Constitutional Reform on Taiwan: Fulfilling a Chinese Notion of Democratic Sovereignty?

Piero Tozzi

Recommended Citation
Piero Tozzi, Constitutional Reform on Taiwan: Fulfilling a Chinese Notion of Democratic Sovereignty?, 64 Fordham L. Rev. 1193 (1995). Available at: https://ir.lawnet.fordham.edu/flr/vol64/iss3/20
CONSTITUTIONAL REFORM ON TAIWAN: FULFILLING A
CHINESE NOTION OF DEMOCRATIC
SOVEREIGNTY?

Piero Tozzi*

INTRODUCTION

In an 1824 notebook entry on the Celestial Empire, the celebrated American poet and Transcendentalist Ralph Waldo Emerson remarked:

The closer contemplation we condescend to bestow, the more disgustful is that booby nation. The Chinese Empire enjoys precisely a Mummy's reputation, that of having preserved to a hair for 3 or 4,000 years the ugliest features in the world. . . . China, reverend dullness! hoary ideot!, all she can say at the convocation of nations must be—"I made the tea."1

While today critics seldom express such benighted sentiments so stridently, echoes of Emerson's condescension have rippled through Western views of the Chinese tradition in particular and of the Eastern tradition in general. Western historians have regarded the East as historically in the thrall of "oriental despotism,"2 against which the little city-states of Greece must forever reenact the battle of Marathon.3 Such a world view may posit that humanism lacks indigenous roots in the barren soil of Asia, soil from which humanism's most evi-

---

* I would like to thank Professor Frank Chiang and Jack Chen for their substantive comments on prior drafts of this Note. I would also like to thank Hsiu-mei Tung and Jui-hua Chang for their help in translating Chinese language sources.


2. Those who have shared this view include Montesquieu, for whom China was a despotic society where fear held sway. Donald M. Lowe, The Function of "China" in Marx, Lenin and Mao 1 (1966). For critiques of Western images of the Orient, see Edward W. Said, Orientalism (1978) (dealing primarily with Western reactions to the Islamic "Near East"). For a discussion of China in the eyes of Western historians, see Cohen, supra note 1.

3. The Greeks fought the battle of Marathon in 490 B.C. against the Persian armies of Darius. The theme of the Greeks struggling to maintain freedom from Eastern despotism runs throughout Herodotus's The Persian Wars, illustrated in the following passage:

[A] Persian is about to throw a bridge over the Hellespont, and bringing with him out of Asia all the forces of the East, to carry war into Greece,—professing indeed that he only seeks to attack Athens, but really bent on bringing all the Greeks into subjection. . . . [A]id those who would maintain the freedom of Greece . . . . For do not cherish a hope that the Persian, when he has conquered our country, will be content and not advance against you. Herodotus, The Persian Wars 559 (George Rawlinson trans., The Modern Library 1942) (n.d.).
dent political manifestation—democracy—could never spring forth.\textsuperscript{4} Certain legal commentators, even those well-versed in the Chinese tradition, likewise claim that China lacks a concept of democratic sovereignty.\textsuperscript{5}

Broad caricatures and well-intentioned generalizations do not adequately describe the Chinese political tradition. While this tradition unmistakably has roots independent of Western democratic, rights-emphasizing theories,\textsuperscript{6} it is hardly bereft of a notion of the people as ultimately sovereign. In classical Chinese thought, particularly that of the Confucian theorist Mencius,\textsuperscript{7} an emperor legitimately wielding the “Mandate of Heaven” ruled for the benefit of the people; if he ceased to place their welfare paramount, popular revolt was justified.\textsuperscript{8} Though this idea contended with the totalitarian theories of the Legalist Han Fei-tzu\textsuperscript{9}—an alternative tradition running throughout Chinese history which some argue approximates modern totalitarianism\textsuperscript{10}—

\textsuperscript{4} A cynic would note that the link between democracy and humanism can be fragile at times. Hitler, after all, assumed the chancellorship of Germany on January 30, 1933, in a perfectly constitutional manner and in the wake of the disarray amongst the other political parties of Weimar Germany. See William L. Shirer, The Rise and Fall of the Third Reich 150-87 (1959). Thracymachus, in Plato’s Republic, also maintains that democracies are as capable of making despotic laws as autocracies are. Plato, The Republic of Plato 18 (Francis M. Comford ed. & trans., Oxford Univ. Press 1941) (n.d.). Cf. The Federalist No. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961) (arguing that “a pure democracy . . . can admit of no cure for the mischiefs of faction”).

\textsuperscript{5} See, e.g., Liwei Wang, The Chinese Traditions Inimical to the Patent Law, 14 Nw. J. Int’l L. & Bus. 15, 61 (1993) (stating that “[i]n traditional China, people had no idea of ‘democracy’ or ‘popular sovereignty’” and that the “[e]mperor with the divine right was the master of the people”). Such statements paint with too broad a brush. See discussion infra part I.B.

\textsuperscript{6} Representative of liberal, individual rights-emphasizing views are those held by modern theorists such as Ronald Dworkin. See, e.g., Ronald Dworkin, Taking Rights Seriously at xi (1977) (defining individual rights as “political trumps held by individuals” capable of checking actions taken by the political community at large). Others posit that the Western democratic tradition is much less individualistic and more communitarian than the late twentieth-century world view of the American Civil Liberties Union would have it. See, e.g., Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse at x (1991) (stating that current American rights talk is marked by “its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities”); see also Barry A. Shain, The Myth of American Individualism: The Protestant Origins of American Political Thought (1994) (arguing that a reformed Protestant communalism that eschewed individualism formed the basis of the American nation’s founding political concepts).


\textsuperscript{8} See discussion infra part I.B.

\textsuperscript{9} The most important of his writings are collected in Han Fei Tzu, Basic Writings (Wm. Theodore de Bary ed. & Burton Watson trans., Columbia Univ. Press 1964) (n.d.).

\textsuperscript{10} See, e.g., Arthur Waley, Three Ways of Thought in Ancient China at ix (Doubleday Anchor Books 1956) (1939) (stating that Legalism “as expounded by Han Fei Tzu, finds so close a parallel in modern Totalitarianism that the reader, so far from being puzzled by anything remote or unfamiliar, will wonder whether these pretended extracts from a book of the third century B.C. are not . . . cuttings from a
Mencius's persistent presence in Chinese theories of the state should dispel any notions that the Chinese political tradition lacked any reference to popular sovereignty. While this humanistic Confucian vein was often submerged throughout China's dynastic history, the ideals of Sun Yat-sen's Republican Revolution of 1911 drew heavily on indigenous precursors. Sun's Three Principles of the People (Nationalism, Democracy, and "People's Livelihood") attempted to splice Western republicanism and Lincolnian rhetoric with the Chinese tradition. Sun's theories of government found expression in the 1947 Constitution of the Republic of China ("ROC"), which was for the most part suspended prior to the Communist victory of 1949 and the ensuing relegation of the government of the ROC to offshore exile on Taiwan. From this current newspaper); see also Derk Bodde & Clarence Morris, Law in Imperial China 18 (1957) (calling the Legalists "genuine totalitarians"). Such a view might posit that Maoism has its origins in the Chinese classical tradition as well, albeit one very different from Confucian humanism.

11. One long-time commentator on Taiwan's democratic evolution, John F. Copper, refers to the classical political tradition as "certainly not an undemocratic tradition." John F. Copper with George P. Chen, Taiwan's Elections: Political Development and Democratization in the Republic of China 8 (1984).

12. Born in 1866 in the fishing village of Ts'ui-heng in Kwangtung province, Sun's given name was Wen. Harold Z. Schiffrin, Sun Yat-sen and the Origins of the Chinese Revolution 10 (1970). "Yat-sen" is the transliteration from the Cantonese dialect of the name he adopted following his baptism in 1884. Id. at 16.

Most Chinese historical names mentioned in this Note will be given in the Chinese order, with last name preceding the given (e.g., Mao Tse-tung, not Tse-tung Mao). Furthermore, the romanizations used in this Note for Chinese names and terms will usually follow the archaic Wade-Giles system, as it is the phonetic system used in most of the sources consulted. Names of authors, however, will appear as they are published.

13. See infra part II.B.

14. Compare Sun Yat-sen, San Min Chu I: The Three Principles of the People 52 (Frank W. Price trans., n.d.) (remarking that "government is a thing of the people and by the people") with Abraham Lincoln, Address at Gettysburg (Nov. 19, 1863), in Living American Documents 186, 187 (Isidore Starr et al. eds., 1971) ("[T]hat government of the people, by the people, and for the people, shall not perish from the earth."); cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) ("The government proceeds directly from the people; is 'ordained and established' in the name of the people . . . .").

15. One biographer of Sun has written that "His dominant ideas were derived from Western political thought, particularly the theories of republicanism and socialism, but they were definitely colored by ethical Confucianism." C. Martin Wilbur, Sun Yat-sen: Frustrated Patriot 7 (1976). This Note seeks to draw attention to the Confucian roots of Sun's concept of democracy.

16. Although the National Assembly adopted this constitution on December 25, 1946, because it did not go into effect until December 25 of the following year, it will be referred to as the 1947 Constitution.

17. ROC Const. ch. I, art. 1 ("The Republic of China, founded on the Three Principles of the People, shall be a democratic republic of the people, to be governed by the people, and for the people.").

18. The use of the preposition "on," rather than "in," when referring to Taiwan is intentional, because neither the international community nor the governments on Taiwan and in mainland China regard the island as an independent entity, which use of
island redoubt Generalissimo Chiang Kai-shek and his Kuomintang party ruled supreme for decades, backed by martial law, and the Republic's constitution stagnated from disuse.¹⁹

Not until July 15, 1987, when Chiang Ching-kuo, son of the Generalissimo, lifted martial law, did the 1947 Constitution truly begin to realize its promise.²⁰ Since then, the government of Taiwan has embarked on a program of widespread electoral liberalization and constitutionalist revival, culminating in constitutional amendments effecting direct popular sovereignty, most notably a 1994 provision permitting direct popular election of the president and vice president by 1996.²¹

the word "in" would imply. Both the Republic of China on Taiwan and the People's Republic of China on the mainland traditionally have claimed to be the legitimate government of all China. Commentary in the *Restatement (Third) of the Foreign Relations Law of the United States* clarifies that: "[A]n entity is not a state if it does not claim to be a state. For example, Taiwan might satisfy the elements of the definition in this section, but its authorities have not claimed it to be a state, but rather part of the state of China." Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. f (1987).

Government officials from Taiwan often refer to "the Republic of China on Taiwan." See, e.g., Lien Chan, *The Republic of China on Taiwan Belongs in the United Nations*, Orbis, Fall 1993, at 633 (stating the case for United Nations recognition). The ostensible reason for this appellation is to help foreigners differentiate between the government on Taiwan and the government of the People's Republic of China on the mainland. Huang Wen-ling, *ROC's Name to Stay the Same: Hu*, China News, Oct. 12, 1995, at 1. Mainland officials remain leery of linguistic nuances that may imply that there is an independent state of Taiwan. See Qian Qichen, Speech at a Luncheon at the U.S. Foreign Policy Association (Sept. 29, 1995), in PR Newswire, Sept. 29, 1995, available in WESTLAW, Wires (speaking in his capacity as Vice Premier and Foreign Minister of mainland China). Opposition politicians on Taiwan who are members of the Democratic Progressive Party are inclined toward Taiwan's independence, and hence are likely to favor use of the word "in." See infra note 244.

The author of this Note does not want to get embroiled in intractable political disputes over names. Much of this Note addresses the constitutional history of the Republic of China while it governed the mainland, making use of the word "Taiwan" to identify the government at that time incongruous. The constitution will be identified as that of the Republic of China throughout. When referring to post-1949 developments, "Taiwan" will sometimes be used to refer to this offshore political entity, while elsewhere, "Republic of China" better lends itself to the narrative. See also discussion infra part III.B (exploring the issue of Taiwan's identity in greater detail).

¹⁹. See infra notes 242-58 and accompanying text. The Kuomintang is commonly referred to by the initials KMT; throughout this Note, both terms will be used interchangeably.

²⁰. Some have suggested that the thawing began in the 1970s. See, e.g., Hung-mao Tien, *Taiwan's Evolution Toward Democracy: A Historical Perspective*, in *Taiwan: Beyond the Economic Miracle* 3, 9 (Denis F. Simon & Michael Y. M. Kau eds., 1992) (stating that significant political change began in the 1970s with the recruitment of native Taiwanese by then Vice President Chiang Ching-kuo into positions of real significance within the Kuomintang). Also significant was the ruling party's toleration of the formation of the opposition Democratic Progressive Party on September 28, 1986. See id. at 10.

²¹. This provision reads: "The President and Vice President shall be directly elected by the entire populace of the free area of the Republic of China. This shall be effective from the election for the ninth-term President and Vice President in 1996." ROC Const. art. 2, as amended Aug. 1, 1994.
A National Affairs Conference convened by President Lee Teng-hui in July 1990, partially in response to student demonstrations for greater political liberalization and constitutional reform, was particularly important in speeding the reform process.

This Note examines the democratization and constitutional reform on Taiwan during the past decade in light of the Chinese political tradition, and considers whether the reform fulfills an indigenous, anticipative Chinese notion of democratic sovereignty. Part I revisits classical Chinese thought, contrasting the Confucian tradition exemplified by Mencius with its Legalist counterpart, as they are the two traditions most relevant to a discussion of modern-day democracy and autocracy. Part II examines the revolutionary ideology of Sun Yat-sen and the reasons for the stillbirth of its democratic ideals. Part III explores the republican revival of the late 1980s and the 1990s on Taiwan as well as hurdles confronting the emergence of truly democratic government. Finally, part IV discusses the significance of the development of a Chinese notion of democratic sovereignty for the Chinese people and for Western observers who view the Chinese political tradition as completely lacking a concept of democratic sovereignty. This Note concludes that the democratic and constitutional evolution on Taiwan, though novel for the Chinese and the non-Western world and brought about in large part due to interaction with the West, is significant because it revives and fulfills a latent, indigenous tradition of popular sovereignty.

To preclude confusion over terminology, it should be noted at the onset that the Chinese notion of democratic sovereignty, certainly in the classical thought of Mencius but also at present, is much less individualistic and more group-oriented than modern, rights-emphasizing Western theories. Citations throughout this Note to works in the

---


23. Thus answering rhetorical questions of concern to the editors of a certain illustrious Gotham gazette, viz. “Why does democracy—to this day—face such an uphill struggle in non-Christian, non-Western societies? ... Are non-Western civilizations ever going to become democratic?” World History: A Non-P.C. Version, N.Y. Post, Nov. 28, 1994, at 24.

24. Although present developments on Taiwan are unmistakably democratic, a less-liberal modern political system based in part on Confucian communitarian values has been advocated by some proponents of a uniquely Asian form of societal governance, most notably Singapore’s authoritarian technocrat, Lee Kuan-yew. See Fareed Zakaria, Culture is Destiny: A Conversation With Lee Kuan Yew, Foreign Affairs, Mar./Apr. 1994, at 109, 113 (“The fundamental difference between Western concepts of society and government and East Asian concepts ... is that Eastern societies believe that the individual exists in the context of his family.”).
Western tradition may provide reference points to readers unfamiliar with the Chinese tradition.25

I. PEOPLE AND EMPEROR IN CLASSICAL CHINESE THOUGHT

The Chinese are rightfully proud of a history which dates back at least 3500 years26—or 3 or 4000 years, to borrow Emerson's chronology. Without first understanding this tradition, China's twentieth century, with its great revolutions and tremendous upheaval, can never be fully intelligible. History may be punctuated by great turmoil, but it also operates as a continuum.

A theme running throughout Chinese history is the relationship between the people and the emperor. In this century, the traditional dynastic emperor arguably has given way to twentieth-century strongmen cloaked with modern-day ideologies to justify their positions of power, like Yuan Shih-k'ai,27 Chiang Kai-shek, or Mao Tsetung. Revolution, be it a change of dynasty or the more radical revolutions of 1911 or 1949, has always been carried out in the name of the people.28

Revolution is not always about radical change. It also can mark the coming to fruition of ideas and concepts latent in the consciousness of

25. As Professor William Theodore de Bary pointed out in a preface to papers presented at a seminal conference held at Columbia University in 1958 on the role of the Oriental Classics in general education, "[O]ne should have a good grounding in Western civilization and thought before attempting what must inevitably be stranger and more difficult to comprehend in the Oriental traditions. . . . Confucius and Mencius will be all the more meaningful to the man who knows Plato and Aristotle." Wm. Theodore de Bary, Preface to Approaches to the Oriental Classics at xi-xii (Wm. Theodore de Bary ed., 1959).

26. The Chinese claim to be descendants of the Yellow Emperor (c. 3500 B.C.), whose reign is shrouded in the mists of history. While there is archaeological evidence of a primitive culture centered around the Yellow River, Chinese history proper dates back to the Shang dynasty (c. 1550 B.C.). Oracle-bone inscriptions—ideographs etched onto scapulae—date back to this era, and form the basis of the written Chinese language. For a discussion of Chinese pre-history, consult K.C. Wu, The Chinese Heritage (1982). For a discussion of the etymology and significance of certain written Chinese characters, see 2 Joseph Needham, Science and Civilisation in China 218-31 (1956).

27. The bonapartist Yuan Shih-k'ai will be discussed infra part II.D. Though a transitional figure, perhaps having more in common with traditional usurpers of the imperial throne than with shapers of China's modern history like Chiang or Mao, it is noteworthy that Yuan favored a constitutional monarchy, thus modifying the traditional imperial system. For a balanced portrait, see Ernest P. Young, The Presidency of Yuan Shih-k'ai (1977).

28. While Sun Yat-sen's 1911 Revolution certainly represented a break with traditions that had become hidebound, this Note will argue that the revolution was much less radical than some might assume. See infra part II.C. Historians sympathetic to the Communist revolution would agree, albeit for different reasons. See, e.g., Lucien Bianco, Origins of the Chinese Revolution, 1915-1949, at 108 (Muriel Bell trans., 2d ed. 1971) ("[T]he Kuomintang by no means stood for the total break with the past represented by the [Chinese Communist Party]: we all know there was only one Chinese Revolution, and that it took place in 1949.").
a people. This part studies ideas formed more than some two thousand years ago. These ideas, nevertheless, remain relevant to any discussion of an evolving Chinese notion of democratic sovereignty because they are the first to state clearly the nature of a relationship which runs throughout Chinese history—that of people and ruler.

A. Basic Principles of Traditional Chinese Thought

Two traditional ideologies are most relevant to a discussion of Chinese political thought—Confucianism, particularly as expressed by Confucius' disciple Mencius, and Legalism. Confucianism is concerned with the moral cultivation of the individual, who exists not as a solitary creature, but as family member, friend, and subject—a creature embedded in a social context. According to the Confucians, five social relations characterize society: emperor and subject, parent and child, husband and wife, elder sibling and younger sibling, friend and friend. All, save the last, are hierarchical. Undergirding all society is the family; undergirding the familial relationship is the ideal

29. Arguably the American Revolution, for example, was much more evolutionary than revolutionary. The year 1776 did not mark a great break with the past, but rather, another year of great significance in the progression of Anglo-American notions of legitimate government. Other years of significance would include 1215 (the year England's barons forced King John to sign the Magna Charta at Runnymede) and 1688 (the year of Britain's Glorious Revolution). Bernard Bailyn, among others, has argued that the American Revolution was essentially conservative, viewing the revolutionary leadership as concerned "not with the need to recast the social order nor... the injustices of stratified societies but with the need to purify a corrupt constitution and fight off the apparent growth of prerogative power." Bernard Bailyn, The Ideological Origins of the American Revolution 283 (1967). For a contrary view, consult Gordon S. Wood, The Radicalism of the American Revolution (1992).

30. Confucianism originates in the thought of a historical sage known as Master K'ung (c. 551-479 B.C.), whose name can be transliterated as K'ung Fu-tzu. Jesuit missionaries in the sixteenth century latinized his name into Confucius. Aside from Confucius, the only other thinker whose name is known in the West by its Latin form is that of his greatest disciple, Mencius (c. 372-289 B.C.). See Introduction to Matteo Ricci, S.J., The True Meaning of the Lord of Heaven 6 (Edward J. Malatesta, S.J. ed., Douglas Lancashire & Peter Hu Kuo-chen, S.J. trans., Ricci Institute 1985) (1603). For an account of the fascinating intellectual dialogue which took place between Jesuit missionaries and Ming Dynasty Neo-Confucian scholars, see John D. Young, Confucianism and Christianity: The First Encounter (1983).


32. Wu, supra note 26, at 75.

33. For a criticism of Confucian patriarchalism, see Teemu Ruskola, Note, Law, Sexual Morality, and Gender Equality in Qing and Communist China, 103 Yale L.J. 2531, 2532-34 (1994).
of hsiao, or filial piety. In the Confucian tradition, in marked contrast to the Legalist, loyalty to the family takes precedence over loyalty to the state.

Central to Confucian theory is a moral cosmology based on the principle of the tao, often translated as "the Way." The tao is a universal absolute, and is ascertainable through human reason as well.

---

34. For primary source material dating to the Sung Dynasty (960-1279) regarding the proper ordering of familial relations along traditional Confucian principles, consult Yuán Ts'ai, Precepts for Social Life (1179) in Family and Property in Sung China (Patricia Buckley Ebrey ed. & trans., Princeton Univ. Press 1984).

35. Ideally there should be no conflict between duties to the family and to the state, for the family is the basis for the polity. See Analects, supra note 31, bk. II, para. 21, at 93 ("Be filial ... and you will be contributing to government."); see discussion infra note 46; compare Aristotle, The Ethics of Aristotle: The Nicomachean Ethics 251 (J.A.K. Thomson ed., 1953) (n.d.) ("The love between husband and wife is evidently a natural feeling, for Nature has made man even more of a pairing than a political animal in so far as the family is an older and more fundamental thing than the state.") and Pope Leo XIII, On the Condition of the Working Classes: Rerum Novarum 13 (N.C.W.C. trans., St. Paul Editions 1942) (1891) ("[T]he family like the State is ... a society in the strictest sense of the term ... [T]he family assuredly possesses rights, at least equal with those of civil society .... We say 'at least equal' because, inasmuch as domestic living together is prior both in thought and in fact to uniting into a polity, it follows that its rights and duties are also prior and more in conformity with nature") with Aristotle, supra note 31, at 1, 6 (arguing that political society is "the most sovereign of all [goods]" as the whole is greater than its parts).

36. See, e.g., Arthur Waley, Introduction to Analects, supra note 31, at 30-31 (defining tao as "the Way").

37. Taoism—Waley's third way of thought in ancient China, see Waley, supra note 10—has a much more relativistic conception of the tao. Chuang Tzu, a wry Taoist sage, states: "[W]hether you point to a little stalk or a great pillar, a leper or the beautiful Hsi-shih ... the Way makes them all into one.... [The sage] has no use [for categories], but relegates all to the constant." Chuang Tzu, Basic Writings 36 (Wm. Theodore de Bary ed. & Burton Watson trans., Columbia Univ. Press 1964) (second alteration in original).

38. The metaphor of the heart (hsin) represents the locus of moral intuition in all people. Human-heartedness (jen), or a capacity to ascertain what Waley terms the Good, is what makes rational humans distinct from animals. See Mencius, supra note 7, bk. VI, pt. A, sec. 15, at 168 ("The organ of the heart can think"); id. bk. IV, pt. B, sec. 19, at 131 ("Slight is the difference between man and the brutes. The common man loses this distinguishing feature, while the gentleman retains it.").; id. bk. IV, pt. B, sec. 28, at 133-34 ("A gentleman differs from other men in that he retains his heart."); see generally D.C. Lau, Introduction to Mencius, supra note 7, at 13-19 (discussing the significance of hsin); see also Analects, supra note 31, bk. IV, para. 17, at 105 ("In the presence of a good man, think all the time how you may learn to equal him. In the presence of a bad man, turn your gaze within"). Cf. Jeremiah 31:33 ("[God] ... will ... write [His Law] on their hearts."); 2 Corinthians 3:3 (citing the heart as the locus of God's law).

A profitable comparison of Western notions of natural law with those of the Confucians is possible. See Needham, supra note 26, at 518-83. According to traditional Thomistic principles, natural law was an expression in nature of God's eternal law, that law which exists always in the mind of God. Natural law is ascertainable through reason, though God also makes His law known through revelation of divine law. Whereas the precepts of eternal law, divine law, and natural law are absolute and universal, human law, or positive law, is an artifact which is just insofar as it corresponds with natural law, and unjust insofar as it deviates. See St. Thomas Aquinas, Summa Theologica in The Political Ideas of St. Thomas Aquinas, pt. I-II, q. 91, at 11-
as through fidelity to \textit{li}, or ritual, in accordance with the teachings of
the ancients.\textsuperscript{39} The \textit{chiān tzu}, or moral gentleman, is obligated to cul-
tivate his heart according to the Way's code: "Just as the hundred ap-
prentices must live in workshops to perfect themselves in their craft,
so the gentleman studies, that he may improve himself in the Way."\textsuperscript{40}

According to Confucian idealism, moral self-cultivation should ben-
efit all society. The individual possessing moral force or virtue (\textit{ti}) is
able to lead baser individuals to virtue, thus promoting not only social
harmony,\textsuperscript{41} but also harmony with the natural world. This theme re-
curs like a leitmotif throughout the proverbs and sayings attributed to
Confucius that are contained in a work called the Analects: "He who
rules by moral force (\textit{ti}) is like the pole-star, which remains in its
place while all the lesser stars do homage to it."\textsuperscript{42} Contrary to the
Legalist, the Confucian posits: "Govern the people by regulations,
keep order among them by chastisements, and they will flee from you,
and lose all self-respect. Govern them by moral force, keep order

\begin{footnotes}
\item[23] (Dino Bigongiari ed., Hafner Press 1953) (1266-1273) [hereinafter \textit{Summa Theo-
logica}]; see also Cicero, \textit{De Legibus} 317, 381 (Clinton W. Keyes trans., 1928) (n.d.)
(stating that "Law is the highest reason, implanted in Nature, which commands what
ought to be done and forbids the opposite" and that "Law is the primal and ultimate
mind of God"). In the Chinese construction, \textit{t\ao} might be synonymous with eternal
law, though \textit{Heaven (tien)} is a nonanthropomorphic quasi-deistic concept, and \textit{li}
the rough equivalent of natural law. \textit{Fa}, of which the Legalists speak, corresponds to
positive law. No equivalent of divine law exists in this paradigm, for China, unique
among civilizations, contains no idea of a godlike lawgiver. Bodde & Morris, supra
note 10, at 8-11; see also Luke T. Lee & Whalen W. Lai, \textit{The Chinese Conception of
Law: Confucian, Legalist and Buddhist}, 29 Hastings L.J. 1307, 1309 (1978) ("\textit{Li}
is closely related to \textit{t\ao}, the natural order, and this emphasis on moral rules and natural
order is not unlike the emphasis on natural law in the West . . . .").

\item[39] "Confucians believed that underlying the minutiae of the specific rules of \textit{li} are
. . . certain broad moral principles which give the \textit{li} their validity because they are
Jacques Maritain, \textit{The Rights of Man and Natural Law} 62-63 (Doris C. Anson trans.,
1951) ("Natural law is not a written law . . . . Natural law is the ensemble of things to
do and not to do . . . . from the simple fact that man is man, nothing else being taken
into account.").

\item[40] Analects, supra note 31, bk. XIX, para. 7, at 225.

\item[41] Consider the following excerpt from \textit{The Great Learning}, (\textit{Ta Hsüeh}), one of
the \textit{Four Books (The Great Learning, The Mean, The Analects, and Mencius)} which
comprise the elementary Confucian canon:

\begin{quote}
Wishing to govern well their states, [the ancients] would first regulate their
families. Wishing to regulate their families, they would first cultivate their
persons. Wishing to cultivate their persons, they would first rectify their
minds. Wishing to rectify their minds, they would first seek sincerity in their
thoughts. Wishing for sincerity in their thoughts, they would first extend
their knowledge.
\end{quote}

\item[1] Sources, supra note 31, at 115.

\item[42] Analects, supra note 31, bk. II, para. 1, at 88; see also id. bk. IV, para. 11, at
104 ("Where gentlemen set their hearts upon moral force (\textit{ti}), the commoners set
themselves upon the soil." (footnotes omitted)).
\end{footnotes}
among them by ritual and they will keep their self-respect and come to you of their own accord."\textsuperscript{43}

Elitism is very much a part of Confucianism, with its distinctions between the virtuous and the vulgar. The chün tzu has an obligation to teach, particularly by example. All education to the Confucians is normative. Although differing schools argued over whether human nature was good or evil—with Mencius the most famous proponent of the intrinsic goodness of the human heart and Hsün Tzu the proponent of its propensity for evil\textsuperscript{44}—they agreed on the importance of moral education.

Morality, however, was not something that an emperor could legislate by means of \textit{fa}, or positive law\textsuperscript{45}—a belief that set them apart from the Legalists. Though the Legalists did not believe in morality, they most certainly believed that the law could be an instrument for controlling behavior. Legalism sought to induce utter fealty to the emperor through behavioristic application of rewards and punishments manifested in a systematic penal code. Two western scholars of imperial China, Derk Bodde and Clarence Morris, describe the Legalists as follows:

\begin{quote}
43. \textit{Id.} bk. II, para. 3, at 88 (footnote omitted).
44. D.C. Lau, \textit{Introduction} to Mencius, \textit{supra} note 7, at 12-37 (providing an excellent discussion of debates on human nature among competing schools of thought in ancient China). Mencius begins with the supposition that human beings are good by nature, though people can easily lose this goodness. Mencius, \textit{supra} note 7, bk. II, pt. A, sec. 6, at 82 ("No man is devoid of a heart sensitive to the sufferings of others."); \textit{see supra} note 38; cf. Hsün Tzu, Basic Writings 157 (Wm. Theodore de Bary ed. \& Burton Watson trans., Columbia Univ. Press 1963) ("Man's nature is evil; goodness is the result of conscious activity."). Interestingly, Hsün Tzu was the teacher of Han Fei-tzu, who took his master's teachings in an entirely different direction. \textit{See} Burton Watson, \textit{Introduction} to Han Fei Tzu, \textit{supra} note 9, at 10-11.
45. Note the following remonstrance by a scholar named Shu-hsiang against the first codes of positive legislation, initially inscribed in 536 B.C.:

\textit{Originally, sir, I had hope in you, but now that is all over. Anciently, the early kings... did not put their punishments and penalties [into writing]... [T]hey used the principle of social rightness (yi) to keep the people in bounds... [i]n [v]iew of the fact that (hsin) toward them, and presented them with [examples of] benevolence (jen)...

But when the people know what the penalties are, they... acquire a contentiousness which causes them to make their appeal to the written words [of the penal laws].... As soon as the people know the grounds on which to conduct disputation, they will reject the [unwritten] accepted ways of behavior (li), and appeal to the written word.... Disorderly litigations will multiply and bribery will become current.... I have heard it said that a state which is about to perish is sure to have many governmental regulations.}

Bodde \& Morris, \textit{supra} note 10, at 16-17 (noting that the letter, strongly Confucian in tone, was written when Confucius was a teenager, and thus that such ideas were not complete innovations of the Great Sage) (alterations in the original). Cf. Tacitus, \textit{The Complete Works of Tacitus} 117 (Moses Hadas ed. \& Alfred J. Church \& William J. Brodribb trans., The Modern Library 1942) (n.d.) (remarking that a superabundance of laws is a sign of a civilization in decay).\end{quote}
Their aim was direct and simple: to create a political and military apparatus powerful enough to suppress feudal privilege at home, expand the state's territories abroad, and eventually weld all the rival kingdoms into a single empire. . . . Their insistence on law . . . was motivated by no concern for "human rights," but simply by the realization that law was essential for effectively controlling the growing populations under their jurisdiction. In thinking and techniques they were genuine totalitarians, concerned with men in the mass, in contrast to the Confucians, for whom individual, family, or local community were of paramount importance. 

Han Fei-tzu provides an example of the draconian sadism the ruler should mete out for trifling violations of the Legalist's law:

Once in the past Marquis Chao of Han got drunk and fell asleep. The keeper of the royal hat, seeing that the marquis was cold, laid a robe over him. . . . [After the marquis awoke he] punished the keeper of the robe for failing to do his duty, and the keeper of the hat for overstepping his office. . . .

Hence an enlightened ruler, in handling his ministers, does not permit them to gain merit by overstepping their offices, or to speak words that do not tally with their actions. Those who overstep their offices are condemned to die; those whose words and actions do not tally are punished. 

The ideal Legalist emperor must act the martinet, his every directive unquestionably obeyed, for if he were "lenient and fond of sparing lives, his subordinates [would] impose upon his kind nature. If superior and inferior try to change roles, the state will never be ordered." 


The contrast between the Confucian and Legalist views toward the family and the state are best illustrated in the story of a man known to posterity as Honest Kung, of whom both Confucius and the great Legalist theoretician Han Fei-tzu write. Kung was so nicknamed for his extreme scrupulosity: He was punctilious to the point of turning in his father to the authorities for having stolen a sheep. Han Fei-tzu considered him a man to be emulated, whereas to the Confucians he was the worst sort of viper, for he struck at the bond of father and son, which is the most basic of social relations. Han Fei Tzu, supra note 9, at 105-07; see Analects, supra note 31, bk. XIII, para. 18, at 175-76. Similarly in the Western canon, Dante places Brutus, along with Cassius and Judas, in the mouth of Dis (Lucifer), his head to be gnawed upon for all eternity in the deepest circle of Inferno. Dante Alighieri, The Divine Comedy of Dante Alighieri: Inferno, Canto XXXIV, Versi 61-69, at 313 (Allen Mandelbaum trans., Bantam Books 1980) (c. 1321). While Brutus may have been motivated by love for the fallen Roman Republic, extinguished by Julius Caesar's autocratic lust, Dante considers him among the most contemptible of men for betraying his benefactor, who had been like a father to him.

In modern times, certain excesses during Chairman Mao's Cultural Revolution (1966-76), in particular the encouraged denunciation of family members as "counter-revolutionaries" or other class enemies, call to mind the perverse priorities of the Legalists. See, e.g., Nien Cheng, Life and Death in Shanghai 285 (1986) (recounting the havoc wreaked upon the family in the name of the state).

47. Han Fei Tzu, supra note 9, at 32-33.
48. Id. at 36.
One beneficial legacy, however, may have resulted from the Legalists' regime: They did proclaim an ideal of equality before the law, albeit a savage equality. Nevertheless, the central legacy of Legalist thought was the idea of the emperor as strongman unchecked by notions of popular sovereignty.

B. The Confucian Humanism of Mencius and The Mandate of Heaven—A Classical Ideal of Democratic Sovereignty

The Confucianism of Confucius is profoundly concerned with the common good and the welfare of the people as the basis of a just state, or rather a state in harmony with the tao. Yet the concept of the people as ultimately sovereign is only implicit in the Analects. Confucius's conservatism, forever looking back for a Golden Age, never results in a clarion call for purging a wicked era of corrupt rulers in the name of the people.

The implicit concept of a sovereign people, however, becomes explicit in the writing of Confucius's greatest disciple, Mencius. Mencian political theory is likewise based on conformity with the dictates of the Way. The emperor is the servant of the people, and when a

49. Confucianism proclaimed a hierarchy of loyalties, as can be seen in the example of Honest Kung cited supra note 46. People are bound to each other by a complex web of social relations known as kuan hsi. Kuan hsi can be a humanizing factor, but in a perverted form it can overcome the Confucian concept of lian, or integrity, as well as the more utilitarian she, or shame at a loss of face, see Mencius, supra note 7, bk. VII, pt. A, sec. 7, at 183, and lead to favoritism or a quid quo pro reciprocity which in turn may lead to corruption. For a discussion of the concept of kuan hsi and its link with corrupt practices, see Helena Kolenda, One Party, Two Systems: Corruption in the People's Republic of China and Attempts to Control It, 4 J. Chinese L. 187, 197-201 (1990); see also Ambrose Yeo-chi King, Kuan-hsi and Network Building: A Sociological Interpretation, Daedalus, Spring 1991, at 65-68, 80 (illustrating the benign Confucian ideal as opposed to its "devious" presence in contemporary China). See also the discussion of "faction" in Andrew J. Nathan, Peking Politics, 1918-1923: Factionalism and the Failure of Constitutionalism (1976).

50. Illustrative of this is the following advice Confucius, or Master K'ung, gives to a Chinese ruler:

Duke Ai asked, What can I do in order to get the support of the common people? Master K'ung replied, If you 'raise up the straight and set them on top of the crooked,' the commoners will support you. But if you raise the crooked and set them on top of the straight, the commoners will not support you.

Analects, supra note 31, bk. II, para. 19, at 92 (footnotes omitted).

51. The impulse to conserve and the impulse to reform reaches a holistic balance in Confucius:

[I]dealization of the past . . . set a high standard for the present, and provided more of an impetus to reform, than to maintain, the status quo. [Confucius] sought to conserve or restore what was good, while changing what was bad. Thus more fundamental to him than either conservatism or reformism in itself was a clear sense of moral values, expressed in his warm humanity, optimism, humility, and good sense.

Sources, supra note 31, at 18.

52. Id. bk. VII, pt. B, sec. 14, at 196 ("The people are of supreme importance; the altars to the gods of earth and grain come next; last comes the ruler.")
dissolute ruler becomes rapacious, sowing evil in society as well as the cosmic order; the emperor's Mandate of Heaven (tien ming) is withdrawn, and the people are justified in exerting their sovereignty. While Mencius urges remonstration to spur the errant ruler to self-reformation, revolution is the ultimate check against the ruler who ceases to care for the moral and physical needs of his people: "If the prince made serious mistakes, they would remonstrate with him, but if repeated remonstrations fell on deaf ears, they would depose him." Even regicide was justified in such instances.

Another Mencian concept particularly important for Sun Yat-sen was the principle of benevolent rule. To Mencius, for virtue to win out over vice and for harmony to reign in the realm, the people must be allowed the means to care for their own livelihood. While a chün-tzu could overcome physical deprivation by remaining constant in the Way, the common people are easily tempted toward criminality if they are deprived of a livelihood—"lacking constant hearts, they will go astray and fall into excesses, stopping at nothing. To punish them af-

53. Mencius, supra note 7, bk. IV, pt. A, sec. 1, at 118 ("[O]nly the benevolent man is fit to be in high position. For a cruel man to be in high position is for him to disseminate his wickedness among the people.").

54. For the origins of the Mandate of Heaven concept, see 1 Sources, supra note 31, at 6.

55. The following dialogue is illustrative of what the Mandate is:

"Is it true that Yao gave the Empire to Shun?" "No," said Mencius. "The Emperor cannot give the Empire to another." "In that case who gave the Empire to Shun?" "Heaven gave it to him. . . . The Emperor can recommend a man to Heaven but he cannot make Heaven give this man the Empire; just as a feudal lord can recommend a man to the Emperor but he cannot make the Emperor bestow a fief on him . . . In antiquity, Yao recommended Shun to Heaven and Heaven accepted him; he presented him to the people and the people accepted him. . . . 'Heaven does not speak but reveals itself by its acts and deeds.' . . . If [Shun] had just moved into Yao's palace and ousted his son, it would have been usurpation of the Empire, not receiving it from Heaven. . . . 'Heaven sees with the eyes of its people. Heaven hears with the ears of its people.' "


This passage is of particular importance in understanding the Confucian roots of Sun Yat-sen's political thought. See text accompanying notes 142, 144.

56. Mencius, supra note 7, bk. V, pt. B, sec. 9, at 159. It is recorded that when Mencius gave this answer to King Hsüan of Ch'i, "[t]he King blenched at this," and it took him a few moments to regain his composure. Id.

57. This is because "A man who mutilates benevolence is a mutilator, while one who cripples rightness is a crippler. He who is both a mutilator and a crippler is an 'outcast.' I have indeed heard of the punishment of the 'outcast Tchou,' but I have not heard of any regicide." Mencius, supra note 7, bk. I, pt. B, sec. 8, at 68. In other words, the former king has forfeited the moral authority he once possessed, thus killing him would technically not constitute regicide. St. Thomas Aquinas similarly writes in the Summa that "A tyrannical government is not just, because it is directed not to the common good, but to the private good of the ruler . . . . Consequently there is no sedition in disturbing a government of this kind . . . . Indeed it is the tyrant rather than that is guilty of sedition." Summa Theologica, supra note 38, pt. II-II, q. 42, 2d Art., Reply Obj. 3, at 95.
ter they have fallen foul of the law is to set a trap for the people. How can a benevolent man in authority allow himself to set a trap for the people?"\(^{58}\) Thus, the clear-sighted ruler makes sure that "the people always have sufficient food in good years and escape starvation in bad; only then does he drive them towards goodness; in this way the people find it easy to follow him."\(^{59}\)

According to Mencius, in keeping with the tradition of providing for the common good, a benevolent government would institute a "well-field" system of land division.\(^{60}\) In this communitarian schema, a land unit called ching is divided into nine equitable allotments. Individual families farm the eight outside portions, ideally assisting their neighbors when the need arises so as to "live in love and harmony."\(^{61}\) Prior to farming their own lot, however, the neighbors are collectively responsible for the center plot, the produce of which belongs to the state. "Benevolent government," Mencius cautions, "must begin with land demarcation. When boundaries are not properly drawn, the division of land according to the well-field system and the yield of grain used for paying officials cannot be equitable. For this reason, despotic rulers and corrupt officials always neglect the boundaries."\(^{62}\) Echoes of Mencius's well-field system can be found in Sun's principle of the People's Livelihood.\(^{63}\)

Accounting for the conventions of his age, Mencius evinces a noble liberality of vision and a political philosophy emphasizing the welfare of the people, in whom sovereignty ultimately rests. This Mencian notion of democratic sovereignty is squarely in the Confucian tradition as well as non-individualistic; searching Mencius's writings for any

---

59. Id. at 158-59. See also 1 Sources, supra note 31, at 93-94 (containing text and commentary regarding Mencius's economic principles necessary for humane government); cf. St. Thomas Aquinas, On Kingship, in St. Thomas Aquinas on Politics and Ethics 14, 29 (Paul E. Sigmund ed. & trans., W.W. Norton 1988) (1265-67) (stating that a ruler must provide sufficient material goods so that subjects may pursue virtue without distraction).
60. For a discussion of the antique origins of the well-field system, see Wu, supra note 26, at 134-36. For the etymology of the term, see D.C. Lau's explanation in Mencius, supra note 7, at 99 n.2.
62. Id. at 99.
63. Sun's quasi-socialistic principle of the People's Livelihood, or min sheng, is developed at length in Sun, supra note 14, at 151-212. Sun distinguishes People's Livelihood from Western socialism, however, explicitly rejecting Marxism, id. at 153-69. Sun, interestingly enough, found a little-known work entitled The Social Interpretation of History by Maurice William, a Brooklyn dentist, to contain the definitive rejection of Marxian principles. Id. at 155; see also 2 Sources of Chinese Tradition 114 (Wm. Theodore de Bary et al. eds., Columbia Univ. Press 1960) [hereinafter 2 Sources]. For a discussion of the continuing relevance of the People's Livelihood concept in contemporary Taiwan, see David S. da Silva Cornell, Note, Transferring the "People's Livelihood" to the People: An Evaluation of Taiwan's Privitization Drive, 24 Law & Pol'y Int'l Bus. 943 (1993).
modern-day vocabulary of rights would be a quest most charitably described as anachronistic.

C. Popular Sovereignty and Emperor in Imperial China

An examination of how the Mencian concept of sovereignty fared throughout most of China's dynastic history, however, reveals that allegiance to the ideal often was vestigial at best. Claims that the emperor had lost the Mandate of Heaven and, hence, that rebellion was justified could appear to be post hoc rationalizations of dynastic change.64

This is not to say that Confucianism did not play an important function limiting the potential for despotism.65 The first dynasty to unify all of China, the Ch'in (221-207 B.C.),66 was the only dynasty to adopt Legalism outright as a state ideology, and it collapsed as a direct result of the harshness of the Legalist remedies it sought to impose.67 The ensuing Han dynasty (202 B.C.-220 A.D.) looked to synthesize Confucian ideals with the Legalist's ability to regulate and to organize state affairs: in other words, to co-opt Confucianism in support of the imperial status quo. Han thinkers were concerned above all with classifying the universal and societal order along a hierarchy that they perceived to exist naturally.68 The hereditary emperor ruled, assisted

64. John King Fairbank, The United States and China 57 (4th ed. 1981) ("[A]ny successful rebellion was justified, and a new rule sanctioned, by the very fact of its success.").
65. Consider one historian's assessment:
[The teachings of Confucius seem to have provided the actual practice of absolutism with more discouragement than encouragement . . . . [W]hen attempts were made to exercise absolutist power, more often than not they were met with vigorous and uncompromising opposition that drew its strength from the public's knowledge and understanding of the Confucian Classics . . . .

Wu, supra note 26, at 405.
66. Though one could speak of China as an entity sharing a cultural unity, in the pre-Ch'in period a number of warring states had competed among each other. Utilizing the draconian Legalist ideology, the Ch'in were able to unite China under their yoke. During this period, a standardization of the written language and measurements occurred, as well as monumental infrastructure development. Thought was also regimented, as the Legalists conducted book-burning campaigns. In 212 B.C. in the Ch'in capital, Hsienyang, 460 scholars accused of slandering the emperor and spreading heterodox ideas were executed in a most horrific manner—burial alive. Dun J. Li, The Ageless Chinese: A History 97-101 (3d ed. 1978).
67. Subjects were forced to render corvée labor; the penalty for tardiness was death. In 209 B.C., workers who had been delayed in arriving at their work assignment because of a flood, and hence were subject to certain execution, began a revolt which soon enveloped the entire nation and led to the toppling of the tyrannical dynasty. Id. at 102-03.
68. 1 Sources, supra note 31, at 146. Foremost among the Han theorists was Tung Chung-shu (c. 179-c. 104 B.C.), who conceived of the ruler as the basis of the state, ideally uniting heaven, earth, and humanity in holistic harmony. See id. at 162-65. A very interesting critique of the Han Confucian-Legalist synthesis is contained in Herbert H.P. Ma, The Legalization of Confucianism and Its Impact on Family Relation-
by a bureaucracy ranging from a chancellor down to local magistrates. Examinations were given annually to select the best students of the realm on the basis of their knowledge of the Confucian classics. Extensive bureaucratization led in practice to a diffusion of the emperor's power and served to check despotism.69

The T'ang dynasty criminal compendium of the seventh century A.D., one of history's great legal codifications, also reflects a synthesis between Legalist methods mitigated by Confucian benevolence. The Code could be ruthless: The state punished plotting rebellion—the greatest of the ten abominations—by not only decapitating principals, but also by strangling the fathers and sons of the rebels and enslaving grandparents and female relations (plus concubines), regardless of guilt.70 Despite practices that appear incredibly harsh by modern standards, ameliorating features in the T'ang Code are recognizable. Confession usually lessened punishment,71 amnesties were common,72 and pregnant women who committed a capital crime would not be put to death until a hundred days after giving birth.73 Stealing within the extended family was treated more leniently, probably due to the Confucian ideal that the family exists for the reciprocal needs of its members.74

History likewise records examples of emperors who emulated Confucian ideals. One proud example is T'ang T'ai-tsung. When asked about the throne, he replied:

The first principle in kingship is to preserve the people. A king who exploits the people for his personal gains is like a man who cuts his own thighs to feed himself. As there is no such thing as a crooked shadow following a straight object, it is inconceivable that the people can be disloyal when their rulers are virtuous.75
Putting into practice what he preached, harmony reigned throughout the realm; at the height of T'ang T'ai-tsung's rule "no banditry occurred anywhere in the empire, and consequently the jails were often empty." Taxation amounted to a mere one-fortieth of the annual harvest—the lowest ever recorded in the annals of Chinese history. T'ang T'ai-tsung ruled by moral force, which could not but affect the people. Anecdotal hagiographers recount that magistrates sentenced three hundred criminals to death in various parts of the empire during T'ang T'ai-tsung's reign. For the last months of their lives, they were paroled by the emperor to spend their remaining time with their families on the condition that they turn themselves in on the date of their execution. Not one of the three hundred failed to show up.

It is significant to note that T'ang T'ai-tsung's reign occurred in the early years of the T'ang dynasty, shortly after the shifting of Heaven's Mandate to a new dynasty. Later members of the T'ang imperial household lived up to Lord Acton's oft-quoted axiom of power tending to corrupt, with absolute power corrupting absolutely.

In response to the degeneration of the throne, the people were justified in asserting their sovereignty, a belief which pervaded China's dynastic history and comprised a significant part of the intellectual and moral Weltanschauung of literate Chinese. "People," of course, means the peasantry, for China has always been a nation overwhelm-

76. Id. at 172.
77. Id.
78. Id. A good Confucian would note the contrast of their behavior with that of Ch'en Sheng and Wu Kuang, the two men who began the revolt against the oppressive Ch'in tyranny rather than submit to the supreme sanction for their tardiness. See supra note 67.
79. John E. Dalberg-Acton, Acton-Creighton Correspondence, in Essays on Freedom and Power, 357, 364 (G. Himmelfarb ed., 1948). One example from the T'ang Dynasty would be the Empress Wu, who ruled from 685-705 and was one of the few women in Chinese history to attain such power. Though an able administrator who promoted competent officials based on merit, she had secured the throne by having three of her own children assassinated and was an insatiable libertine. Later T'ang emperors were even worse, for they were incompetent in addition to being incontinent, and were unable to preserve China's borders from barbarian invasion. As the imperial court became beholden to conniving eunuchs, revolt and centrifugalism spread, with the dynasty finally collapsing in 907. Li, supra note 66, at 170-77.
80. For example, the Manchu imperial edict of abdication, promulgated on February 12, 1912, states in part:
It is now evident that the hearts of the majority of the people are in favour of a republican form of government . . . . From the preference of the people's hearts, the Will of Heaven can be discerned. How could We then bear to oppose the will of the millions for the glory of one Family! Therefore, observing the tendencies of the age on the one hand and studying the opinions of the people on the other, We and His Majesty the Emperor hereby vest the sovereignty in the People and decide in favour of a republican form of constitutional government. Thus we would gratify on the one hand the desires of the whole nation who tired of anarchy are desirous of peace, and on the other hand would follow in the footsteps of the Ancient Sages, who regarded the Throne as the sacred trust of the Nation.
ingly based on agriculture. Mencius recorded commoners who in antiquity had risen to the throne, and the founders of both the Han and the Ming dynasties, Liu Pang (d. 195 B.C.) and Chu YUan-chang (1328-1398) respectively, were of peasant stock—a fact never lost on Mao Tse-tung, whose contributions to Marxist theory most prominently included the idea that the peasantry, not the proletariat, can be the revolutionary class, particularly in underdeveloped countries.

But as the case of the nineteenth-century peasant revolutionaries known as the Taipings indicates, the peasantry’s revolutionary force was a colossal event.... Several hundred million peasants will rise... a force so extraordinarily swift and violent that no power... will be able to suppress it.... All revolutionary parties and all revolutionary comrades will stand before them to be tested, and to be accepted or rejected as they decide.”

Karl Marx and Frederick Engels viewed China as a dullard nation, similar to Ralph Waldo Emerson’s enlightened nineteenth-century characterization. Lowe, supra note 2, at 19 (quoting Karl Marx, Marx on China, 1853-1860: Articles from the New York Daily Tribune 4, 45 (1951)) (stating that Marx had described China as “a mummy carefully preserved in a hermetically sealed coffin” and that Engels wrote of China as “the rotting semi-civilization of the oldest state of the world”). The Manifesto speaks of the “idiocy of rural life” and how the bourgeoisie “has made barbarian and semi-barbarian countries dependent on the civilized ones, nations of peasants on nations of bourgeois [sic], the East on the West.” Karl Marx & Frederick Engels, Manifesto of the Communist Party 13 (Frederick Engels ed., Int’l Publishers 1948) (1848). Lenin viewed revolution in China as coming through the proletariat. Lowe, supra note 2, at 64-81. Likewise Trotskyites were orthodox Marxists at least in regard to their “unswerving condemnation of the Maoist development of Chinese Communism as a peasant perversion.” Benjamin Schwartz, Introduction to the Third Edition of Leon Trotsky, Problems of the Chinese Revolution at iii (3d ed. 1966). For a discussion of Mao’s shifting of the revolutionary class paradigm, see Bianco, supra note 28; see also Chalmers A. Johnson, Peasant Nationalism and Communist Power: The Emergence of Revolutionary China, 1937-1945 (1962) (describing how Mao, unlike Chiang Kai-shek, successfully harnessed peasant nationalism in the war against the Japanese).

Most communist insurrections in Asia have been Maoist in inspiration, whereby peasant-based armies in the countryside encircle urban areas. See Mao Tse-tung, The Present Situation and Our Tasks, in Quotations from Chairman Mao Tse-tung 51, 53 (English ed. 1967). The most notorious was Pol Pot’s revolution in Cambodia; the New People’s Army in the Philippines similarly looks to Mao for its inspiration. For an account of the latter in their heyday prior to the overthrow of Philippine dictator Ferdinand Marcos, see Ross H. Munro, The New Khmer Rouge, Commentary, Dec. 1983, at 19, 19-38. For an account of a successful counterinsurgency campaign in southeast Asia, see Noel Barber, War of the Running Dogs (1971) (recounting how British tactics and strategy in peninsular Malaya, in contrast with that of the United States in Vietnam, successfully thwarted the Maoist insurgents).

See infra part II.A.
can be dissipated if it is not guided. Peasant revolts as an expression of popular revulsion over imperial corruption and injustice may have been common throughout the history of old China, yet in the modern age that was fast dawning, the people would have to be channelled towards a nationalistic cause, championing not only their own sovereignty, but also that of China.

85. For a discussion of Sun’s Confucian-based notion of “tutelage,” see infra notes 122-23, 149-50 and accompanying text. Cf. the Bolshevik notion of the Vanguard, discussed infra note 86.

86. Chalmers Johnson argues that Mao’s communist revolution was successful precisely because it was able to mobilize peasant nationalism more effectively than the Kuomintang under Chiang Kai-shek had in the patriotic war against Japan (1937-45). Johnson, supra note 83, at 1-6. Notably, Sun Yat-sen is revered on both sides of the Taiwan Strait because he was the first modern revolutionary to appeal to the ideals of the Chinese people in a great nationalistic undertaking against foreign oppressors. Beyond that, the reasons for admiring Sun in the two Chinas is quite different. In the Republic of China on Taiwan, his Three Principles of the People form the basis of the state: “The Republic of China [is] founded on the Three Principles of the People.” ROC Const. ch. I, art. 1. This Note posits that the Principle of Democracy, though springing in part from humanistic roots quite different from those of the West, is a concept capable of being interpreted as broadly analogous to Western notions of popular sovereignty. The democratization underway in Taiwan is significant because the popular sovereignty promised by the republican constitution is beginning to emerge after decades of suppression.

From a traditional Marxian perspective, however, Sun ushered in the bourgeois stage of history; according to the theory of dialectical materialism, this stage must be passed through before getting to the final stage of conflict between capitalist and worker (thesis and antithesis) that would result in the inevitable victory of the proletariat (synthesis), to be followed by the withering away of the state following the implementation of true communism. See Marx & Engels, supra note 83, at 9-21. Cf. Lyman P. Van Slyke, Enemies and Friends: The United Front in Chinese Communist History 9 (1967) (discussing the reasons the Chinese Communists utilized bourgeois allies like the Kuomintang). It is important to distinguish a Marxian meaning of democracy from what democracy means in this Note. A communist state like the People’s Republic of China is one where, by Marxian definition, the people have emerged supreme from their conflict with the bourgeoisie—thus the state is already “democratic.” Before the state can wither away, however, socialism must first be built under the guidance of the revolutionary Vanguard (Lenin’s term) that had led it to its “inevitable” victory over the bourgeoisie. Thus Chou En-lai, prime minister and number-two man in the mainland’s government during the Maoist era, was able to call China “democratic” consistent with the internal logic of Marxism:

Democratic centralism operates in our state organs by combining widespread democracy with a high degree of centralism. We are not practicing democracy for its own sake. We need widespread democracy because we want to rally all the forces that can be rallied to build socialism . . . . As laid down in the provisions of our Constitution, citizens of our country enjoy a wide measure of democracy and freedom.

II. THE REPUBLICAN REVOLUTION OF SUN YAT-SEN

Sun Yat-sen's Revolution of 1911, like the communist revolution of 1949, is often viewed as a radical shift, setting up an entirely new regime that broke with the past.87 This view has some legitimacy; nonetheless, the republican revolution built upon ideas that were implicit in Chinese notions of the political order.88 In large part, Confucian concepts of morality and the people's ultimate sovereignty lent themselves to the reformer's effort, while the revolt against the Manchu tyranny can be seen in part as a revolt against China's despotic, Legalist heritage.89 Sun, though a democrat who believed in equality of opportunity as opposed to equality of result,90 was nevertheless well aware of the ignorance and political unsophistication of the masses, and thus retained an elitist Confucian conception of the necessity of educating and guiding the people.91

A. Backdrop to Revolution

On the eve of the twentieth century, China was a sorry sight indeed, and it is easy to see what may have provoked Emerson's earlier outburst. Moral decay was endemic, China rife with opium smoking, footbinding, concubinage, and female infanticide.92 The nation had been ruled since 1644 by the non-Chinese Manchus,93 whose Ch'ing

87. See, e.g., Edwin A. Winckler in Constitutional Reform and the Future of the Republic of China 11, 13 (Harvey J. Feldman ed., 1991) [hereinafter Constitutional Reform] (seeing Sun's republican constitutionalism as radical); see discussion infra part IV.
88. Though a full discussion of the Communist Revolution of 1949 is beyond the scope of this Note, it too had historical precursors. Certainly Mao's idea of the peasantry as the revolutionary class, discussed supra note 83, comes from his reading of Chinese history. More ominous are certain parallels between the classical totalitarianism of Han Fei-tzu and the modern totalitarianism of Mao Tse-tung. See supra note 10.
89. See supra notes 45-49 and accompanying text.
90. See, e.g., Sun, supra note 14, at 82 ("If we pay no attention to each man's intellectual endowments and capacities and push down those who rise to a high position in order to make all equal, the world will not progress and mankind will retrocede. . . . After the revolution, we want every man to have an equal political standing . . . ." (emphasis added)).
91. See infra notes 149-50 and accompanying text.
92. See Sun's appraisal infra text accompanying note 120.
93. Ethnic Chinese are referred to as "Han." The Manchus came from Manchuria, on the northeast periphery of the Chinese world. Throughout its history, China has played Greece to a variety of barbarian Romes. The Yitan dynasty (1260-1368), for example, was founded by wild Mongol hordesmen who subsequently became sinicized. Theirs was the stately court of Cathay visited by Marco Polo as well as the Franciscan missionaries led by John of Montecorvino, its splendor memorialized centuries later by the English poet Samuel Taylor Coleridge: "In Xanadu did Kubla Khan a stately pleasure-dome decree . . . ." Samuel T. Coleridge, Kubla Khan, in Selected Poetry and Prose of Coleridge 44, 44 (Donald A. Staufffer ed., The Modern Library 1951) (1816). For accounts of these early east-west encounters, consult Marco Polo, The Travels of Marco Polo 83-133 (Ronald Latham trans., Penguin Books 1958) (n.d.); A.C. Moule, Christians in China Before the Year 1550, at 166-215 (photo. re-
Dynasty court was a place of byzantine scheming among eunuchs and, since 1862, by a usurping dowager empress named Tz'u Hsi. China was teetering under incessant Western imperialistic pressure that had been building for more than a century.

In 1793, the Earl of Macartney had arrived in Peking as an envoy of King George III, seeking trade privileges. British sources maintain that he never performed the kowtow, the obsequious act of prostrating oneself completely before the emperor. Chinese records state that indeed Macartney had performed the kowtow, as was customary for Dutch, Russian, Portuguese, and Papal envoys, not to mention the Emperor's own subjects. To the Chinese, these “South Sea Barbarians” had come to offer homage, as “all under heaven” should rightfully do. They further viewed the British use of flour paste and oil to style their coiffures as a preposterous waste of comestibles.

From these Gilbert-and-Sullivanesque encounters, the West began to erode the Middle Kingdom's pretensions of cultural superiority and to encroach on Chinese sovereignty. Most egregious were the British. British demand for Chinese porcelain, tea, and other goods increased, creating an unequal balance of trade that, under the prevailing mercantilist theory of economics, needed to be addressed.

---

94. Tz'u Hsi was an imperial concubine who was made co-regent for her son, the child emperor, in 1862. Her power strengthened as she outmaneuvered others with whom she was to exercise authority jointly. After the death of her emperor son from venereal disease in 1875, she placed a nephew, Kuang-hsü, on the throne, thus violating the rules governing imperial succession and tightening her grip on power. Though Kuang-hsü would clash with her as he grew older, she retained actual power until 1908. Li, supra note 66, at 410-14. Actual empresses in Chinese history have been quite rare, the Empress Wu (624-705) in the Tang dynasty (618-906) being a notable exception. See supra note 79.

95. To return to the vexing romanization question, see supra note 12, the preferred transliteration for “Peking” at present is “Beijing,” in accord with the mainland’s pinyin romanization. Because most older English-language sources consulted herein use “Peking,” I retain it.


97. Id. at 196.

98. Chinese sources originally referred to the Europeans as “South Sea Barbarians,” for that was the direction from which their ships had approached the Chinese coast. Arnold J. Toynbee, Civilization on Trial 73 (1948).

99. See id. at 71-72.


101. Mercantilism holds that the wealth of a nation lies in its hoard of precious metals; thus, the goal of a nation should be to export as much as possible and import as little as possible, preferably collecting payment in gold and silver. This zero-sum, inflationary theory was challenged most importantly by David Ricardo's theory of comparative advantage, extolling the mutual benefit to nations of a free-trade regime in which countries were free to dedicate themselves to producing products for which they were best suited (i.e., Britain should abandon any ill-conceived pretensions of producing a halfway drinkable port, instead importing the beverage from the Portu-
reverse the balance was simple—export Indian opium to the Chinese, and allow its addictive qualities to ensure a healthy demand. The Chinese were understandably incensed, and in 1838 launched their version of a war on drugs, seizing and destroying the foreigners’ stocks of opium in the southern city of Canton, the West’s principal port of entry to China.  

In 1839, the British promptly launched their own war, the opprobrious Opium War, forcing the Chinese to reconsider their attempts to ban the toxin and to accept the Treaty of Nanking.

British appetite, once whetted, was difficult to sate. A second war, or rather a series of Anglo-French expeditions known collectively as the “Arrow” War (1856-60), further humbled China and accelerated the signing of unequal treaties whereby China was forced to open more cities to Western trade. Extraterritorial concessions allowed the Western powers the right to try their subjects for crimes committed on Chinese soil, and foreign gunboats plied China’s rivers. The Chinese chafed under the indignities inflicted upon them.

Internal disorders also mounted. Beginning in the 1840s, an iconoclastic, quasi-Christian sect known as the Taipings began to gather adherents among the peasantry of Kwangsi province in southern China. In Taiping eyes, the Manchus were demons to be exorcised. By December of 1850, under the charismatic leadership of a peasant seer named Hung Hsiu-ch’üan, a full-blown military insurrection

---

102. See generally Arthur Waley, The Opium War Through Chinese Eyes (1958) (providing an account of the war sympathetic to the Chinese perspective).

103. The Treaty of Nanking, executed in 1842, resulted in the ceding of Hong Kong island to Great Britain. It was followed by a number of other treaties, such as the Treaty of the Bogue (1843), which granted the United Kingdom extraterritorial privileges in China and the Treaty of Wang-hsia (1844), which granted the same privileges to the United States and even expanded American jurisdiction to civil, in addition to criminal, cases.

104. The Arrow was a riverboat owned by a disreputable Chinese merchant and manned by a Chinese crew. She was believed, however, to have been registered in Hong Kong. Had this been so—the registration had actually expired—she would technically have been a British vessel. Seizing upon a rightful Chinese interdiction of the vessel for piracy as a pretext, the British set out to punish the Chinese. The French causus belli arose from the execution of a priest and his converts in interior China—thus cloaking their intervention with a smidgen more principle relative to the British, assuming one accepts their justifications at face value. See Li, supra note 66, at 395-96.

105. Id.

106. Their basic creeds and manifestos are reprinted, along with explanatory text, in 2 Sources, supra note 63, at 18-42. Other anti-Manchu movements included the Nien revolt in Anhwei and Shantung provinces, which lasted from 1853-68, and major unrest on the part of Muslim minorities in southwestern China (1855-73) and in the northwest (1862-77). Id. at 43-44.

107. As a young man, Sun Yat-sen was quite enamored of this peasant revolutionary from southern China. Acquaintances, who thought of the young Sun as a sincere but quixotic armchair bomb-thrower, nicknamed him “Hung Hsiu-ch’üan.” (Sun was
had begun. In 1853, the major city of Nanking was seized and renamed “Heavenly Capital,” or T’ien-ching. The rebels overextended themselves, however, and Western powers that were perhaps initially sympathetic to their Christian-overlaid monotheism came to shun them—particularly when it appeared that the Taipings would threaten business at the port city of Shanghai. The Manchus rallied, finally routing the rebels by 1864, but not without first revealing their internal weaknesses.

The Taipings, however, were not China’s last mystical mass movement in the unsettled nineteenth century. As the century came to a close, a secret society known as the Society of the Righteous and Harmonious Fists, or “Boxers,” began to rail against the foreigners bedeviling the once-illustrious Middle Kingdom. The dowager Tz’u Hsi and a circle of retrogressive ministers channeled the ever-latent xenophobia away from the Manchus and toward China’s external tormentors, as the Boxers butchered missionaries and Chinese deemed to be pro-Western in the provinces. Encouraged by the Manchu court, the Boxers laid siege to the foreign legation compound in Peking for fifty-five days in 1900. Western retribution was swift, and after

108. Fundamentalist in tenor, the Taipings’s “militant monotheism, prophetic inspiration, and drive for power in the name of God,” made the rebellion reminiscent of the rise of Islam, despite the Christian trappings. Sources, supra note 63, at 24.

109. Id. at 22. As the fortunes of the Taipings began to decline, Hung Hsiu-ch’lan became more and more profligate, living with a harem while still enjoining his followers to maintain their puritanical demeanor. Id. at 23.

110. Most reform-minded ministers had been quashed in 1898 following a brief flowering of reform that year. One should not dwell on the Manchus’ mischiefs without recalling their merits; although the Confucian-inspired attempts of officials associated with the reformist K’ang Yu-wei to rejuvenate China were spurned by the court they served, their ideals were echoed in the republican revolution of Sun Yat-sen. For a discussion of K’ang Yu-wei’s revival of Confucian ideals in service of a modern imperial China, see Kung-chuan Hsiao, A Modern China and a New World: K’ang Yu-wei, Reformer and Utopian, 1858-1927 (1975).

111. Unsurprisingly, the Boxer movement began in rural areas and its devotees were ragtag peasants imbued with Taoist mummerly. See Peter Fleming, The Siege at Peking 48-51 (1959); Li, supra note 66, at 427-30. Such violent xenophobia was not unprecedented; in 878 during the T’ang dynasty, the rebel Huang Ch’ao seized Canton and slaughtered 120,000 foreigners. Id. at 175-76. Arabic sources confirm that in the year of the Hejira 264 [877-78 A.D.], “six score thousand” Muslims, Jews, and Parsees were killed in Khanfu [Canton], and that “[t]he exact number of those who perished of these four religions could be known because the Chinese levied a tax on these foreigners according to their number.” Moule, supra note 93, at 76 & n.97 (quoting translations of Arabic sources).

112. For a retelling of the rousing Boxer siege of the Western and Japanese legations in Peking, see Fleming, supra note 111.

113. Or, technically speaking, reprisal, which is a “hostile measure short of war.” International Law 1220 (Barry E. Carter & Phillip R. Trimble eds., 1991).
relieving the garrison via an expeditionary force, the foreigners imposed harsh reparations.

Such was the state of the world which confronted a young idealistic doctor from Canton named Sun Yat-sen who, while living abroad, tried to rally the overseas Chinese communities to the cause of revolution. While there had been sincere attempts to reform the imperial system, Sun saw a need to wipe away the dross of centuries in order to reassert the Mencian belief in the ultimate sovereignty of the people by establishing a modern republic in China.

B. Sun Yat-sen's Republican Revolution

In the same year as Russia’s premature Revolution of 1905, Sun Yat-sen first enunciated his “Three Stages of Revolution.” In a China still smarting from its chastisement by the Western powers and by Japan following the Boxer revolt, the nation had to rid itself of the alien Manchu oppressors before it could begin to realize its des-

114. A Western eyewitness to the relief expedition reported that “[e]very town, every village, every peasant’s hut in the path of the troops was first looted and then burned.” Barbara W. Tuchman, Stilwell and the American Experience in China, 1911-45, at 33 (1970) (quoting veteran journalist Thomas Millard).

115. The monetary portion of the compensation was set at $333 million. The lion’s share of this went to the Russians; reparations owed America amounted to $25 million, the bulk of which was later set aside to provide scholarships for Chinese students to study in the United States. Li, supra note 66, at 430-31.

116. As a youngster, Sun lived in Hawaii, where his older brother was a well-established shopkeeper who later assisted him in raising funds for the revolutionary cause. Schiffrin, supra note 12, at 11-14, 40-42. New York buffs will be interested to note that while raising funds in Chinatown, he stayed at 10 Mott Street. Gwen Kinkead, Chinatown: A Portrait of a Closed Society 55 (1992).

117. See supra note 110.

118. In 1895, Sun had tried to stage a premature putsch in Canton with his co-conspirators in the Hsing Chung Hui, or the “Revive China League.” For the definitive English language account of this incident, as well as Sun’s early years as a revolutionary, consult Schiffrin, supra note 12, at 56-97.

Contemporary Western commentators observed the antics of the young revolutionary with annoyed disdain. Following the kidnapping and detention of Sun by Ch’ing legates in London in 1897, the normally broad-minded Robert Hart, who served as Inspector General of the Chinese Maritime Customs, groused:

As regards Dr. Sun—it must not be forgotten that he plotted and caused trouble at [Canton] and made use of British territory [i.e., Hong Kong] to work mischief for a neighbouring friendly power: so he deserves no sympathy at all, and, had he been caught in China, would very properly have been ‘hanged, drawn, and quartered.’


119. Among the indignities that Han Chinese suffered under the Manchus was the wearing of the queue, a long braid of hair which could not be cut, worn as a reminder to the Chinese of their subservient status. Han Chinese on the eve of the twentieth century still would recount the bloodletting that attended the Manchu rise to power in the seventeenth century, in particular the ten-day pillage of Yangchow and the carnage in the city of Chia-ting. Schiffrin, supra note 12, at 88 & n.96.
tined greatness as a modern nation. Thus, according to Sun, the first stage of revolution was to be one of destruction, in which “[t]he revolutionary army undertakes to overthrow the Manchu tyranny, to eradicate the corruption of officialdom, to eliminate depraved customs, to exterminate the system of slave girls, [and] to wipe out the scourge of opium.”

According to Sun’s thesis, the second stage was to be transitional—a provisional constitution would be promulgated, providing for local self-government on the district (hsien) level under the direction of the revolutionary government, whose army would be busy wiping up resistance. As the peasant populace had not been prepared for democracy, Sun predicted that this period would be one of political “tutelage”—not an indefinite stage like the period of Communist dictatorship before the withering away of the state that Marx spoke about, but one initially envisioned to last six years.

After the six-year tutelage expired and stability was attained, the third stage would begin: “[D]istricts which have become full-fledged self-governing units are each entitled to elect one representative to form the National Assembly. The task of the Assembly would be to adopt a five-power constitution and to organize a central government consisting of five branches.” Thus, a modern Republic was to be born.

Manchu resiliency lasted another six years following the issuance of the rebel manifesto, as the imperial government, prompted by mounting popular discontent, stumbled in the direction of institutional reform. Sun united his cohorts in a revolutionary society called the

121. Id. at 118.
122. See discussion supra note 86. The concept of tutelage, see infra text accompanying note 149, is derived from Confucian sensibilities, not Marxian notions.
123. The six-year time frame was later modified and extended.
124. Sun Yat-sen, Chung-shan ch’ian-shu, Vol. II, Chien-kuo fang-lüeh, Part I, translated in 2 Sources, supra note 63, at 118. Sun’s plan for a five-branch government, consisting of familiar Executive, Legislative, and Judicial branches, as well as Examination and Control (censorate) branches, will be discussed in greater detail infra notes 152-56 and accompanying text.
125. Min-ch’ien T.Z. Tyau, China’s New Constitution and International Problems 9-13 (photo. reprint 1976) (1918). The Manchu government sent five officials in December of 1905 to Japan, Europe, and the United States to study constitutional systems. In response to their positive recommendations, the first imperial edict to refer to a constitutional form of government was issued on September 1, 1905. On September 20, 1907 a unicameral State Council (Tzu Chéng Yuan) was proclaimed, presided over jointly by a Manchu prince and a Han Grand Secretary; on October 19, 1907 the throne allowed the creation of provincial assemblies in all the provincial capitals. The purpose of the assemblies would be “to ascertain the public opinion, so that the people in the provinces may have the opportunity of pointing out and stating the benefits and evils existing in their particular provinces, and also planning the local peace and being trained for service in the State Council in the Capital.” Id. at 11 (quoting edict of Oct. 19, 1907). The provincial assemblies were established on October 14, 1909,
T'ung-meng Hui, or the League of Common Alliance. The conspirators brewed sedition until the confluence of events lead to an auspicious opening for outright revolution. On October 10, 1911, revolt erupted in the city of Wuchang, located in the central province of Hupeh. Rather than unleashing a great conflagration, the revolt initiated a series of provincial coups d'etat, primarily in the southern and central provinces.

In an attempt to curb the rebel tide, the Manchu State Council promulgated a nineteen-article constitution on November 3, circumscribing the powers of the Emperor and outlining a constitutional monarchy. This sop could not dissuade the ascendant revolutionaries. On November 30, 1911, twenty-three republican delegates met in liberated Wuchang and devised their own twenty-one article compact. Shortly thereafter the city of Nanking fell to the revolutionary forces, which Provisional President Sun made the provisional capital of the provisional government. The Republic of China was formally proclaimed on January 1, 1912, and on February 12, the Manchus followed by the opening of the State Council on October 3, 1910. Their resolutions were merely precatory, however, as any significant initiative first needed imperial sanction. A second edict in August of the following year promised a granting of a constitution in nine years time (i.e., by 1917) and the convocation of a national parliament.

126. This organization is the direct precursor to Sun's Kuomintang, or KMT, which sometimes is translated in Western sources as the Nationalist Party. The Kuomintang, founded in 1912, constitutes the present government on Taiwan. The T'ung Meng Hui's predecessor was the Hsing Chung Hui.

127. This date, "Double Ten" is still celebrated in Taiwan and countless Chinatowns throughout the world as the birthday of the Republic of China, though the actual proclamation of the new Republic did not occur until January 1, 1912. On the mainland and among overseas Chinese who sympathize with its communist government, October 1 is celebrated as the anniversary of the founding of the People's Republic of China in 1949. See Kinkead, supra note 116, at 65-67.

128. One issue which must be addressed is how much Sun Yat-sen actually contributed to the immediate outbreak of revolution in 1911. At the time of the Wuchang revolt, Sun was in the United States, rallying overseas Chinese support, and was unaware that the revolution had begun until reading an account in a Denver newspaper. Because of this, and because of Sun's quixotic revolutionary penchant, some have downplayed his role to that of a "political medicine man," to borrow the words of John Paton Davies, Jr., a China-born former American foreign service officer. John Paton Davies, Jr., Dragon by the Tail: American, British, Japanese, and Russian Encounters With China and One Another 59 (1972). More charitable and perhaps more illuminating, however, is the assessment of Sir John Jordan, the British minister at Peking, who stated that when revolution did break out, Sun was "undoubtedly its prime mover." Quoted in Wilbur, supra note 15, at 18 n.22. Sun returned to China shortly thereafter to assume the provisional presidency of the Republic.

129. See Young, supra note 27, at 28-29.

130. See supra note 125.

131. The text of this document, called "China's Magna Charta," is reprinted in Tyau, supra note 125, at 14-16.

132. This would form the basis of the provisional constitution of Nanking promulgated on March 11, 1912. Id. at 17.
CONSTITUTIONAL REFORM ON TAIWAN

mally abdicated. Their parting document states that a former general in the imperial army named Yuan Shih-k'ai, whose defection sped the republican overthrow of the wheezing dynasty, "was elected by the Tzu cheng-yuan [State Council] to be the Premier." The document continues: "Let Yuan Shih-k'ai organize with full powers a provisional republican government and confer with the Republican Army as to the methods of union, thus ... forming the one Great Republic of China ... ." Yuan Shih-k'ai's selection would prove very fateful indeed for the infant Republic, for he would attempt to resuscitate the imperial system with himself as emperor, basing his claim on the idea that republicanism and democracy were incompatible with the Chinese tradition—a claim that Sun Yat-sen sought to prove false.

C. Republican Ideology and the Principle of Democracy: Chinese—and Western—Sources

Sun was very much aware that the Chinese tradition contained a deeply ingrained absolutist strain. Indeed he remarked that the Chinese people "have been soaked in the poison of absolute monarchy for several thousand years." Yet the republicans looked to an indigenous Chinese tradition of democratic sovereignty to justify their revolution and its Three People's Principles of Nationalism, Democracy, and "People's Livelihood," a fact that can easily be overlooked.

For Sun, the Principle of Democracy meant the "people's sovereignty," democracy, as a solitary word, "has only lately been intro-

133. See supra note 80.
134. Imperial Edicts of Abdication, reprinted in Supplementary Laws and Documents, supra note 80, at 1-2.
135. Id. Sun resigned the provisional presidency on February 13, 1912, the provisional senate elected Yuan president (not premier) two days later, and on March 10, he assumed the provisional presidency. Yearbook of the Republic of China 1994, at 665 (Gov't Info. Off. 1994) [hereinafter Yearbook].
136. See infra text accompanying notes 171-86.
137. See infra text accompanying notes 142-44.
139. As Hu Han-min, a revolutionary comrade of Sun remarked in a 1905 manifesto, "People who depend on hearsay all argue that the Chinese nation lacks the tradition of democracy in its history ... . Alas! they are not only ignorant of political science but unqualified to discuss history." Hu Han-min, The Six Principles of the People's Report, in 2 Sources, supra note 63, at 102.
140. Sun, supra note 14, at 52.
duced into China." Yet, Sun went on to argue, democracy is what the modern Chinese people are best suited for because the concept, though not expressed in a modern vocabulary of popular sovereignty or rights, is implicit in the Chinese political tradition:

Confucius and Mencius two thousand years ago spoke for people’s rights. Confucius said, ‘When the Great Doctrine prevails, all under heaven will work for the common good.’ He was pleading for a free and fraternal world in which the people would rule. He was constantly referring to Yao and Shun simply because they did not try to monopolize the empire. Although their government was autocratic in name, yet in reality they gave the people power and so were highly reverenced by Confucius. Mencius said, ‘Most precious are the people; next come the land and grain; and last, the princes.’ Again: ‘Heaven sees as the people see, Heaven hears as the people hear,’ and ‘I have heard of the punishment of the tyrant Chou, but never of the assassination of a sovereign.’ He, in his age, already saw that kings were not absolutely necessary and would not last forever, so he called those who brought happiness to the people holy monarchs, but those who were cruel and unprincipled he called individualists whom all should oppose. Thus China more than two millennia ago had already considered the idea of democracy . . . .

This Confucian tradition and its rejection of autocracy, coupled with the new vocabulary of democracy, would form the basis of a new republic. Republican structures imported from the West, crafted to suit the Chinese disposition, would fulfill the latent political ideals of Confucius and Mencius, whose lofty conceptions of the common good were limited by the governmental structures extant in their time:

As we study Chinese history, we find that the governments of Yao, Shun, Yu, T'ang, Wen Wang, and Wu Wang are always lauded and held in admiration by the Chinese people; Chinese of every period hoped that they might have a government like those, which would seek the welfare of the people. Before Western democratic ideas penetrated China, the deepest desire of the Chinese people was for emperors like Yao, Shun, Yu, T'ang, Wen Wang and Wu Wang . . . . But since our recent revolution, the people have absorbed democratic ideas and are no longer satisfied with those ancient emperors.

141. Id. at 58.
142. Id. at 58-59 (citations omitted). Sun elsewhere refers to this tradition: “Before the day of despotic emperors, China had the splendid rulers Yao and Shun; they both opened the throne to the people and did not attempt to keep it in their own family. Autocracy did not flower until after Yao and Shun . . . .” Id. at 121
143. For example, by adding Control and Examination branches, discussed infra text accompanying notes 153-56.
144. Sun, supra note 14, at 114 (citations omitted). Sun, whose systematic education began when his family emigrated to Hawaii, learned Chinese history by reading it himself. He was nevertheless well-versed in the ancient annals, and particularly enamored of the Han dynasty, a period which saw a great synthesis between Confucian
Sun then went on to note that the people's desire for self-government, though laudable, must nonetheless be directed—"If we let this attitude [of opposition to government spawned by the democratic impulse] continue without any attempt to change it, it will be exceedingly difficult for government to make any progress."\textsuperscript{145}

Sun qualified his ideal of democracy; the observation that unfettered rule of the people could trample on liberties\textsuperscript{146} that are better guarded in a republican system is consonant with the American experience as well.\textsuperscript{147} Yet the true inspiration for Sun's wariness—as well as his democratic optimism—comes from the Confucian tradition, despite obvious borrowings from the West.\textsuperscript{148} Sun felt that China was in need of tutelage, recalling a tradition of benevolent Confucian elitism. Sun had a very Confucian faith in the ability of a modern-day body of chün tzu—a revolutionary elite versed in the Three Principles—to educate the masses:

Even an ox can be trained to plow the field and a horse to carry man. Are men not capable of being trained? . . . China . . . needs a republican government just as a boy needs school. As a schoolboy must have good teachers and helpful friends, so the Chinese people, being for the first time under republican rule, must have a far-sighted revolutionary government for their training. This calls for [a] period of political tutelage, which is a necessary transitional

---

\textsuperscript{145} Sun, \textit{supra} note 14, at 114.

\textsuperscript{146} See, e.g., the following discussion of "liberty":

When European democracy was just budding, Europeans talked about fighting for liberty; when they had gained their end, everyone began to extend the limits of his individual liberty and soon the excesses of liberty led to many evil consequences. Therefore [John Stuart] Mill said that only individual liberty which did not interfere with the liberty of others can be considered true liberty. . . . Western scholars had come to realize that [absolute] liberty was not a sacred thing which could not be encroached upon, but that it must be put within boundaries.

Sun, \textit{supra} note 14, at 73-74 (citations omitted). \textit{See also} Sun's lambasting of the French Revolution: "The result was that a mob tyranny was instituted. . . . The real obstructionists [to the progress of democracy] were the believers in absolute democracy." \textit{Id.} at 100-01.

\textsuperscript{147} This can be seen most evidently in the Madisonian separation-of-powers structure of our government and arguments expressing wariness of mob rule, e.g., The Federalist No. 10 (James Madison).

The democratic ideal also had a much more limited connotation throughout much of United States history, a fact that Sun makes critical reference to. Sun, \textit{supra} note 14, at 99-100. The franchise in America was originally limited to propertied white males; the extension of the franchise came about gradually, through such developments as Jacksonian populism in the 1830s, the Fourteenth Amendment's diminution of a state's representation for restricting of over-twenty-one male suffrage, and with the Nineteenth Amendment in 1920 (female suffrage). \textit{See also} Reynolds v. Sims, 377 U.S. 533 (1964) (articulating the principle "one man, one vote").

\textsuperscript{148} \textit{See infra} notes 157-62 and accompanying text.
stage from monarchy to republicanism. Without this, disorder will be unavoidable.\textsuperscript{149}

Just as Confucian thought posited that all people were capable of being educated and becoming virtuous,\textsuperscript{150} the people were similarly capable of being educated and attaining true sovereignty according to Sunist ideology. Indeed, Confucian morality would guide the Republic.\textsuperscript{151}

While Sun shared with Alexander Hamilton and James Madison a view that a constitution of separate powers is best suited to a healthy republic, he did not wish to blindly "parrot" their tripartite schema.\textsuperscript{152} Instead, he looked to the Chinese tradition for guidance. In imperial China, the Emperor monopolized executive, legislative and judicial


\textsuperscript{150} See supra part II.A-B. Tutelage, however, was to be limited:

\begin{quote}
[I]f within . . . three years, the Self-Government Commission of a district can . . . get more than half of the population to understand the Three Principles of the People and pledge allegiance to the republic . . . the district may also elect its own officials and become a full-fledged self-governing area. . . . When a period of six years expires after the attainment of political stability throughout the country, the districts . . . are each entitled to elect one representative to form the National Assembly.
\end{quote}


\textsuperscript{151} Consider the following passage:

\begin{quote}
If today we want to restore the standing of our people . . . we must recover and restore our characteristic, traditional morality. . . . This characteristic morality the Chinese people today have still not forgotten. First comes loyalty and filial piety, then humanity and love, faithfulness and duty, harmony and peace. Of these traditional virtues, the Chinese people still speak, but now, under foreign oppression, we have been invaded by a new culture . . . . Men wholly intoxicated by this new culture have thus begun to attack the traditional morality, saying that with the adoption of the new culture, we no longer have need of the old morality. . . . They say that when we formerly spoke of loyalty, it was loyalty to princes, but now in our democracy there are no princes, so loyalty is unnecessary and can be dispensed with. This kind of reasoning is certainly mistaken. In our country princes can be dispensed with, but not loyalty. . . . Can we, or can we not, make loyalty serve the nation? If indeed we can no longer speak of loyalty to princes, can we not, however, speak of loyalty to our people?
\end{quote}


These eight virtues are wholly Confucian: "filial piety" is the concept of \textit{hsiao}; humanity is \textit{jen}; \textit{yi} can be translated as duty or social rightness. Among the classical sources influencing Sun’s moralistic elitism was the essay \textit{On Shepherding the People}, or \textit{Mu Min}. Primarily Confucian in tenor, tradition attributes this short guidebook for rulers to the 7th-century B.C. statesman K’uan Tzu, although it was likely written three centuries later. See \textit{Guanzi: Political, Economic, and Philosophical Essays from Early China} 51-52 (W. Allyn Rickett trans., Princeton Univ. Press 1985) (n.d.).

Chiang Kai-shek, despite his relapsing into authoritarian politics, was even more explicit in his belief that Confucian ethics should guide the Republic of China. 2 Sources, supra note 63, at 134-50. For a discussion of the continuing relevance Confucian ethics can have on modern Taiwan, see Ma, supra note 68, at 675-78.

\textsuperscript{152} Sun, supra note 14, at 97.
power, but the traditional system also created an independent cen-
sorate and an independent bureaucracy supervising itself via an exam-
ination system that checked the absolutist impulse. The censorate had impeachment functions that in the American system are vested in the legislature; historically, according to Sun, the censorate was able to rectify abuses.

An examination system, testing the examinees in their knowledge of the Confucian canon, insured an independent, merit-based bureaucracy thoroughly grounded in the humanistic ideals of the great sages.

Focusing on the underemphasized Chinese aspects of Sun’s republicanism should not result in an underestimation of the influence of Western sources on Sun’s political thought. Sun acknowledges that the germs of modern democracy come from classical Greece and Rome, and praises both the American Revolution and the Civil War to free the slaves as the “two finest periods in American history.” In addition to adopting rhetoric culled from Lincoln and American republican theorists, as well as discoursing on the distinctions between Hamilton and Jefferson, Sun appears comfortable...
discussing the theories of Rousseau. 161 From the Swiss, Sun borrowed ideas concerning the rights of initiative and referendum. 162 Yet he often appears to be trying to distinguish the Western political experience from that of China, averting his eyes from his more obvious borrowings by criticizing shortcomings in the Western democratic experience and by adapting distinctly Chinese institutions to his constitutional schema.

D. Constitutional Stillbirths

The years 1912 and 1913 brought a liberal flowering to China. More than three hundred political parties sprouted, though only about fifteen were of any significance. 163 Whereas in 1898 there were only sixty newspapers and magazines in China, by 1913 the nation had 487.164

The political situation was still fluid, however, and with foreign wolves at the door, China needed stable leadership. This led to a drafting of Yuan Shih-k'ai for the presidency. As governor of Shantung province, which was in the German sphere of influence, 165 Yuan had shown himself capable of curbing both German and Italian adventurism. 166 Sun reluctantly resigned the provisional presidency in mid-February of 1912 and a government was formed under Yuan's leadership. 167 In accord with the terms of a provisional constitution, 168 the country held elections in December 1912 and January

161. Id. at 61-63. Commentators have suggested that Chinese republican theorists were attempting to meld the Mencian tradition with the ideas of Rousseau. Nathan, supra note 49, at 24-25.

162. Sun, supra note 14, at 106. Sun does not credit the American Populist or Progressive movements for this inspiration. For a discussion of the contemporaneous development of initiative and referendum in the American context, see Ellis P. Oberholtzer, The Referendum in America 391-426 (2d ed. 1911).

163. Young, supra note 27, at 77.

164. Id. It should be remembered, however, that a great portion of the population was illiterate and unaffected by political reform. Socially, the lot of women improved, as the republicans campaigned against footbinding. In urban areas, the intelligentsia adopted western garb; throughout the country, men were shorn of queues that had been a sign of subservience to the Manchus. Only in Szechwan, in the interior, were there reports of uprisings that sought to restore the Ch'ing dynasty. Id. at 77-80.

165. In 1898 the Germans seized the port city of Tsingtao on Shantung peninsula. Lest one think this imperialist aggrandizement was totally without benefit to the local populace, the Germans did bequeath at least one legacy to the inhabitants of this city—the art of beer brewing. Today the export-quality beer "Tsingtao" comes from that region. John Byron & Robert Pack, The Claws of the Dragon: Kang Sheng 42 (1992).

166. Young, supra note 27, at 53 & n.9, 54.

167. Yuan assumed the provisional presidency on March 10 in Peking. Within a month the provisional senate likewise moved to Peking. Yearbook, supra note 135, at 665.

168. The infant government promulgated a Sunist fifty-six article constitution on March 11, 1912. It provided for a bicameral National Assembly consisting of a 274-member Senate and a 596-member lower house, which first convened on April 8, 1913. Tyau, supra note 125, at 18-19.
1913. Sun's revolutionary party, rechristened the Kuomintang, achieved nationwide success in elections for a two-house assembly, winning 269 of 596 seats in the lower house.

Yuan Shih-k'ai's gambit for an autocrat's power was not long in coming. Sun's partisans found themselves frozen out of the cabinet by Yuan, so they turned to parliamentary tactics and advocacy of legislative predominance. A KMT parliamentarian named Sung Chiao-jen, impatient with Sun's temporizing, sought to constitutionally deprive Yuan of power by backing a reform candidate for the regular, as opposed to provisional, presidency. An assassin sent by Yuan Shih-k'ai put an end to this challenge, murdering Sung on March 20, 1913.

Next, defying the constitution and foregoing legislative approval, Yuan sought a large foreign loan. Cajoling legislators who could be bought, Yuan compromised the integrity of the Assembly through bribery. By the summer of 1913, Sun's allies in the provinces were in open revolt. This gave Yuan an excuse to arrest recalcitrant legislators under the color of emergency powers. Thus cowed and compromised, the National Assembly formally elected Yuan president on October 6, 1913.

---

170. Young, supra note 27, at 114. Until the present-day rebirth of democracy on Taiwan, see infra part III, these elections had been considered "the only time in Chinese history when a sizable proportion of the population chose its national representatives in a manner we associate with liberal representative government." Young, supra note 27, at 113. Voters chose electors who would vote for lower house representatives, while provincial assemblies chose upper house members. The franchise was limited to literate males above twenty-one years of age who had at least an elementary school education or met certain property requirements. Id. at 113-14. Though Sun himself favored the political equality of women in theory, he bowed to societal consensus and did not actively champion women's suffrage at this time. Id. at 80.
171. Id. at 85-87.
172. Sung, one of the leading revolutionaries, was a brilliant political organizer who was largely responsible for the reorganization of the T'ung-meng Hui into the amalgamated Kuomintang. He was architect of the KMT's significant victory at the polls in the winter of 1912-13. Id. at 113-15.
173. Id. at 116-17. The president was to be elected by the National Assembly, in accord with the provisional constitution. See id.
174. Id. at 117.
175. Id. at 118.
176. Id. at 122.
177. Li Lieh-chun, the governor of Kiangsi, began a revolt on July 12, 1913. Other republican stalwarts like Hu Han-min, supra note 139, also joined in the struggle against Yuan Shih-k'ai. Young, supra note 27, at 129-30. Li, a member of the Kuomintang, actually was attempting to implement Sun's Three Stage Revolution at the provincial level. 2 Sources, supra note 63, at 117.
178. Young, supra note 27, at 122.
seated Kuomintang members of the National Assembly, ending the necessary quorum and effectively dissolving parliament.¹⁸⁰

Shorn of his antagonists, Yuan still sought to legitimize his regime. On May 1, 1914, he abolished the provisional constitution, and promulgated a new sixty-eight article constitution drawn up by his State Council (Ts’an Chêng Yuan). The self-serving charter arrogated Yuan executive, legislative, and judicial power without specifying any limit to the “presidential” term.¹⁸¹ Thus ensconced, the bludgeon appeared. Victims of Yuan Shih-k’ai’s purges numbered in the thousands during the first half of 1914.¹⁸²

In the summer of 1915, supporters of the megalomaniacal Yuan Shih-k’ai, who had begun to envision himself emperor, published a theoretical memorandum by a middle-aged American law professor named Frank J. Goodnow in the Peking Daily News, entitled Monarchy or Republic?¹⁸³ The piece argued that China’s national interest required aborting its republican experiment and establishing a constitutional monarchy. “It is of course not susceptible of doubt,” Goodnow expounded,

that a monarchy is better suited than a republic to China. China’s history and traditions, her social and economic conditions . . . all make it probable that the country would develop that constitutional government which it must develop if it is to preserve its independence as a State, more easily as a monarchy than as a republic.¹⁸⁴

Although Goodnow soon after attempted to backpedal from this apparent benison, Yuan’s pretensions had been stoked and garbed with

---

¹⁸⁰. Tyau, supra note 125, at 19-20. Contemporaneous with the events described was a ploy by the republicans to draft a permanent constitution. Article 54 of the provisional constitution empowered the National Assembly to do so, and thirty men were thus selected to a Constitution Drafting Committee. Meeting from July 10 to October 31, 1913, the Committee drafted an alternative constitution. Proposing this document to a Constitution Conference consisting of both houses on November 3 was what prompted Yuan Shih-k’ai to effectively dissolve parliament. Id. The many newspapers that had blossomed in the aftermath of the republican victory were now “censored, controlled and suspended.” Young, supra note 27, at 143.

¹⁸¹. Tyau, supra note 125, at 20.

¹⁸². Young, supra note 27, at 143. Yuan Shih-k’ai did not by any means control the entire nation at this time, and was forced to rely uneasily on local strongmen to extend his nominal control. One such tough was Chang Hsun, whose marauding soldiers still wore the queue as a sign of loyalty to the vanquished Manchus (Chang would actually attempt to restore the old imperial family in the chaotic year of 1917). At the bidding of Yuan Shih-k’ai, Chang Hsun entered Nanking in September of 1913. Whereas in 1911 “[t]he revolutionary forces in Nanking had behaved toward the population in an exemplary manner, keeping discipline and paying for their provisions,” Chang’s freebooters “pillaged, raped, and burned for two weeks once in the city.” Id. at 144.


¹⁸⁴. Id. at 169.
quasi-legitimacy. All that was left was for the strongman to have himself elected emperor, which he did on December 12, 1915.

His ambitions, however, proved short lived, for Yuan died on June 6, 1916. Following his death the republicans resurrected the provisional constitution and the National Assembly reconvened in September. Factionalism soon beset the republican revival, and alternative power centers vied with each other. A Provisional National Council, dominated by Peking reactionaries, promulgated a Parliamentary Organic Law (tsu-chih fa) as well as election laws (hsuan-chi fa) that reduced parliamentary power, removed the privilege of electing upper house representatives from KMT-dominated provincial assemblies, and sharply restricted the popular franchise by increasing voter qualifications. Sun Yat-sen formed a military government in Canton during the summer of 1917; elections in 1918 were marred by fraud perpetrated by the reactionaries that led to the installation of a "Militarists' Parliament." These parliamentarians in turn elected Hsu Shih-chang president in September of 1918. Meanwhile, proponents of federalism, arguing that the militaristic desire to centralize government fueled disunity, advocated granting more power to the provinces, but their proposed panacea was largely ignored.

---


Goodnow served as an advisor to the Chinese government from 1913 to 1914, before returning to the United States to assume the presidency of Johns Hopkins University, which he held from 1914 to 1929. Without deigning to mention Goodnow, Sun Yat-sen issued the following heavy-handed riposte: "Men of the Yuan Shih-k'ai type argue that the Chinese people, deficient in knowledge, are unfit for republican-ism. Crude scholars have also maintained that monarchy is necessary." Sun Yat-sen, *Chung-shan ch'aan-shu*, Vol. II, *Chien-kuo fang-lüeh*, Part I, translated in *2 Sources*, supra note 63, at 120.

186. Yearbook, *supra* note 135, at 665. Republican and constitutional ideals apparently had made enough of an impression on Yuan that he would seek to legitimize his ascent to the throne via kangaroo elections and proclaiming himself a constitutional monarch. Young, *supra* note 27, at 215-16.


188. This is the disparaging term used by Kuomintang sources. Yearbook, *supra* note 135, at 665. A British observer characterized the 1918 parliamentary elections as "a veritable orgie [sic] of corruption and rowdynamism"; ostensible restrictions imposed on voter qualifications did not prevent shameless supporters of the various reactionary factions from hiring "beggars, hawkers, fortune-tellers, peasants and such small fry" to stuff ballot boxes. Nathan, *supra* note 49, at 96 (quoting Bertram Giles, Nanking Intelligence Report for Quarter Ended July 31, 1918, at 15-23).

By 1920, the Republic associated with Sun Yat-sen was effectively reduced to southwestern China.\textsuperscript{190} In May of 1921, Sun assumed the presidency of a government based in Canton; a competing regime held sway in Peking, led first by Hsu Shih-chang and then by Li Yuan-hung. The Peking government proclaimed a new constitution in October 1923 to replace the provisional charter of 1912, but without national unity its affect was limited.\textsuperscript{191}

More significantly for the common Chinese, the death of Yuan Shih-k'ai had heralded the beginning of the warlordism which was to buffet China for the next decade, when localized armies\textsuperscript{192} terrorized a stricken population and the republican torch flickered faintly. Beset by warlords and foreign powers, Sun cast about for allies. He was reduced to forming a controversial foreign alliance of convenience with the equally beleaguered Soviet Union.\textsuperscript{193} As a consequence of this agreement, the Kuomintang formed a united front with the nascent Communist Party. The two parties vowed to work together to unify the country under a modern government.\textsuperscript{194}

At this critical juncture, Chiang Kai-shek appeared, a man whose name would become almost synonymous with "Free China" during the Second World War and the Cold War.\textsuperscript{195} In 1924, the Sunist government appointed Chiang commandant of the military academy at Whampoa, where he forged an elite corp of officers trained in modern techniques of warfare and devoted to the republican cause. The ailing Sun, who was to die the following year, drew the young officer into closer confidences, so that at the passing of the Father of the Chinese Republic,\textsuperscript{196} Chiang Kai-shek was able to stake a reasonable claim to his mantle. Chiang further solidified his ties to Sun's legacy by marrying Soong Mei-ling, the sister of Sun's widow.

Chiang became commander-in-chief of the republican forces in June of 1926, and then began the great Northern Expedition to quell the rapacious warlords and unite the nation under the Republic's

\textsuperscript{190} The five southwestern provinces of Kwangtung, Kwangsi, Yunnan, Kweichow and Szechwan refused to recognize the authority of Peking. Nathan, supra note 49, at 92.

\textsuperscript{191} Id. at 219.

\textsuperscript{192} See supra note 49.

\textsuperscript{193} The Sun-Joffe Accord between the Soviet Union and the Republic of China was signed on January 26, 1923. The reasons for this alliance are summarized in Fairbank, supra note 64, at 236-39.

\textsuperscript{194} The first National Congress of the Kuomintang in Canton agreed to this policy of cooperation with the Soviet Union and the Chinese Communist Party on January 20, 1924. Yearbook, supra note 135, at 666.

\textsuperscript{195} This was due in large part to the efforts of Henry Luce and Clare Booth Luce, whose Time magazine had proclaimed Chiang and his wife "Man and Wife of the Year" in 1937, speculating that Chiang might one day become "Asia's Man of the Century." See Michael Schaller, The United States and China in the Twentieth Century 4 (1979).

\textsuperscript{196} Or "kuofu," as many on Taiwan today often call Sun.
The alliance between the KMT and the Communists, initially characterized by cooperation, began to fray, finally coming into open warfare after the Northern Expeditionary Force occupied the non-Concession portions of Shanghai in 1927. The Communists were thoroughly routed, and their plans for eventual domination of China received a substantial setback.

Despite persistent wrangling among various Kuomintang factions, prospects for a unified Republic of China brightened when the warlord Chang Hsueh-liang of Manchuria pledged allegiance to the national government in 1930. Chiang consolidated his position of leadership while attempting to establish viable central governmental and ostensibly republican institutions. The Kuomintang announced plans to end by 1935 the period of political tutelage, which

197. The military as well as the political aspects of this campaign are discussed in Jordan, supra note 189.

198. The foreign powers had divided Shanghai into an open-city International Settlement and into a French sector, with the remainder in the hands of the Chinese.

199. As a result of the decimation of the orthodox Marxist-Leninist leadership, the Communist initiative turned to the peasant revolutionary Mao Tse-tung. See supra note 83. Interestingly enough, the Chinese Communist Party had initially viewed Chiang as a leftist within the Kuomintang. So Wai-chor, The Kuomintang Left in the National Revolution 1924-1931, at 3 (1991).

200. So, supra note 199, at 144. Between May and November of 1930, KMT factions allied with regional militarists such as Feng Yu-hsiang of north China directly challenged Chiang's Nanking-based authority in hostilities that pitted up to a million soldiers against each other. Id. at 139-40. Three warlord generals in Kwangsi province along the Indo-China border also challenged the central government in 1929-30. Tuchman, supra note 114, at 132. Such challenges to central authority, while serious, were not as threatening militarily as one might think, given the tendency of the warlords to avoid serious warfare. See Davies, supra note 128, at 97-98 (giving the American diplomat John Paton Davies's eyewitness accounts of "engagements" between warlords). When faced with a serious military force like that of the Japanese, Chinese soldiers fared poorly. See infra notes 206-08, 213 and accompanying text.

201. For example, the Central Bank of China was founded on November 3, 1928. Another historical footnote indicative of the attempt to shoulder the responsibilities of a central government amid the chaos of internecine struggle was the Republic's payment of interest on bonds financing the construction of the Hukuang railroad connecting Peking with Canton, which had been contracted by the Manchu Government via Imperial Edict on May 20, 1911. Timely interest payments were made until December 15, 1930, after which time only two half-interest payments were made, one on June 15, 1937 and another exactly a year later. The Sino-Japanese struggle, see infra notes 206-08, 213 and accompanying text, effectively diverted whatever intention the government had of honoring the commitment to the more pressing issue of survival. Interestingly, these facts led to a district court case which held that the People's Republic of China, established in 1949, and not the Republic of China, which exists today on Taiwan and still claims to be the legitimate government of all of China, is the successor government to the Manchu and hence liable for the acts conducted by its predecessor. Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982); see also Larry D. Stratton, Comment, Defaulting of Foreign States and an Expansive Role for the Act of State Doctrine: Jackson v. People's Republic of China, 6 Whittier L. Rev. 177 (1984).

202. A Legislative Yuan along Sunist lines was established on December 5, 1928, followed by the Examination Yuan on January 6, 1930 and the Control Yuan on February 16, 1931. Yearbook, supra note 135, at 667.
had been indefinitely extended amidst the chaos. To that end yet another provisional constitution was promulgated on June 1, 1931. Critics within the Kuomintang nevertheless maintained that Chiang was stifling Sun’s Principle of Democracy for the purpose of promoting a personal dictatorship similar to Yuan Shih-kai’s.\textsuperscript{203}

The question remained whether the foreign powers would idly allow a unified China to assert itself. On December 30, 1929, the Republic’s Ministry of Foreign Affairs announced the nullification of consular extraterritorial jurisdiction. A tired West, drained by the Great War and mired in economic depression, no longer had its heart in playing the imperialist game originally spawned by the infelicitous union of avarice and cultural chauvinism. The United Kingdom responded positively to China’s coming of age, returning the naval base of Weihaiwei in April 1930.\textsuperscript{204} The United States reiterated its “Open Door” Policy in 1932, refusing to recognize other countries’ violations of China’s integrity.\textsuperscript{205}

The Japanese, however, were less demure, and hungrily eyed the northeastern territory of Manchuria.\textsuperscript{206} After engaging the Northern Expeditionary Forces in 1929 and occupying the city of Tsinan for a year, they bided their time. Opportunity interjected itself in 1931, and the Japanese launched an unprovoked surprise attack on the Chinese

\textsuperscript{203.} Wang Ching-wei, the standard-bearer of Kuomintang Left, analogized Chiang’s behavior to Yuan’s in speeches he gave in March 1931. So, \textit{supra} note 199, at 185.

Wang Ching-wei offered by far the most significant articulation of democratic principles during this period. In a speech before KMT party members on July 3, 1931, Wang extolled the need to adhere foremost to Sun’s Principle of Democracy:

\begin{quote}
In principle we certainly aim at the realization of all the Three People’s Principles. . . . In the politics of today, the elements most ruinous to the country and to the people are the Communist theory of a single class dictatorship and Chiang Kai-shek’s \textit{de facto} personal dictatorship. To oppose these we therefore advocate democracy. Based upon the spirit of the entire Three People’s Principles we advocate implementing democracy first . . . .
\end{quote}

\textit{Id.} at 106-07.


\textsuperscript{205.} For a discussion of the Open Door Policy, see Fairbank, \textit{supra} note 64, at 320-27. The origins of the Open Door Policy, first articulated by the United States in 1899, are discussed in Davies, \textit{supra} note 128, at 88 (detailing the role an Englishman, Alfred Hippisley, had in convincing Secretary of State John Hay to adopt a principle of equal economic opportunity for all nations, a policy which had been abandoned by the British).

\textsuperscript{206.} The imperialist expansion of Japan at the expense of China was as follows: The Sino-Japanese war of 1894-95 had netted them Taiwan and weaned Korea from China’s sphere of influence and into a Japanese orbit (Korea, like Taiwan before it, became a full-fledged Japanese colony in 1910); the Russo-Japanese War of 1904-05 garnered Japan the ports of Liaoyang and Port Arthur; in 1919, the Paris Peace Conference awarded Japan the former German colony of Tsingtao, placing Shantung peninsula within effective Japanese control. For an analysis of the genesis of Japanese territorial ambitions, see Hilary Conroy, \textit{The Japanese Seizure of Korea: 1868-1910} (1960).
city of Shenyang\textsuperscript{207} on September 18, 1931, quickly overrunning the northeastern provinces of Kirin and Liaoning. The next month, the Council of the League of Nations ineffectually exhorted Japan to leave northeast China by November 16. Japanese naval forces responded by attacking Shanghai,\textsuperscript{208} precipitating the national government's flight from Nanking to Loyang. Japan established the puppet state of Manchukuo in Manchuria, setting up the last Ch'ing emperor as its quisling.\textsuperscript{209} The League of Nations refused to recognize this act; in response, the Japanese stormed out of the ill-starred League in February 1933.\textsuperscript{210}

Japanese forays into China continued until 1933, at which time Chiang Kai-shek, who briefly had been shuffled out of a position of leadership,\textsuperscript{211} concluded the Sino-Japanese Tangku Armistice Agreement. This allowed Chiang to turn his attention to the Communists, who were amassing power in the rural soviets of Kiangsi province.\textsuperscript{212} Chiang drove the Communists from their Kiangsi lair, but they escaped north in the famous Long March of 1934. The two Chinese sides, however, were soon forced into another uneasy alliance: On July 7,
1937, Japan staged the infamous Marco Polo Bridge incident as a prelude to an assault on Peking.\textsuperscript{213} Thus began the Chinese chapter of the Second World War, two years before Adolf Hitler invaded Poland and started the conflict in the European theater, a war that included the brutal Rape of Nanking and the relegation of republican China to a rump state in the nation's interior.

Chiang's power grew amid a period of nationwide emergency.\textsuperscript{214} During this time, democratic practices fell by the wayside out of sheer necessity of national survival, yet still the republican aspiration remained.\textsuperscript{215} Even the Allied victory over the Japanese in 1945 could not be long savored, for the civil war with the Soviet-aided Communists\textsuperscript{216} resumed almost immediately. Amidst this civil turmoil, the Republic attempted to construct a new constitution for the day when China would be at peace.\textsuperscript{217} This document, the Constitution of 1947, still governs the Republic of China on Taiwan today.

E. The 1947 Constitution and its Suspension

Following the end of World War II, Chiang's Nanking-based government convened a Political Consultative Conference that met from January 10 to 30, 1946.\textsuperscript{218} This Conference duly presented a draft constitution to the National Assembly for deliberation; the Assembly passed the charter on Christmas Day 1946. It went into effect exactly one year later.\textsuperscript{219}

\begin{enumerate}
\item The Japanese, claiming that Chinese forces fired upon them, precipitated the incident to gain control of a railroad bridge at Lukuochiao. The Marco Polo Bridge, an 800-year-old landmark named after its famous thirteenth-century admirer, ran alongside the railroad bridge. Tuchman, \textit{supra} note 114, at 164-65. \textit{Cf.} Polo, \textit{supra} note 93, at 134 (describing the bridge that posterity would associate with him and expressing his admiration for the civilization that constructed it).
\item The fifth plenary session of the Fifth Central Committee of the Kuomintang created a Supreme National Defence Council with Chiang as its chair. Concurrently he served as President of the Executive Yuan, a body pared of the constitutional legitimacy which Sun Yat-sen had envisioned for it. Yearbook, \textit{supra} note 135, at 669.
\item On May 5, 1936 the government promulgated a draft constitution. \textit{Id.} at 97. This draft would form the basis of the 1947 constitution discussed \textit{infra} part II.E. Yearbook, \textit{supra} note 135, at 97.
\item The Soviet Union under Stalin, though nominally an ally of the Republic of China, invaded Manchuria in the waning days of World War II and supplied the Chinese Communists with arms seized from the surrendering Japanese, fueling internecine struggle in the hopes of furthering Soviet territorial ambitions at China's expense. \textit{See} Davies, \textit{supra} note 128, at 424-25.
\item \textit{See} \textit{infra} notes 218-36 and accompanying text.
\item Ironically, the then-Governor-General of Taiwan province, the nefarious Chen Yi, announced on January 10, 1947 that the new constitution would not apply to Taiwan, which needed to be under "tutelage" for a few more years due to its fifty-year Japanese occupation; post-colonial Taiwan's standard of living at this time was much higher than that of the rest of China. This helped precipitate the "February 28th
Given the multipartisan background of the twenty-nine conference members, the result reached was by consensus, though in general it remained faithful to the vision of Sun Yat-sen. As such, it provided for a new National Assembly whose primary responsibilities were to elect the president and to amend the constitution. The National Assembly sits as a supralegislature, distinct from the Legislative Yuan, which is one of the five branches of the national government. The other four branches are the Executive Yuan, Judicial Yuan, Examination Yuan, and the Control Yuan. Straddling Incident," discussed infra text accompanying note 247, for which Chen Yi is universally reviled. George H. Kerr, Formosa Betrayed 239-40 (1965).

Chiang Kai-shek ordered Chen in front of a firing squad on June 16, 1950—not as punishment for atrocities committed against the Taiwanese people, as Kuomintang propagandists then asserted, but in punishment for collaboration with the Communists while governor of Chekiang province, a post he had been promoted to because of his effectiveness in pacifying Taiwan. Id. at 367-68, 396.

220. See Chiu, supra note 218, at 18.

221. This may account for what certain commentators have considered its flaws, in particular the lack of clarity regarding "the rights and powers of the president and those of the premier." Hong Yuh-Chin, in Constitutional Reform, supra note 87, at 7. Such a view posits that the draft constitution was a superior document, as it did not suffer from such ambiguity. Id.

222. Sun's principles are discussed supra part II.C.

223. ROC Const. ch. III.

224. ROC Const. ch. III, art. 27.

225. "The Legislative Yuan shall be the highest legislative organ of the State, to be constituted of members elected by the people. It shall exercise legislative power on behalf of the people." ROC Const. ch. VI, art. 62.

226. This complex system does create confusion, for the National Assembly has no power to enact legislation other than amendments to the constitution; it is not a legislative house. See, e.g., Taiwan: The Outsider, The Economist, July 2, 1994, at 17 (stating, in error, that the National Assembly is "the second chamber of [Taiwan's] bicameral parliament"). For a description of the structure of the ROC's government and the interrelation between the branches, see Yearbook, supra note 135, at 100-22.

227. ROC Const. ch. V. The Executive Yuan is the highest administrative organ of the state, ROC Const. ch. V, art. 53.

228. ROC Const. ch. VII. The constitution provides for the creation of a Council of Grand Justices, currently numbering fifteen members, though the constitution merely mentions "a certain number." ROC Const. ch. VII, art. 79. The Judicial Yuan is composed of a president and vice president as well as the grand justices; the Council of Grand Justices interprets the Constitution of the ROC and unifies the interpretation of laws and ordinances. Yearbook, supra note 135, at 113. Distinct from the Council of Grand Justices and subordinate to the Judicial Yuan is the Supreme Court, which is the final court of appeal in criminal and civil cases that do not implicate a constitutional question. Id. at 116.

229. ROC Const. ch. VIII. "The Examination Yuan shall be the highest examination organ of the State and shall have charge of matters relating to examination, employment, registration, service rating, scale of salaries, promotion and transfer, security of tenure, commendation, pecuniary aid in case of death, retirement and old age pension." ROC Const. ch. VIII, art. 83.

230. ROC Const. ch. IX. The Control Yuan, as a general oversight branch, can interject itself into the affairs of other governmental branches, both on the central or local level. A recent illustration of its power occurred in connection with an August 1994 investigation into allegations of abuse by the Taipei City Police, where three suspects in a kidnap and murder case were violently interrogated for twenty-four
the five branches, yet subject to recall by the National Assembly under the constitution,231 is the president.232

What is significant is the promise of the 1947 Constitution to safeguard the sovereignty of the people. Despite the absence of provisions for direct popular election of the president in the original document,233 it explicitly stated that "[t]he sovereignty of the Republic of China shall reside in the whole body of citizens." Nevertheless, the president holds several trumps that could effectively increase his power consistent with legislative-branch safeguards. Specifically, he may declare martial law subject to the approval of or confirmation by the Legislative Yuan,235 and he is granted emergency powers subject to certain checks.236

Such was the system designed to function in normal circumstances. Normalcy in China in the late 1940s, however, was a state of continuing civil warfare, a fratricidal conflict exacerbated by ideological forces that attracted the active attention of the United States and the Soviet Union. The center of power for the non-communist side was personified in Chiang Kai-shek. Without the formation of institutional alternatives capable of rallying the loyalty of the ravaged citizens of the Republic, Chiang was the only individual to provide a counterweight to the growing totalitarian menace that appeared to be in lockstep with the Soviet monolith in those early years of the Cold War. He was the Generalissimo, an authoritarian strongman who, ironically, remained the last hope for preserving the vision of the democratic and republican heirs of Sun Yat-sen. Chiang Kai-shek was elected president, with Marshal Li Tsung-jen as vice president, and inaugurated on May 20, 1948.237
Elections in 1947 and 1948 for delegates to the National Assembly, the Legislative Yuan, and the Control Yuan brought some hope that an institutional alternative to Chiang’s authoritarianism would arise. Yet, as the Communist rebellion grew in ferocity and corruption undermined the morale of the Republic, the National Assembly under Article 174 of the constitution enacted an amendment intended to be temporary on April 18, 1948, entitled “Temporary Provisions in Effect During the Period of Communist Rebellion” (“Temporary Provisions”). The Temporary Provisions stated that during the period of Communist Rebellion, “the president is empowered to adopt emergency measures through a resolution of a cabinet meeting of the Executive Yuan. The president’s power will not be limited by the regular procedures of Articles 39 and 43 of the constitution.”

Surveying these events, U.S. Ambassador J. Leighton Stuart, in a letter to Secretary of State George C. Marshall four days after the Temporary Provisions went into effect, noted:

The one significant result from the National Assembly was the election of [Marshal] Li Tsung-jen despite the determined opposition of [ ] Generalissimo [Chiang] and his henchmen. Every form of pressure was employed regardless of the promise of free elections, and President Chiang has lost much face as well as for perhaps the first time in his experience as Party Leader been unable to assert his will. The rejoicing over this has been wide-spread even within the Government, for Li is generally regarded as the symbol of constructive reforms.

The supremely important question now is as to whether President Chiang can welcome Li as his helper in these progressive plans and himself lead in proclaiming and effecting them, or whether he will resent Li’s triumph . . . . His treatment of various individuals or groups who voted for Li—including the two minor parties—is being interpreted as vindictive . . . . Personally I still hold to the belief that [Chiang] wants to do the right thing but is so steeped in the Chinese tradition of autocratic rule and in his own training and habits . . . that he simply does not know how to change.

Hopes that the constitution could thwart the rise of a strongman fell victim to historical circumstances. The situation worsened on the bat-
tlefield; 1949 brought defeat after defeat, forcing the beleaguered Nationalist army to seek refuge in Taiwan.242

From this island outpost, the ROC continued to maintain that it was the legitimate government of all of China, despite the Communist victory on the mainland and the founding of the People’s Republic of China (“PRC”) on October 1, 1949.243 Taiwan had been a Japanese colony for half a century, and despite its restoration to Chinese control in 1945,244 the exiled mainlanders viewed the native Taiwanese245

242. On October 25, 1949, the Communists launched an operation against Nationalist soldiers holding the offshore island of Kinmen (Quemoy), occupation of which would be necessary prior to an invasion of Taiwan. On that occasion, Nationalist forces under Sun Li-jen annihilated the Communists, providing an extremely rare victory in a year of military disasters. A. Doak Barnett, China on the Eve of Communist Takeover 309-10 (1963).

Sun Li-jen, a disciplined, professional soldier and a graduate of Virginia Military Institute, fought alongside American General Joseph “Vinegar Joe” Stilwell in Burma. Tuchman, supra note 114, at 281. He had a high regard for the American general, of whom he said “no foreigner had ever understood or appreciated the Chinese soldier as had Stilwell.” Memorandum of Conversations by Counsel General at Canton Raymond P. Ludden (Sept. 1-2, 1948), in Foreign Relations, supra note 241, at 446, 446. Sun Li-jen, however, was contemptuous of Chiang Kai-shek and his corrupt Nanking minions who interfered with military conduct of the Chinese Civil War, thwarted successful officers of whom they were jealous, and promoted incompetents. Id. at 446-48. For having crossed both the Generalissimo and his son, Chiang Ching-kuo, this fine soldier was first cashiered and then placed under house arrest in 1955. Kerr, supra note 219, at 448.

For the fascinating chronology of events leading to the fall of the Republic of China on the mainland, as well as background information regarding the Chinese Civil War of 1945-49, see The China White Paper (Stanford Univ. Press 1967) (1949). For an understanding of the affect that McCarthyite recriminations over who was responsible for “losing China” to the Communists had on the career of one State Department official, see Gary May, China Scapegoat: The Diplomatic Ordeal of John Carter Vincent (1979).

243. The PRC of course claimed that it was the legitimate representative of the Chinese people, arguing that Taiwan was a renegade province. See Qian, supra note 18. The United States continued to recognize Chiang’s ROC government as the legitimate government of all of China until January 1, 1979, when President James E. Carter derecognized the ROC in favor of the PRC. See discussion infra part III.B.

244. In 1895, the Ch’ing dynasty had ceded Taiwan, or Formosa, to Japan via the treaty of Shimonoseki, which concluded the Sino-Japanese War. In 1945, after a fifty-year occupation, Japan presumably retroceded Taiwan to the Republic of China, which was then the only government of China. See Kerr, supra note 219, at 26-27.

There is, however, some room for the argument that de jure, as opposed to de facto, retrocession never occurred. At the Cairo Conference in November, 1943, President Franklin D. Roosevelt, with the acquiescence of Prime Minister Winston Churchill, reached an agreement with Chiang Kai-shek regarding the future of Taiwan. Herbert Feis, The China Tangle 106, 108 (1953). The Cairo Statement of December 1st declared that “all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China.” Id. at 108.

The Potsdam Declaration of 1945 subsequently affirmed the Allies’s decision that Taiwan should be granted to China. The question remains, however, whether Taiwan belonged to the Allies to grant, or whether, like other occupied territories, it should have been placed under United Nations trusteeship and its people granted the opportunity to engage in national self-determination. See Kerr, supra note 219, at 25-27.
with unease, prohibiting the speaking of the Taiwanese dialect\textsuperscript{246} and disbanding political associations. "Unease" at times broke into savage repression, most notoriously in the aftermath of the "February 28th Incident" of 1947, which began as a riot over contraband cigarettes and quickly escalated into a pogrom by mainland Chinese soldiers against any Taiwanese who were in a position of leadership, from village headmen to Japanese-educated lawyers.\textsuperscript{247}

Following the flight to Taiwan, what initially had been envisioned as a temporary suspension of the constitution became indefinite. In 1954, the National Assembly, based in the "provisional" capital in Taipei, extended the Temporary Provisions. In addition, the Provisions allowed for the creation of a Garrison Command which enforced martial law internally.\textsuperscript{248} Despite the suspended constitution's Article 9 guarantees against the trying of civilians by courts martial,\textsuperscript{249} an estimated 10,000 civilians were tried in military courts between 1950 and 1986.\textsuperscript{250}

The present-day opposition Democratic Progressive Party on Taiwan, which is composed primarily of ethnic Taiwanese as opposed to Chinese of mainlander descent, points out in a recent policy paper that the first post-war treaty on the status of Taiwan was the 1951 San Francisco Peace Treaty, whereby Japan surrendered its claim to Taiwan without saying to whom it surrendered Taiwan. "Taiwan is Taiwan, China is China": \textit{A Practical Basis for a New Cross-Strait Order}, Taiwan Communiqué, Sept. 1994, at 12 [hereinafter \textit{Taiwan is Taiwan}]. The party also stresses that the People's Republic of China has never exercised control over any of Taiwan's territory, thus countering Communist China's claim that it is the rightful government of Taiwan. \textit{Id.} 245. The most important ethnic distinction in contemporary Taiwan is between exiled mainlanders, from sundry provinces, and the Taiwanese, who trace their roots to Fukien province across the Taiwan Strait. Another important ethnic group is the Hakka (literally, "Guest Families"), who traditionally maintained a clannish separateness from other Chinese. All these groups are Han Chinese, in distinction to the indigenous Formosans, who are a Malay-related people and constitute only a small percentage of the present-day population. These distinctions are discussed in Chen Chi-lu, \textit{People and Culture} 1-20 (1987). Modern-day Taiwan explodes the myth that the Chinese can be seen as a monocultural bloc; for a discussion of efforts to forge a common identity amidst this hodgepodge, \textit{see} Thomas B. Gold, \textit{Taiwan's Quest for Identity in the Shadow of China, in} \textit{In the Shadow of China: Political Developments in Taiwan Since 1949}, at 169 (Steve Tsang ed., 1993).

246. The term "dialect" is misleading. Though China shares a written language, the spoken tongue varies widely. Taiwanese, a southern Min "dialect" from Fukien, and Mandarin, a northern Chinese "dialect" which is the national language, are mutually unintelligible. In contrast, a Spaniard who only speaks Castillian and an Italian who only speaks Tuscan could easily carry on a detailed conversation, despite "Spanish" and "Italian" being different languages. \textit{See Yearbook, supra} 135, at 44. As a wag once put it, "A language is a dialect with an army."

247. \textit{See Kerr, supra} note 219, at 291-307, for the heart-rending accounts of the author, who was a State Department "Formosa Specialist" at the time.

248. The role of the Garrison Command and the effect of martial law on Taiwan are discussed in John F. Copper, \textit{Taiwan's Recent Elections: Fulfilling the Democratic Promise} 11-12 (1990).

249. ROC Const. ch. II, art. 9.

While Taiwan prospered economically, due in part to American aid, and perhaps more significantly, because of access to the United States market, and while certain freedoms like religious exercise flowered, the regime brooked no toleration of direct challenges to its authority. The Chiang regime regularly jackbooted attempts at political reform. In 1960, for example, a circle of reformist mainlander mandarins met with like-minded local Taiwanese officials under the sponsorship of Lei Chen, the editor of the fortnightly magazine *Free China*. The group helped found the China Democratic Party on September 4, 1960. The regime saw these modest attempts to have the Republic of China live up to its democratic ideals as a threat and promptly arrested the organizers.

Elections took place for local offices, with voters choosing among a slate of candidates either endorsed by the Kuomintang or deemed safe. In the Legislative Yuan and the National Assembly, however, the delegates elected from the mainland in 1947-48 were frozen in their seats so as not to compromise the Republic of China's claim to represent all of China. Chiang Kai-shek turned Taiwan into an island fortress, vowing to return one day to the mainland in victory. Thus, Taiwan existed in the stagnant political shadow of an authoritarian regime for over three decades. Though spared the tumult that was engulfing mainland China, such as the engineered famines of the Great Leap Forward or the self-destruction of the Cultural Revolution, the republican constitution lay fallow, the people constrained from exercising their sovereignty.

251. See Kwoh-ting Li, Economic Transformation of Taiwan, ROC 161-63 (1988).
253. *Id.* at 447-48.
255. See Copper, *supra* note 11, at 46-47. The Democratic Socialist Party and the Young China Party, two minor organizations, fled the Communists with the Kuomintang in 1949. A sense of their subservient roles in helping Chiang Kai-shek maintain a pluralistic facade during the chilly decades of ideological competition with the mainland can be gleaned from *China Yearbook 1969-70*, at 90-94 (China Publishing Co. 1970).
256. See Copper, *supra* note 11, at 48-50. Supplemental elections began to be held in 1969 to fill vacancies and to increase Taiwanese participation. See Lasater, *supra* note 254, at 11. These bodies remained the rubber-stamp domains of gerontocrats up through the 1980s. See *infra* notes 270-74 and accompanying text.
257. See, for example, President Chiang Kai-shek's national address of October 10, 1961: "Our driving force stems from our sacred duty of recovering the Chinese mainland, eliminating Communism and delivering our compatriots from their bondage." *China Yearbook 1961-62*, at 977 (China Publishing Co. 1962). As time went on, this scenario became increasingly unlikely, though the government continued to profess its desire to eventually recapture the mainland. Copper, *supra* note 11, at 49.
258. Copper describes the situation during this period as follows:
III. CONSTITUTIONAL REFORM OF THE 1990S AND THE GROUNDWORK FOR FULL DEMOCRATIC SOVEREIGNTY

The following section examines the breathtaking reform undertaken by the ROC's current president, Taiwan-born Lee Teng-hui, asking whether it leads to the fulfillment of a tradition of democratic sovereignty. Consistent with the earlier emphasis on the classical Confucian roots of the concept, this Note argues that the reforms of the Lee era do not mark a radical break from the past, but rather the fruition of ideals of democratic sovereignty implicit in traditional Chinese notions. Just as Edmund Burke saw in conservative reform the regeneration of "the deficient part of the old constitution through the parts which were not impaired," the present generation on Taiwan harks back to Confucius and Mencius through Sun Yat-sen.

A. Basic Framework of Reform

When the son of the late Generalissimo died on January 13, 1988, progressives mourned. Chiang Ching-kuo, who at his father's behest had recalibrated the ever-staunchly anti-Communist Kuomintang along Leninist organizational lines in the 1950s, had ended his career as a true reformer. As a mainlander and the son of the Generalissimo, this enlightened autocrat increased the "Taiwanization" of the Kuomintang in the 1970s, and was sufficiently confident of his grip on power to name a native Taiwanese agronomist, Lee Teng-hui, as his...
vice president. Chiang not only had the foresight, but also the political will and—perhaps most importantly in a militarist state with a quasi-Leninist ruling party—the political capital to effect far-reaching changes. Preeminent among the changes was his decision to lift martial law on July 15, 1987, effectively legitimizing the opposition Democratic Progressive Party ("DPP") which had been formed in violation of existing laws on December 28, 1986. Chiang, however, saved his biggest announcement for Christmas Day 1987: advocacy of full elections for the National Assembly and the Legislative Yuan.

When Lee Teng-hui first took the oath of office he had inherited a strongman system, but he was not a strongman. He soldiered on with Chiang Ching-kuo's reforms under the watchful eye of the old guard mainlander elite. After cautiously laying the groundwork, on May 1, 1991 he announced the termination of the Period of Communist Rebellion, while the National Assembly simultaneously announced the repeal of the Temporary Provisions and the adoption of ten new articles to the constitution. The latter reform represented an exceptionally bold step away from the past, for the Kuomintang government had said that it would never revise the text until its recovery of the mainland.

263. Chiu, supra note 218, at 32.
264. Id.
266. Speculation was rife that General Chiang Wei-kuo, Ching-kuo's younger brother, would remain the power behind the throne. While the military provided Chiang Wei-kuo with a base of support, the late president's statement that no member of the Chiang family would succeed him appeared to undercut any ambitions the surviving members of the Chiang family may have had. See David Holley, Taiwan Looks for New Era After Chiang: Collective Rule May Enhance Democracy, L.A. Times, Feb. 8, 1988, at 4. For a discussion of the tightrope Lee had to walk early in his presidency, see Jeff Hoffman, Taiwan: The Struggle to Shake Off Authoritarian Rule, S. China Morning Post, Dec. 29, 1990, available in LEXIS, World Library, TXTFE File.
267. Lee's election as Chairman of the Kuomintang at the party's Thirteenth National Congress on July 8, 1988 was a significant step, especially since the Taiwanese Lee won the muted endorsement of Madame Chiang Kai-shek. David Holley, Taiwan's President Elected Ruling Party Leader, L.A. Times, July 9, 1988, at 12. One week later, President Lee replaced more than a third of the Kuomintang's 180-member Central Standing Committee with younger reformists. David Holley, Reformist Members Named to Taiwan Party Leadership, L.A. Times, Jul. 15, 1988, at 13.
269. Yeh Jiunn-Rong, Changing Forces of Constitutional and Regulatory Reform in Taiwan, 4 J. Chinese L. 83, 88 (1990) (noting that "not amending the Constitution became the national policy, and suggesting constitutional revision became political taboo").
The next major step was fully competitive elections for the National Assembly and the Legislative Yuan. One problem in democratizing these two institutions had been the presence of the aging parliamentarians who had not faced a competitive election since the late 1940s. In 1991, however, the Judicial Yuan's Council of Grand Justices issued Interpretation No. 261, reversing its previous rulings and ordering the gerontocrats to retire by the end of the year. Thus on December 21, 1991, elections were held for the National Assembly, followed by balloting for Legislative Yuan seats the next year.

With the democratization of the parliamentary bodies, the presidency remained the one major non-democratic bastion. As student demonstrators protested in favor of direct popular election of the president at the Chiang Kai-shek Memorial Hall—Taipei's closest equivalent to Tiananmen Square in Peking—President Lee boldly called for a National Affairs Conference from June 28 to July 3, 1990 to represent the diverse viewpoints on constitutional reform, in particular regarding direct election of the president. Leading dissidents, including one independence activist who had been released from prison just one month previously, attended this extraconstitutional conference. As to his own views, President Lee remained reticent until the spring of 1992, when he expressed support for direct democracy. On July 28, 1994, Taiwan's National Assembly voted to amend the constitution to allow for direct presidential elections at the end of Lee Teng-hui's six-year presidential term, set to expire in 1996.

270. Taiwan held elections for a significant number of Legislative Yuan seats on December 2, 1989; though significant, representatives elected on the mainland continued to hold 166 of 296 seats. Lasater, supra note 254, at 23.
271. In early 1990, 632 of the 2961 members of the National Assembly and 144 of 760 Legislators originally elected were still alive and attending to their political duties. Tien, supra note 20, at 7.
272. Hong Yuh-Chin, in Constitutional Reform, supra note 87, at 8. The Council of Grand Justices is discussed supra note 228.
277. ROC Const. art. 2, as amended Aug. 1, 1994; Jane Macartney, Taiwan Assembly Approves Direct Presidential Poll, Reuter, July 29, 1994, available in WESTLAW, Int-News. The National Assembly also decided to allow overseas Chinese the right to vote in the election and to expand the president's power by taking away the premier's power to veto senior personnel nominations made by the Chief Executive. See National Assembly Passes Controversial Constitutional Reform Package, Bbc Monitoring Service, Aug. 1, 1994, available in WESTLAW, Int-News. Additionally, the presidential term will be shortened from six years to four. Taiwan President Seeks Reelection, Party Set to Split, Japan Econ. Newswire, Aug. 23, 1995, available in WESTLAW, Farnews.
election has been set for March 23, 1996, marking the first time the people of a Chinese polity have chosen their head of state directly.278 While unprecedented, this event is not incongruous with a Chinese political tradition rooted in Mencius and fostered by Sun; rather it fulfills this tradition.

As the 1996 presidential balloting nears, two interesting debates concerning democracy have emerged, the first involving intraparty democracy within the Kuomintang. Former KMT Vice-Chairman Lin Yang-kang, a native Taiwanese who has announced he intends to challenge Lee for the presidency, had called for allowing the approximately 2.5 million KMT party members to vote for a candidate.279 Instead, the roughly two thousand delegates to the Second Plenary Session of the Party’s Fourteenth Congress held in August 1995 alone voted, renominating Lee Teng-hui and precipitating a division in the party.280

A second debate concerns whether presidential candidates will have to meet minimum education standards.281 KMT Organizational Affairs Department Director Chang Cheng-ching is a proponent of such standards, while the populist DPP, through its secretary general Su Tseng-chang, is vehemently opposed to the elitist notion.282 The Kuomintang view harkens back to Sun’s concept of tutelage under a revolutionary elite,283 which in turn echoes the Confucian concept of


Previously, a former premier and a leader of the mainlander-dominated “Old Guard” of the KMT, Hau Pei-tsun, offered a more detailed critique of the lack of intraparty democracy. Hsieh Chung-liang, Hau Pei-tsun Hsiang Fa Ch’i San Hsiang Yun Tong Lai Chieh Chiu Wu Ta Wei Chi [Hau Pei-tsun Would Like to Start “Three Movements” to Save Taiwan from “Five Threats”], The Journalist, Dec. 12, 1993, at 19-21. In addition to intraparty democracy, Hau advocated preservation of the existing constitutional structure with the premier retaining actual power, as well as maintenance of the ROC’s identity instead of an independent Taiwan status—the “Three Movements.” He further articulated what he saw as the “Five Threats”: (i) the Democratic Progressive Party’s advocacy of Taiwanese independence; (ii) the disappearance of the “one China” policy; (iii) conflict between native Taiwanese and those of mainland extraction; (iv) lack of devotion to the Three Principles of the People; and (v) abandonment of the five branch division of governmental power in favor of a presidential autocracy. Id.; see also discussion infra notes 296-301 and accompanying text.


President Lee holds a doctorate from the United States, as do many Cabinet officials. Id.

282. Id.

283. See supra notes 149-50 and accompanying text.
morally superior chin-tzu leading the people. The DPP maintains that the KMT maneuver crassly attempts to forestall future contenders for the presidency, such as DPP chairman Shih Ming-teh, who does not meet the proposed educational criteria.

B. **Who are the Sovereign People of the Republic of China on Taiwan?**

In a July 5, 1994 White Paper, the Kuomintang government announced a nuanced revision of the party's traditional "one China" policy: From now on, the Republic of China "would no longer compete with Beijing for the 'right to represent China' in the international arena." Instead, it acknowledges as fact that "China" comprises "two political entities;" this, the government emphatically points out, is not intended to mean that there are "two Chinas." Because this policy can be construed to mean that Taiwan has acquiesced to the mainland's claim to be the sovereign representative of the Chinese people, the question then arises: Who are the sovereign people being enfranchised by the ongoing democratization on Taiwan? Although the eligible electorate has not been limited solely to people within Taiwan proper or the offshore islands controlled by the Republic of China, the issuance of the White Paper, coupled with the mandatory retirement of old legislators initially elected in 1947 and 1948 from mainland districts as well as certain comments made by Lee Teng-hui, has raised the question of whether the Republic of China would seek international recognition as a democratic nation of Taiwan. At present, the island nation is seeking readmission...
to the United Nations under its official title against the strenuous opposition of the People's Republic on the mainland, as well as accession to the General Agreement on Tariffs and Trade ("GATT") and its successor entity, the World Trade Organization ("WTO"), under the rubric "Taiwan, Penghu, Kinmen and Matsu Customs Territory."

The opposition Democratic Progressive Party was quick with a rejoinder to the KMT gambit to shift the terms of the debate contained in the White Paper. A nine-page statement issued on August 2, 1994, declared that "[the] ultimate basis for a state's sovereignty is popular consent." Appealing to those portions of the United Nations Charter that speak to the principle of "self-determination," the declaration continued: "No person or government shall be permitted to decide Taiwan's future without the consent of its people. The DPP advocates defining the issue of Taiwan's sovereignty in accordance with international law and the principle of self-determination."

292. See Lien, supra note 18, at 636.


294. The ROC was one of the original contracting parties to GATT, signing both the Final Act, Oct. 30, 1947, 55 U.N.T.S. 188, and the Protocol of Provisional Application ("PPA") of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 308, 313. On March 6, 1950, the ROC gave the Secretary General of the United Nations the sixty-day notice required by Article 5 of the PPA that it planned to withdraw from GATT, presumably because it had lost control of the mainland and did not want to be held responsible for the entire customs territory of China. Ya Qin, China and GATT: Accession Instead of Resumption, 27 J. World Trade, Apr., 1993, at 77, 79 & n.13 (1993). In 1965, GATT granted the ROC observer status, which it lost in 1971 when it was expelled from the United Nations and "all the organizations related to it." Id. at 80 & n.19 (noting GATT policy to follow the decisions of the United Nations on political matters).

In 1990, Taiwan applied for GATT membership as a customs territory. International Law, supra note 113, at 499. As GATT membership entitles a member to become a founding member of the WTO, Taiwan seeks to enter GATT as a means of gaining acceptance to the WTO. Bilateral Agreements in GATT Talks Reached with Four Nations, Reuter Textline, Feb. 21, 1995, available in LEXIS, World Library, CURNWS File. As of January 31, 1995, both organizations had only granted Taiwan observer status. Week in Review, Free China J., Feb. 10, 1995, at 1.

295. Taiwan is Taiwan, supra note 244, at 11.

296. U.N. Charter arts. 1 & 55; see supra note 243.

297. Taiwan is Taiwan, supra note 244, at 11.
The ability of the DPP to win competitive elections, coupled with their refusal to disavow the cause of Taiwanese independence, raises the possibility of the future election of a president committed to dismantling the Republic of China in favor of an independent nation of Taiwan. It would be ironic if the democratization born within the context of the ROC's constitutional framework resulted in the knell of the Republic. Thus at the moment of the apparent victory of the Sun Yat-sen's Principle of Democracy, it is possible that his Principle of Nationalism, with its view of a united China, may slip further away from realization.

C. Limitations to the Sovereignty of the People

Other hurdles remain before realizing the people's dignified assumption of sovereignty, some of which come from the people themselves. The foreign media has shown pictures illustrating the growing pains of democracy, which have sometimes included acts of mob violence. Muckrakers have alleged massive vote buying, especially on behalf of Kuomintang candidates, and the involvement of underworld figures in political campaigns. Politicians, particularly those in the opposition, have turned the august Legislative Yuan and National Assembly into pugilists dens.

DPP members counter that parliamentary violence is provoked by the Kuomintang's high-handed, anti-democratic tactics. One incident occurred on December 30, 1993, when a female opposition member walloped the deputy speaker of the Legislative Yuan, a KMT member, with a pink trash can. At issue was a KMT decision to ramrod three bills through the legislature in violation of parliamentary

298. For example, in the December 1994, voters in Taipei chose DPP candidate Chen Shui-bian as mayor of the ROC's provisional capital. Stephanie Low & Christopher Bodeen, Chen Picked as Taipei Mayor, China Post, Dec. 4, 1994, at 12.

299. Taiwan's Opposition Party Retains Independence Plank, Dow Jones Int'l News, Mar. 18, 1995, available in WESTLAW, Farnews (reporting decision by 276 delegates at a DPP conference discussing the party's platform to retain the call for a referendum on the issue of independence).

300. Mainland China has threatened to "shed blood" if Taiwan ever were to declare official independence, thus providing an incentive for Taiwanese voters to maintain the status quo, even if it leaves issues like the international status of Taiwan unresolved. See China Warns Taiwan Against Independence Move, Reuter Textline, Oct. 30, 1992, available in LEXIS, World Library, TXTFE File (reporting PRC Politburo member Li Ruihuan's remarks).


302. Snel & Tozzi, supra note 21, at 10-11 (reporting allegations by former Finance Minister Wang Chien-shien and DPP legislator Tsai Shih-yuan).


304. See, e.g., Andrew Quinn, Speaker of Taiwan Floored in Latest Fighting, Reuter, Apr. 12, 1991, available in LEXIS, World Library, TXTFE File.

rules. More objectionable, however, was President Lee's eager signing of the bills within hours of their passing.

Such behavior by the still-popular Lee raises eyebrows. The three bills allowed the continued existence of two national security agencies as well as a presidential personnel organization that fall under the president's purview. This amounts to a substantial delegation of power to the presidency, which, according to constitutional expert Hu Fu of National Taiwan University, threatens the delicate balance of power outlined in the constitution: "We basically have a parliamentary system. Yet the president is accumulating a lot of power and he's not responsible to the legislature." Hu Fu does not want to see the power of the president expand at the expense of the Executive Yuan, voicing concern that the emergence of a president lacking accountability could lead to the future emergence of a "Latin American-style strongman." With a popularly-elected president in March 1996, more power will likely accrue to the office.

Yet such prognostications may be unduly alarmist. If the power of the presidency increases relative to that of the premiership after the 1996 elections, it may be a natural outgrowth from the fact that he will have been directly elected by popular vote, hence vesting the occupant of the office with greater perception of authority. Significant

---

306. Id. Specifically, the deputy speaker denied opponents their rightful filibuster and did not hold the requisite second and third readings of the bills. Id.

307. Id.

308. Id. The two national security agencies, the National Security Council and the National Security Bureau, have a checkered history. Under Chiang Kai-shek, the former overrode Legislative and Executive Yuan decisions while the latter allegedly served as a presidential spy agency. They operated without explicit legal authorization for over a decade before an emergency decree legitimized them in 1968. In 1991, when President Lee ended the Period of Communist Rebellion, see supra text accompanying note 268, the National Assembly passed a special amendment extending the organizations until the end of 1993—thus accounting for the brazen, eleventh-hour maneuvering by the Kuomintang. Baum, supra note 305, at 14.

309. Baum, supra note 305, at 14. Hu adds that it would require more than constitutional revisions to make the president accountable, perhaps destroying the Republic of China's nuanced five-branch government. Id.


Hu's concerns have been seconded by Hau Pei-tsun, a gruff ex-general and former premier whom Lee had replaced with the more pliable current premier. Huang Kuang-chin, Hau Pei-tsun Tu Ch'ang Pi Kung Chan Tou Ke Lee Teng-hui Han Jan Hua Hsia Hsiu Chih Fu [Hau Pei-tsun Flies Solo, Lee Teng-hui Shoots Him Down], The Journalist, Dec. 12, 1993, at 12; see also supra note 280. Article 55 gives the president authority to nominate and appoint the premier subject to legislative consent. ROC Const. ch. V, art. 55.

311. Such were the gist of observations made by Lien Chan, the current premier, who nevertheless foresaw the continued relevance of the premiership, as its administrative functions are delegated by the constitution. Wei Lai Ke K'uei Lien Chan Shuo Pu Hui Jo Shih [Lien Chan Says, the Premier's Power Won't be Weakened], World J., Sept. 8, 1995, at A12.
signs of improvement give grounds for overall optimism that democratic practices are taking strong enough root to forestall any return to authoritarianism.

Other political figures, for example, are being held accountable for their actions. One particularly egregious act of mob political rioting from the December 1994 election cycle has resulted in the sentencing of eighteen people for hooliganism, including two DPP National Assemblymen. Four Kuomintang legislators who voted in favor of a nuclear power plant in their home districts faced a recall campaign by their constituents in accordance with the constitution. While the effort failed to garner a high enough percentage of registered voters to effect a recall, it marked the first time in the constitutional history of the Republic of China that this right has been exercised. Thus despite flaws, the constitution appears to be working, effecting a largely indigenous notion of popular sovereignty that has its roots outside the Western world.

IV. SIGNIFICANCE OF A CHINESE NOTION OF DEMOCRATIC SOVEREIGNTY AND A CHINESE CONSTITUTIONALISM

The most obvious ramifications of Taiwan's as-yet-incomplete emergence as a constitutional democracy is the model it creates for mainland China. Never before in history has a Chinese head of state been directly selected by the people. While the present situation on mainland China does not bode well for the immediate emergence of constitutional democracy, Taiwan's progression cannot go unnoticed across the Strait.

313. ROC Const. ch. II, art. 17.
317. Critics of the mainland's continued aversion to democracy point to meddling in Hong Kong's internal affairs, despite having promised to respect a "high degree of autonomy" for 50 years after taking the crown colony over in 1997. Most significant is the People's Republic's refusal to continue to recognize the results of elections in Hong Kong after sovereignty reverts to China. In First Free Vote, Anti-China Forces Win in Hong Kong, N.Y. Times, Sept. 19, 1994, at A11 (reporting that the PRC government news agency, Xinhua, reiterated China's intent to scrap the results of elections after 1997); see also Frank Ching, China Reneges on Hong Kong, Far E. Econ. Rev., Feb. 16, 1995, at 31 (criticizing China's request for confidential files of civil servants as contrary to the spirit of 1984's Sino-British Joint Declaration as well as Hong Kong's Basic Law, which will serve as a constitution after 1997).

Optimists might point, however, to the petitioning of the National People's Congress, the nation's parliament, by a group of dissidents arguing that alleged human rights abuses be rectified. Among the signers of the petition is Wang Dan, who was predominant in the Tiananmen Square student demonstrations of 1989. Patrick E. Tyler, In Beijing, Dissidents File New Petitions, N.Y. Times, Feb. 28, 1995, at A8; see
President Lee Teng-hui is certainly aware of the example a democratic Taiwan could set for mainland China. Responding to observations that a rise in a sense of autonomy among local governments on the mainland may be due in part to Taiwan's experiments in extending local self-government, President Lee has remarked:

[The] rise of the sense of autonomy among local governments [on the mainland] not only presages that the people want to be their own masters but also marks the beginning of the decline of the centralized totalitarian authority. Democratic politics is local politics... We should let more influential mainland thinkers come to see Taiwan, especially Taiwan's rural areas.

The significance of direct popular election of a president in a Chinese political entity cannot be overstated. Even if the ROC were to evolve into an independent nation of "Taiwan," it still would be culturally Chinese, much as Austria is German while at the same time being a nation independent of Germany. Thus, it could still serve

also Merle Goldman, Sowing the Seeds of Democracy in China: Political Reform in the Deng Xiaoping Era (1994) (seeing the emergence of a grassroots democratic movement despite the ruling elite's intransigence).

318. This is most notable in the rich coastal provinces of southern China like Kwangtung and Fukien. See Gerald Segal, Beijing's Fading Clout, N.Y. Times, May 25, 1994, at A21 ("Beijing pretends to rule the provinces, and the provinces pretend to be ruled by Beijing."). This trend was only temporarily checked by the crackdown at Tiananmen Square and subsequent attempts by the center to reassert itself. See Nicholas D. Kristoff, From China's Provinces, Rare Voice of Dissent, N.Y. Times, Nov. 12, 1990, at A5 (reporting that "even the governors of minor provinces were reportedly outspoken and critical of the national government").

One fiscal reason for the assertion of parochial independence may be due to a tax system which leaves money in the provinces. James McGregor, China's Backward-Flowing Tax System Leaves Beijing Up the Budgetary Creek, Wall St. J., Nov. 12, 1990, at A11.

319. The elections of December 3, 1994, represented the first truly competitive elections for the mayors of Taipei and Kaohsiung, as well as for the governor of Taiwan Province. The exile of the government claiming to represent all of China to the nation's smallest province and a handful of offshore islands has led to a layer-cake effect of a national governmental structure sitting atop a provincial structure. Law professor Hu Fu of National Taiwan University has remarked that overlapping mandates may cause friction between the president and the provincial governor, as they would be elected by the same constituency. Alice Hung, Taiwan to Hold First Presidential Poll Next March, Reuters, Feb. 18, 1995, available in LEXIS, World Library, CURNWS File.

320. Lee Teng-hui, Serve the People of this Land to Rejuvenate the Chinese Nation 14 (China Times interview published in pamphlet form Nov. 16, 1993).

321. This awkward term would include not only the ROC and PRC or imperial China, but also overwhelmingly Chinese Singapore, Hong Kong, and Macao. The British colony of Hong Kong is to revert to mainland Chinese control in 1997, while Macao, a Portuguese colony since 1557, will not be returned until 1999.

322. Illustrative of this is a statement by DPP presidential candidate, Peng Ming-Min: "Chinese' to me is an ethnic description... If people ask me [what my nationality is], I answer I am a Taiwanese of Han Chinese descent. I am not anti-Chinese. I am also proud of my Han culture and heritage." Professor Peng Ming-min Speaks Out, Taiwan Communiqué, Feb. 1993, at 17. Peng was selected as the DPP candidate
as a model for mainland China, and perhaps even technocratic Singapore.  

The example of a healthy constitutional system contrasts with the quirky constitutionalism of the People's Republic of China. The most recent PRC constitutional permutation appeared in 1993, following the previous constitutions of 1954, 1975, and 1982. Frank Ching, the astute commentator for the Far Eastern Economic Review, has observed that "China's constitution, unlike such documents in the West, is akin to a political platform ... This is why it has to be amended, or replaced wholesale, every time the Chinese Communist Party changes its policy. China still does not have a constitution in the Western sense of the word."  

How then may a Western student of Sun's theories of government best adapt a framework by which to understand the constitutionalism proposed for republican China? Edwin A. Winckler, a Research Associate at Columbia University's East Asian Institute, participated in a forum entitled "Constitutional Reform and the Future of the Republic of China" sponsored by the Institute's Taiwan Area Studies Program. In his remarks, he offers a useful conceptual framework, positing that the Western tradition contains three vastly different conceptions of constitutionalism: conservative, radical, and liberal.  

The conservative constitution he distills as "Aristotelian"—"the constitution of a country is 'what constitutes' the country, a summary that ‘conserves’ its historical and social essence." The radical constitution, on the other hand, "prescribes how to abolish an undesirable historically-inherited political system and how to construct an ideal modern political one." Winckler defines the liberal constitution as Madisonian, deploying "checks and balances to occupy the feasible middle ground between the historically real and the politically ideal."  

---

323. While Singapore under the tutelage of Lee Kuan-yew has evolved into a prosperous city-state, the government remains thin-skinned about criticism. See, e.g., Drawing Lines: Singapore Cites Professor for Contempt, Far E. Econ. Rev., Feb. 2, 1995, at 5 (criticizing a Singapore court for holding author Christopher Lingle and the International Herald Tribune in contempt for implying that Singapore's judiciary is not above political decision making). For an elaboration of Lee Kuan Yew's philosophy of guided political development, see Zakaria, supra, note 24, at 109-26. 


325. Proceedings of the conference, held from October 16-17, 1990, are recorded in Constitutional Reform, supra note 87. 

326. Id. at 12-13. 

327. Id. at 13. 

328. Id. 

329. Id.
Winckler concludes that the drafters of the 1947 constitution had in mind a radical model, and that "Taiwan is groping" toward a liberal one. Such an analysis discounts the very conservative elements implicit in Chinese republican constitutionalism—conservative in the Aristotelian, or rather Burkean and Confucian, sense.

Edmund Burke was no hidebound conservative seeking to mumify institutions simply because they had existed since time immemorial. Yet he objected most strongly to the French Revolution, and its bloodthirsty assault on all who remained from the old order. The 1949 revolution in China most closely resembled the French Revolution to which Burke objected. Sun's republican revolution was rather like England's Glorious Revolution of 1688, a revolt against tyranny as well as a revolution to restore ancient liberties. In Burke's memorable prose,

The speculative line of demarcation, where obedience ought to end, and resistance must begin, is faint, obscure, and not easily definable. . . . The wise will determine from the gravity of the case; the irritable from sensibility to oppression; the high-minded from disdain and indignation at abusive power in unworthy hands; the brave and bold from the love of honourable danger in a generous cause: but, with or without right, a revolution will be the very last resource of the thinking and the good. . . .

. . . The Revolution was made to preserve our antient indisputable laws and liberties, and that antient constitution of government which is our only security for law and liberty. . . . We wished at the period of the Revolution, and do now wish, to derive all we possess as an inheritance from our forefathers.

In a like manner, Sun Yat-sen's revolution, in addition to the constitution it gave rise to, can be appreciated anew if one looks at it as a restorative revolution from the context of the Chinese political tradition.

In referring to Yao and Shun, Sun appealed to a Chinese tradition of democratic sovereignty that was already ancient when Mencius made reference to it. True, centuries of tyranny had obscured this tradition, yet the ultimate sovereignty of the people was a notion implicit in the Chinese idea of the state. As the early republican constitutionalist theorist Dr. Min-ch'ien T.Z. Tyau observed:

330. "It was the hope of twentieth-century Chinese constitutionalists, particularly those who favored parliamentarism, during the drafting of the 1947 Chinese constitution, and during the current attempt on Taiwan to revive it [to overcome traditionalism, imperialism and authoritarianism]." Id.
331. Id.
332. That is, as contained in Reflections on the Revolution in France. Burke, supra note 259.
333. Id. at 42-43.
334. See supra note 142 and accompanying text.
[In the Confucian classics] we have in embryo the fundamentals of a limited monarchy, although the details remain to be worked out. From a limited monarchy to a republic is not a far cry, and therefore the change from autocracy to democracy requires no violent wrenching from old traditions. Grounded on such political conceptions, the people are ripe for a greater measure of liberalism than is vouchsafed in a limited monarchy. To admit the people as the co-equal of the ruler is but a preliminary to the recognition that the people, and not the ruler, is the sovereign of the country. So when the new ideas of government and administration based on a written constitution came along, they fell on good, fertile ground . . . .

Although it would not be until eighty years into the republican era that the promise of "the new ideas of government" would truly begin to bear fruit, Dr. Tyau was precisely on the mark when he stated that the seeds of popular sovereignty and constitutionalism fell onto "good, fertile ground." 

**Conclusion**

This Note has interpreted the ongoing constitutional reform of the Republic of China on Taiwan of the 1990s by acknowledging the often neglected contribution that the Confucian political tradition of popular sovereignty had on the Republic's founder, Sun Yat-sen. While influences that are obviously derived from the West affected Sun's ideology, a perspective that attempts to understand Taiwan's democratization from within the framework of the Chinese political tradition can act as a corrective to those views that have seen the Chinese tradition as solely despotic.

---

336. *Id.*