” the conclusion that China has been a “lawless” state.

1. Qin Dynasty’s Legalistic System

The State of Qin, the predecessor of the Qin dynasty (221–206 BCE), established a “rule-by-law” government during the Warring States Period (475–221 BCE). The theoretical basis was fa jia (the Legalistic school). King Xiao (381–338 BCE) employed the Legalist Shang Yang, to reform the government and increase the competitiveness of his state. According to Shang Yang, public law was “the most important device for upholding the power of the state.” He emphasized equal application and strict enforcement of the law, and “[t]he punishments did not spare the strong and great.” However, the crown prince was among the first offenders after the enactment and promulgation of the new law. The incident was probably set up to frustrate the reform effort and dare Shang Yang to punish the crown prince. The prince, as heir to the throne, was immune from physical punishment under the law of Qin. How the event unfolded was a big surprise to those who expected no more than a slap on the wrist. Shang Yang brought criminal punishment against the prince’s two tutors. The prince’s tutors, both aristocrats themselves, were high-ranking officials in the kingdom. To subject aristocratic officials with high status to criminal punishment was unthinkable before Shang Yang’s time. A dramatic change of attitude followed and everyone in the kingdom started to obey the new law. Ironically, Shang Yang almost became a victim of

123. Id. at 36.
124. Id. (quoting Chan-kuo ts’e [a.k.a. Zhan guo ce]).
125. See SIMA QIAN, RECORDS OF THE GRAND HISTORIAN: QIN DYNASTY 93 (Burton Watson trans., 1993) [hereinafter RECORDS OF QIN DYNASTY].
126. See id.
127. See id.
128. See id.
his own carefully designed legal system. When King Hui, the law-breaking prince, assumed the throne, his severely disgruntled former tutors and others accused Shang Yang of “plotting revolt.”129 During his escape, Shang Yang could not find lodging because “anyone giving lodging to a person who lack[ed] proper credentials” would be prosecuted under “Lord Shang’s laws.”130 Although Shang Yang was removed from power, King Hui retained the legal system.

Shang Yang’s laws established a system that provided rewards for meritorious conduct and punishments for wrongdoing.131 If the king and his heir were above the law at the beginning of Shang Yang’s implementation of the Legalistic system, King Zhao Xiang’s act seemed to indicate a more advanced stage where the law was binding on the sovereign as well. During the reign of King Zhao Xiang (324–251 BCE), there was a famine and one official suggested using the government’s food in reserve.132 The king refused because if the government offered food to people regardless of whether they had done good deeds, the law was not followed and disorder would ensue.133 The Legalists cited this example to illustrate the importance of prohibiting arbitrary government behavior. The story was reminiscent of President Grover Cleveland’s veto of the relief bill for the drought-stricken counties of Texas in 1887.134 Even though it was a district that strongly supported his Democratic presidency, Cleveland found “no warrant for such an appropriation in the Constitution,” and resisted the “prevalent tendency to disregard the limited mission of this power and duty” of the government.135

2. Han Dynasty’s Establishment of Confucian Orthodoxy

The Qin dynasty (221–206 BCE) collapsed just a few years after the death of the first emperor, and was superseded by the Han dynasty (202 BCE–220 CE). To recover from the misery of ongoing wars, the Han dynasty’s founder and his immediate successors adopted the official

129. See id. at 98.
130. Id. at 99.
131. 1 THE CAMBRIDGE HISTORY OF CHINA, supra note 122, at 36.
133. Id.
134. President Grover Cleveland Vetoes Disaster Relief Legislation (Feb. 16, 1887), in PRESIDENTIAL DOCUMENTS 164–65 (Fred L. Israel & Jim F. Watts eds., 2000).
135. Id. With respect to President Cleveland’s veto, federalism was also a factor for consideration.
policy of “wu wei,” which translates to “doing nothing,” pursuant to Taoism, and brought a laissez-faire social order, while “the essential Legalist apparatus continued to operate for central administration.” Confucianism rose to prominence during the reign of Emperor Wu (141 BCE–87 BCE), and imbued Legalism with the Confucian principles of righteousness and justice. The twin pillars of Chinese jurisprudence began to take shape.

The Confucian scholar Dong Zhongshu proposed a theoretical system that expanded the teachings of Confucius and Mencius. He resolved the thorny issues of power succession and government legitimacy, and filled the void left open by the Legalistic theory. The source of power under Legalism is “strength.” When the throne was succeeded by heirs, the strength-based power succession theory created an ideological dilemma. Self-preservation called for moral condemnation of any attempt by power contenders not in the hereditary line. However, such position cast doubt on the legitimacy of the dynastic founder who overthrew the preceding regime by force. According to Dong Zhongshu:

One becomes a king only after he has received the Mandate of Heaven. As the king, he will determine which day is to be the first day of the year for his dynasty, change the color of clothes worn at court, institute systems of ceremonies and music, and unify the whole empire. All this is to show that the dynasty has changed and that he is not succeeding any human being, and to make it very clear that he has received the mandate from Heaven.”

Heaven is “the master of all living things” and dictates “the norms” for the ruler. The ruler is the master of the state if he “maintains


137. “Indeed, the horse can carry a heavy load, pull the wagon, and make a distant trip, because of its muscular strength; the sovereign of ten thousand chariots and the ruler of one thousand chariots can rule over the world and subdue the feudal lords, because of their prestige and position. Thus, prestige and position are the muscular strength of the lord of men. Now suppose chief vassals gain the sovereign’s prestige and attendants abuse the august position. Then the lord of men will lose his strength. The lord of men who has lost his strength and is still able to keep the state, is none out of a thousand.” 2 HAN FEI, supra note 132, at 319.

138. CHAN, supra note 136, at 287 (quoting Chun qiu fan lu).

139. 1 SOURCES OF CHINESE TRADITION: FROM EARLIEST TIMES TO 1600, at 295–96 (Wm. Theodore De Bary & Irene Bloom eds., 2d ed. 2000) [hereinafter 1 SOURCES OF CHINESE TRADITION].
constant norms."140 Dong Zhongshu admonishes that “Heaven creates the people not for the king; Heaven creates the king for the people.”141 Since the ruler’s legitimacy depends on the effective maintenance of the mandate that is not inalienable, the establishment of a new reign is perfectly compatible with the succession of the throne by an heir so long as both acts conform to the norms set by Heaven.

Dong Zhongshu’s expanded Confucian theories impressed Emperor Wu, and Confucianism became the state orthodoxy.142 Emperor Wu established a state university training students in Confucian learning in 124 BCE.143 However, he did not abandon the practical Legalistic system that was largely a continuance of the previous Qin dynasty’s legal system.144

3. Reason and Fiat Harmonized

Lon Fuller noticed that the associations of “a government of men” with “natural reason” and “a government of laws” with “human fiat” are “curiously transposed” under the two “chief schools of legal philosophy in China”:

The Confucian school, which advocates a government of men, rests its whole theory on the notion that there is a natural order underlying human society. The natural principles governing man’s life in society are not, however, according to Confucian notions, to be attained by mere syllogistic reasoning, but primarily by an intuition that comes from study and virtuous living. Good government is therefore a government of good men who seek constantly to bring society into conformity with the natural principles that will enable it to live and prosper. The School of Laws [a.k.a. the Legalistic school], on the other hand, denies the existence of a natural order underlying human society. Nature says at the most only one clear thing about society, namely, that it is impossible without some kind of order. But this order must be created by man and incorporated in man-made laws, logically formulated and rigorously enforced.

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140. Id. at 296.
143. 1 Sources of Chinese Tradition, supra note 139, at 312.
144. See id. at 313.
The school advocating a government of men teaches that law is natural reason; the school advocating a government of laws that it is human fiat.\(^{145}\)

The description was very insightful regarding certain aspects of the two schools of thought, but it mechanically cast the two schools into separate categories of “reason” and “fiat.” The antinomy of “reason” versus “fiat” is fictional because neither the Confucian school nor the Legalistic school treats them as two contradictory concepts. The difficulty in comprehensive understanding arises from the changing meaning of Chinese words in different contexts and the mismatch in connotation for the corresponding English translation. For example, “rites” have strong religious connotation as an English word, while the Confucian conceptions of “rites” and “laws” overlap considerably.\(^{146}\) In Confucian terminology, “rites” are not religious in nature, but a set of internalized “norms of human conduct, including governance.”\(^{147}\)

The “natural principles” sought by the Confucian school are equivalent to a categorical imperative in Kant’s philosophy in the sense that these principles reflect “a natural order underlying human society” (categorical part) and guide good men’s conduct (imperative part), and thus already embody the concept of fiat in the form of a command.\(^{148}\) Even if we restrict the “natural principles” to represent only reason in “a government of men,” such government is still bound by precedents—another form of fiat. The precedents exert their influence in two layers: theoretical and practical. At the theoretical layer Mencius teaches that “Never has any one fallen into error, who followed the laws of the ancient kings.”\(^{149}\) The more practical layer is the laws enacted and the institutions established by the founder of the dynasty.\(^{150}\) The dynastic founder’s laws and institutions carried the

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147. *Id.* at 8, 10 (“the actual institutions cited as representative of the humane rule of the sages, for example, the enfeoffment system, the land distribution system, the school system and the like, are all institutions identified with and included in the classical ritual texts as ‘rites.”


binding authority for his successors.\textsuperscript{151} Similar to the common law principle of \textit{stare decisis}, the exemplary models established by the dynastic founders or the ancient kings and often expressed in the form of “rites” constituted a highly persuasive, sometimes mandatory, authority for the successors in their governance.\textsuperscript{152}

As discussed earlier, the Legalistic school developed a form of institution distinct from the Confucian ideals. Reason and fiat are reconciled in a different way from the Confucian approach. Law is human fiat in its source of authority and reason in its application. Contrary to Mencius’s teaching of following precedents, Han Fei discounts the importance of precedents and opens a path for reason to work into fiat: “[T]he sage neither seeks to follow the ways of the ancients nor establishes any fixed standard for all times but examines the things of his age and then prepares to deal with them.”\textsuperscript{153}

The deficiency of the Western rule-of-law model, as illustrated in the discussion of judicial independence in the context of American jurisprudence, is a result of the exclusion of culturally and historically determined human factors, probably intentionally for the purpose of objectivity. The Confucian and Legalistic approaches do not shy away from the human aspect, and provide two alternative ways of compromise between law as reason and law as human fiat. The dichotomy between “a government of men” and “a government of law” is not absolute.

C. Fundamental Principles of the Chinese Rule of Law

Chinese jurisprudence is a very complicated system, and it has been evolving in response to historical circumstances. There are five fundamental principles that are often misunderstood or neglected in the Western legal scholars’ discussion about China.

1. The Authority of Precedents

The establishment of Confucian orthodoxy means the adoption of Confucian precedents that include teachings by the sages and canonized historical records. During the Han dynasty (202 BCE–220 CE), \textit{Chun qiu}, one of the Confucian classics, was directly used as a binding

\textsuperscript{151} Id. De Bary attributes the binding power to the “filial obligation to perpetuate the regime and its founding institutions” under the Confucian doctrine. \textit{Id.}

\textsuperscript{152} See \textit{id.}

\textsuperscript{153} 2 \textsc{Han Fei}, supra note 132, at 276.
authority in adjudication when no legal code was on point.\textsuperscript{154} The practice was initiated by the great Confucian scholar Dong Zhongshu and followed to a lesser degree in later dynasties.\textsuperscript{155}

Precedents are double-edged swords, serving the purposes of both continuing the existing system and reforming. This flexibility comes from the process of reasoning by example. Reasoning by example is “neither like reasoning from part to whole, nor like reasoning from whole to part, but rather reasoning from part to part . . . and does not draw its proof from all the particular cases.”\textsuperscript{156} What constitutes authoritative precedents can be outcome determinative.

The political battles between the conservatives and the reformers during the Song dynasty (960–1279 CE) highlighted the contention about precedents. Learning from the failure of earlier reform efforts and supported by the emperor, the reformist Prime Minister Wang Anshi (1021–1086 CE) attributed various social problems to the failure to “adopt the governmental system of the ancient kings,” and he reinterpreted classical texts to provide legitimacy for the reform efforts.\textsuperscript{157} In addition he suggested following the ancient kings’ “general intent” rather than recreating the same ancient institutions because of the long time span and different circumstances.\textsuperscript{158} In contrast, his political opponents, a group of equally capable scholars and historians, emphasized the precedential value of the history of the Han (202 BCE–220 CE) and Tang (618–907 CE) dynasties because their approach favored the status quo.\textsuperscript{159}

2. Legitimacy of Power and Its Succession

In contrast to the divine right of kings in Europe, the aura of the emperor’s title was more of an after-the-fact gloss than the guiding principle of imperial China. When a young man named Xiang Yu, who later led one of the rebellion armies to overthrow the Qin dynasty (221–206 BCE), watched the procession of the first emperor of Qin, he


\textsuperscript{157} 1 Sources of Chinese Tradition, supra note 139, at 612–13 (quoting Wang Anshi’s Memorial to Emperor Renzong (1058)).

\textsuperscript{158} Id. at 613.

\textsuperscript{159} See id. at 631–36.
said to his uncle: “This fellow could be deposed and replaced!” At the end of the Qin dynasty, another rebellion leader, Chen She, defiantly proclaimed: “Kings and nobles, generals and ministers—such men are made, not born!”

Confucianism never granted an absolute divine right to the king. Legitimacy of the throne depends on the receipt of the mandate of Heaven that sees and hears as the people do, and maintenance of “constant norms” of Heaven. Mencius expressly stated: “The people are the most important element in a nation; the spirits of the land and grain are the next; the sovereign is the lightest.” According to the idealized rule of succession, the throne should go to “the worthiest,” regardless of the bloodline. The following text from Mencius represents the exemplary precedents for the later rulers:

[King] Yao presented Shun to Heaven, and Heaven accepted him. . . . Heaven gave the throne to him. The people gave it to him. Therefore I said, “The sovereign cannot give the throne to another.” . . . Seventeen years elapsed, and [King] Shun died. When the three years’ mourning was expired, Yu withdrew from the son of [King] Shun to [the city of] Yangcheng. The people of the kingdom followed him just as after the death of [King] Yao, instead of following his son, they had followed Shun. [King] Yu presented Yi to Heaven. Seven years elapsed, and [King] Yu died. . . . The princes, repairing to court, went not to Yi, but they went to Qi [King Yu’s son]. Litigants did not go to Yi, but they went to Qi, saying, “He is the son of our sovereign;” the singers did not sing Yi, but they sang Qi, saying, “He is the son of our sovereign.” . . . [T]hat Qi was able, as a man of talents and virtue, reverently to pursue the same course as [King] Yu; that Yi assisted [King] Yu only for a few years, and had not long conferred benefits on the people; . . . all this was from Heaven, and what could not be brought about by man.


161. Id. at 3.

162. 2 LEGGE, supra note 149, at 357 (“Heaven sees according as my people see; Heaven hears according as my people hear.”); 1 SOURCES OF CHINESE TRADITION, supra note 139, at 295–96 (quoting Chun qiu fan lu).

163. 2 LEGGE, supra note 149, at 483.

164. Id. at 355–56, 358–59 (modified transliteration of names).
The default rule for succession within a dynasty is similar to the European male primogeniture rule: “Among the sons of the wife proper, the succession devolved on the eldest, and not on the worthiest and ablest. Among a ruler’s sons by other ladies of his harem, the succession devolved on the noblest, and not on the eldest.”165 In practice, the primogeniture rule can best be described as a starting point subject to further considerations. At the death of the first emperor in Chinese history, the younger son plotted with his advisors and fabricated imperial documents to remove the crown prince from the succession line by accusing him of incompetence and lack of filial obedience, in other words, not worthy of the throne.166 The earlier mentioned Emperor Wu of the Han dynasty (202 BCE–220 CE) only became the heir after his father removed his elder brother as the crown prince.167

The overthrow of a sovereign by force could always be justified by a new mandate of Heaven. A peaceful transition of power to someone other than the emperor’s heir posed a bigger challenge. Besides popular support, a sense of legitimacy was indispensible under Chinese jurisprudence. It was difficult to have all the required elements aligned properly, so such peaceful transition did not occur very often. Wang Mang (45 BCE–23 AD) was the first to achieve this in imperial China. He was a relative of the royal consort family of the Han dynasty (202 BCE–220 CE), and worked his way up to the acting emperor for a hand-picked child emperor.168 To complete the last step to the throne, his supporters began to circulate omens conveying the message that Wang Mang had the mandate of Heaven.169 Eventually he took the final step to the throne by declaring the Han defunct and ascending the throne himself.170 Although Wang Mang was generally considered a usurper in Chinese history, later throne contenders often emulated his transition method to establish legitimacy.

3. Merit-Based Selection of Government Officials

Democracy is often overlooked in the study of Chinese history. Probably because of the bad memories from military defeats and

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166. See RECORDS OF QIN DYNASTY, supra note 125, at 190–91.
167. See RECORDS OF HAN DYNASTY, supra note 160, at 319.
168. See THE CAMBRIDGE HISTORY OF CHINA, supra note 122, at 226, 229.
169. Id. at 231.
170. Id.
economic exploitation during the late Qing dynasty (from the First Opium War to the end of the dynasty in 1911), even Chinese scholars tend to summarily categorize imperial China as “feudal” and automatically exclude the topic of democracy from dynastic China. although the Chinese phrase for democracy, min zhu, was of a later making, the democratic concept and practice have long been discussed in the classical texts. The succession of the throne was hardly democratic in practice, but the selection and promotion process of the officialdom was very much so.

The Confucianism-Legalism based government system required a team of capable officials to be the administrators at various levels, from the prime minister to the local magistrates. During the Spring and Autumn period (1077–771 BCE), the kings relied on hereditary aristocrats to staff the government. In the Han dynasty (202 BCE–220 CE), the government first relied on military exploits, and later developed a recruitment system “based upon objective standards of merit” such as “education, administrative experience, recommendation, and examination.” The problem of this selection method was that over time prestigious and influential families monopolized the officialdom with their recommendation power. The system of ke ju, which refers to the selection of government officials by subject matter examinations and is usually translated as “imperial examination system,” was a product of learning and adjustment from past errors. The institution began in the Sui dynasty (581–618 CE), was significantly improved during the Tang dynasty (618–907 CE), and was continuously refined afterwards. In the Tang dynasty, the examination began to include the test on “the knowledge of codes, judgment and legal theories” because adjudication was part of the official duty. Blind grading was used to ensure fairness and breach of confidential examination questions would result in criminal punishment.

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172. Chen Duxiu first used “Mr. De” for the word “democracy” based on the phonetic translation in 1919. See Chen Duxiu, Ben zhi zui an zhi da bian shu, 6 Xin qing nian 10, 10 (1919), available at http://fylib.znufe.edu.cn/new/ShowArticle.asp?ArticleID=4172. Later it was discovered that the Meiji Reformers in Japan already attached kanji to various Western political terms, including democracy. Since then the same Chinese characters, min zhu, were used for “democracy.”


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The most important feature of the examination system was the eligibility of the candidates. The application did not discriminate on social status or personal wealth. According to the groundbreaking research by Ping-ti Ho, about half of the officials selected from ke ju in the Ming dynasty (1368–1644 CE) were from non-elite families.\textsuperscript{176} These officials would carry out government functions across the country, including the administration of law. A lot of famous scholar-officials in Chinese history indeed came from ordinary peasant families.

The ke ju institution was abolished after the demise of the Qing dynasty in the early twentieth century, and its importance was dismissed as a governing tool by the dynastic rulers. The criticism was more of a political tactic than a philosophical argument because the Confucian teaching holds that the source of the governing power is the people. Even if some rulers had adopted the institution out of the practical reason of maintaining the power, the institution took on a life of its own and kept the imperial power in check. Equal participation and the merit-based selection process produced an officialdom that represented the interests of the population at large. The emperor could not fix the results of the examinations. The scholar-officials acted in accordance with their ingrained Confucian principles, and these principles served a function similar to the statutory limitation and judicial guard on executive power in the West. The phrase “checks and balances” was not used in Chinese political theories because it would have suggested inherently inharmonious relationship between the emperor and officials, but the emperor was obligated to heed the advice from the scholar-officials and was prohibited from making whimsical decisions. Officials who were willing to risk their title or even life to criticize the emperors and the government policies were highly celebrated throughout the recorded history.

4. Supervision and Impeachment

One branch of the Legalistic school advocates “tact” in governance:

Tact is the means whereby to create posts according to responsibilities, hold actual services accountable according to official titles, exercise the power over life and death, and examine the

\textsuperscript{176} Non-elite families were defined as the families that produced no office holders or very low ranking officials in the three preceding generations. Ping-ti Ho, The Ladder of Success in Imperial China: Aspects of Social Mobility, 1368–1911, at 107–25 (Science Editions 1964) (1962).
officials’ abilities. It is what the lord of men has in his grip. Law includes mandates and ordinances that are manifest in the official bureaux, penalties that are definite in the mind of the people, rewards that are due to the careful observers of laws, and punishments that are inflicted on the offenders against orders. It is what the subjects and ministers take as model. If the ruler is tactless, delusion will come to the superior; if the subjects and ministers are lawless, disorder will appear among the inferiors. Thus, neither can be dispensed with: both are implements of emperors and kings.\footnote{177}

Political calculation and maneuvering have always been part of the art of governance. Tact is a useful tool to check power abuse at various levels of the government. The Chinese system divided responsibilities to “check the growth of a monopoly of power,” but the division did not remain constant.\footnote{178} The Han dynasty (202 BCE–220 CE) set up “Three Excellencies”—the chancellor, the imperial counsellor and the supreme commander—to head the most senior level of the government.\footnote{179} The supreme commander led the national army, and the general officers at a lower level carried out specific military duties.\footnote{180} In the civil service, the chancellor was senior to the imperial counsellor, and stood “second only to the emperor.”\footnote{181} The imperial counsellor, although inferior in ranks, was authorized to examine the chancellor’s conduct.\footnote{182} One of his assistants was specifically tasked to “[check] on the performance of all officials in the central government and [impeach] those who were delinquent.”\footnote{183} The censorial officials had the authority to “submit their impeachment memorials directly to the throne, bypassing routine communication channels,” and “enjoyed considerable independence of action and high prestige.”\footnote{184} Separate reporting channels served as institutional checks on the chancellor’s monopoly of power.

The Chinese mechanism of checks and balances is distinct from that

177. 2 HAN FEI, supra note 132, at 212.
179. Id. at 19–20.
180. See id. at 22; 1 THE CAMBRIDGE HISTORY OF CHINA, supra note 122, at 468.
181. LOEWE, supra note 178, at 20.
182. 1 THE CAMBRIDGE HISTORY OF CHINA, supra note 122, at 500.
183. Id.
184. CHARLES O. HUCKER, CHINA’S IMPERIAL PAST: AN INTRODUCTION TO CHINESE HISTORY AND CULTURE 162 (Stanford Univ. Press 1975).
of the American tripartite system. The Chinese division of power is more practical than philosophical. Behind the difference are the cultural-specific views on the grant of trust. To achieve the same end of preventing power abuse, the American approach grants partial trust while the Chinese approach tends to grant the whole trust and then verify its proper use.

A seventeenth century scholar, Huang Zongxi (1610–1695 CE), proposed a parliamentary-like system that better suited the Confucian ideal of governance as an alternative to the traditional dynastic rule. Like earlier reformers such as Wang Anshı (1021–1086 CE), Huang Zongxi invoked the authority for reform under the auspices of ancient precedents. He honored the law of the ancient kings, but criticized the laws of later times as failing to “safeguard the world for the sake of all-under-Heaven.” To guard against the sovereign’s “selfishness,” he proposed a government staffed by ministers “for all the people and not for one family.” More than educational institutions, the schools would provide public forums to debate government policies. The Rector of the Imperial College was an equal to the prime minister and could discuss any issues of the administration. Unfortunately, the sovereign of the time was Manchu, a pastoral people consisting of nomadic tribes. The Manchu leaders apparently were not capable of appreciating the prescience of Huang Zongxi’s political institution, and retained similar institutions of the preceding Ming dynasty (1368–1644 CE).

5. Nonpartisan Historical Recordings

In the United States, the focus of the freedom of speech is on contemporary speech. In China, the battle lines are in the historians’ realm. Nonpartisanship is a Confucian virtue. Although the Chinese historians were government officials, they abided by the time-honored tradition of truthful recording of historical events, and sometimes paid with the ultimate price. Several historians had been canonized in the

187. Id. at 93–94.
188. Id. at 107.
189. Id.
Confucian classics:

[Minister Cui Zhu killed Duke Zhuang in an ambush. He set up a new ruler and became the prime minister.] The grand historian wrote in his records: “Cui Zhu assassinated his ruler.” Cui Zhu had him killed. The historian’s younger brother succeeded to the post and wrote the same thing. He too was killed, as was another brother. When a fourth brother came forward to write, Cui Zhu finally desisted. Meanwhile, when the assistant historian living south of the city heard that the grand historians had been killed, he took up his bamboo tablets and set out for the court. Only when he learned that the fact had been recorded did he turn back.191

Martyrdom was admired, but not required. Great historians were more concerned about preserving the works for later generations. Containing scathing criticism of a sitting emperor, Shi ji (Records of the Grand Historian) was not circulated until the author’s grandson’s time.192

No ruler has outlived the critique of the historians. The above mentioned Wang Mang ruled for 15 years, but he could not escape the fate of being described as a usurper by later historians. The practice of designating the official history of a previous dynasty during a later dynasty further shields the historians from contemporary political manipulations. As of today, there are 24 “Official Histories” beginning with Shi ji. Because of the high standards set by Shi ji, the designation of “Official History” is a rigorous process. The most comprehensive historical recordings of the Qing dynasty (1644–1911 CE), Qing shi gao, failed to receive the official designation because of the inconsistent writing styles, factual errors and perspective biases.193

Besides the precedential value of truthful historical recordings, independent assessment by the historians also exerted strong influence on government conduct. Mencius said: “Confucius completed the


192. See BURTON WATSON, SSU-MA CH’IEN: GRAND HISTORIAN OF CHINA 67 (1958) (“After Ch’ien [a.k.a. Sima Qian] died, his book came gradually to light in the time of emperor. In the time of Emperor Hsuan, Ch’ien’s grandson by his daughter, the Marquis of P’ing-t’ung, Yang Yun, worked to transmit and make known his work, so that finally it circulated widely.”) (translating the biography of Shi ji’s author Sima Qian).

‘Spring and Autumn,’ and rebellious ministers and villainous sons were struck with terror.” Like a criminal code, an independent assessment by historians does not prevent bad government, but it certainly makes the perpetrators pause before committing any wrong.

D. Common Ground Between the Chinese and Western Rule-of-Law Models

Liberal democracy comes with a set of values that have been associated with the rule of law for a long period of time. The advocates of the substantive theory believe that these values are inseparable from the rule of law. The formal theory highlights the procedural aspects of the rule of law, but we still cannot completely ignore the cultural and historical context—for example, the influence of American due process on Lon Fuller’s ideal legal system. It is no surprise that China presents a sui generis case for the Western rule-of-law model because of the different cultural and philosophical context. However, the difference does not prevent us from seeking universal principles of the rule of law:

When anthropologists like Richard Shweder and Alan Fiske survey moral concerns across the globe, they find that a few themes keep popping up from amid the diversity. People everywhere, at least in some circumstances and with certain other folks in mind, think it’s bad to harm others and good to help them. They have a sense of fairness: that one should reciprocate favors, reward benefactors and punish cheaters. They value loyalty to a group, sharing and solidarity among its members and conformity to its norms. They believe that it is right to defer to legitimate authorities and to respect people with high status. And they exalt purity, cleanliness and sanctity while loathing defilement, contamination and carnality.

The exact number of themes depends on whether you’re a lumper or a splitter, but Haidt counts five—harm, fairness, community (or group loyalty), authority and purity—and suggests that they are the primary colors of our moral sense. Not only do they keep reappearing in cross-cultural surveys, but each one tugs on the moral intuitions of people in our own culture.195

194. 2 LEGGE, supra note 149, at 283.
Based on the anthropological research, some elements of the liberal democratic principles such as freedom and equality are indeed shared cross-culturally even though they may have a different form or expression.

While the Chinese rule-of-law model is distinct from the Western model, the moral “primary colors” suggest several universal principles. Both the Chinese and Western rule-of-law models endorse the supremacy of the will of the people, denounce absolute power and employ mechanisms to check power aggrandizement. The vaguely-defined “Asian values” that condone authoritarian rule is nothing more than a misunderstanding of the fundamental principles of the Chinese rule of law.196

**CONCLUSION**

Rule-of-law projects over the decades produced laundry lists of things to do, but the rule of law is an area of great conceptual and practical complexity, and the functioning of law has “the tremendous particularity of the legal systems.”197 Templates and checklists used by aid programs are efficient tools for practical implementation. At a certain point, we need to examine what is under the rubric of the rule of law, how these components work together, whether they actually worked in the past, and whether the presumptions are still true and circumstances analogous. Dogmatic insistence on a framework that does not conform to reality is probably a sign for lack of sophistication or lack of sincerity.

American jurisprudence illustrates the inconvenient truth that reality does not have the neatness of theory. The important rule-of-law principles of an independent judiciary and the equal application of justice certainly cannot be reduced to an easy yes or no answer, as in the marketing-survey-like questionnaire of the World Bank’s governance project. The law means “the prophecies” of its actual practice, and “nothing more pretentious.”198 The discrepancy between the rule-of-law model and reality does not necessarily undercut the rule-of-law concept. It is simply a reminder that the model is not perfect yet.

196. See generally WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFLICT COMMUNITARIAN PERSPECTIVE 1–16 (Harvard Univ. Press 1998) (analyzing the specious connection between “Asian values” and “Confucian values,” and suggesting that Confucianism is compatible with Western liberal democratic values and human rights).
197. Carothers, supra note 11, at 26.
People’s Republic of China began its efforts of legal reform and attendant legislation “after the ascendency of Deng Xiaoping and his pragmatic economic policies in the late 1970s.” Over the years, China has increased the level of cooperation in the field of law with foreign countries. In the economic sphere, China borrowed heavily from the Western commercial laws in areas of joint-venture, foreign direct investment and antitrust. In 1997, the United States and China agreed to establish a joint liaison group to pursue cooperative activities in legal exchanges. The program included “exchanges of legal experts; training of judges and lawyers; strengthening legal information systems and the exchange of legal materials; sharing ideas about legal assistance; consulting on administrative procedures; and strengthening commercial law and arbitration.”

However, the referencing of foreign legal codes in the past three decades does not indicate a void of rule-of-law theories and practices in Chinese history, even though this misconception is quite common in the legal discourse relating to China. It is worth noting that the foreign borrowing concentrated in the economic sphere, such as foreign investment and trade law, where the relevant laws were indeed underdeveloped or non-existent before Deng’s economic reform. The political order, on the other hand, is well developed and deeply rooted in the national ethos. The often-raised complaint about the slow progress in political reform reveals a false presumption that the Chinese rule of law is a less developed Western model. The fact of the matter is that the Chinese rule of law is so firmly established that neither the political upheavals nor the economic reforms significantly altered “the bureaucratic state apparatus” built upon Confucianism and Legalism, a form of Chinese “constitutionalism.” Different as they are, after in-depth comparison, the Chinese and Western rule-of-law theories lead to proof of universal principles of democracy and republican governance.

200. See id.
202. Id.
204. See De Bary, supra note 136, at 9.