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PEOPLE SHOULD BE MASTERS IN BOTH POLITICAL AND CULTURAL AREAS: Toward a New “Free Speech Clause” in China

Yilu Zuo*

This article tries to challenge—more accurately, to supplement—the “politico-centered” view in understanding China’s free speech. Unlike the conventional view that only treats Article 35 as China’s free speech clause and mainly focuses on political speech, this article argues that China’s “free speech clause” includes not one, but three articles: 35, 41 and 47. While Articles 35 and 41 guarantee the right to political speech, Article 47 explicitly safeguards citizens’ right to cultural construction. The underpinning of this new interpretation is the dual constitutional ideal embedded in the Chinese Constitution: the Chinese people should be masters in both political and cultural areas. All speech, both political and cultural, that could further this dual ideal should be protected. Also, by tracing the development and changes of above three clauses in China’s three earlier Constitutions (the 1954 Constitution, the 1975 Constitution, and the 1978 Constitution) as well as the newly discovered 1953 Draft, this article shows that this unique understanding of free speech can be found throughout the evolvement of the Chinese Constitution; it also explains how China’s “free speech clause” has been shaped over time and why it has taken its present form.

TABLE OF CONTENTS

INTRODUCTION	189
A. <i>A Constitution-Based Free Speech Theory in China</i>	189
B. <i>Beyond the “Politico-Centralism” in Free Speech Thinking</i> ..	195
I. READING THE CHINESE CONSTITUTION HORIZONTALLY.....	199
A. <i>The Preamble and the Ethos of “The People Are Masters of the Country”</i>	200
1. “First Things First”: The Binding Force of a Constitutional Preamble	200

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2.	China's Constitutional Ethos: "The People Are Masters of the Country"	203
3.	A Textual Analysis of the Preamble to the Chinese Constitution	206
B.	<i>The Structure of the Chinese Constitution: People First, State Second</i>	211
C.	<i>China's Complete "Free Speech Clause": Articles 35, 41 and 47</i>	213
II.	READING THE CONSTITUTION VERTICALLY	217
A.	<i>China's First Constitution: The 1954 Constitution</i>	218
1.	The "Political Expression Clause" in the 1954 Constitution	219
2.	The "Right to Supervise Clause" in the 1954 Constitution	220
3.	The "Right to Cultural Construction Clause" in the 1954 Constitution	221
B.	<i>The Constitution of Cultural Revolution: The 1975 Constitution</i>	222
1.	The "Political Expression Clause" in the 1975 Constitution	223
2.	The "Right to Supervise Clause" in the 1975 Constitution	225
3.	Missing or Upgraded?: The "Right to Cultural Construction Clause" in the 1975 Constitution	226
4.	The "Big Four Freedoms": An Upgraded Version of Political Expression Clause and the Right to Supervise Clause	230
C.	<i>Still Living in the Shadow of Cultural Revolution: The 1978 Constitution</i>	232
1.	The "Political Expression Clause" in the 1978 Constitution	233
2.	The "Right to Supervise Clause" in the 1978 Constitution	234
3.	The "Right to Cultural Construction Clause" in the 1978 Constitution	235
4.	The End of the "Big Four Freedoms" in 1980.....	237
D.	<i>The Newly Discovered 1953 Constitution Draft</i>	239
1.	Different Drafts of the 1954 Constitution	239
2.	Article 20: The Right of the Few vs. the Right of the Many	240
	CONCLUSION	242

INTRODUCTION

A. *A Constitution-Based Free Speech Theory in China*

If we ask Americans to locate the provision in the U.S. Constitution protecting free speech, most will quickly name the First Amendment. But if we ask a Chinese citizen the same of the Chinese Constitution, most would probably identify Article 35,¹ which says: “Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”²

This article offers a new interpretation of free speech protection under the Chinese Constitution. It argues that China’s “free speech clause” includes not one, but three articles: 35, 41 and 47. While Articles 35 and 41 guarantee the right to political speech, Article 47 explicitly safeguards citizens’ right to cultural construction, which aims to enable and empower ordinary Chinese people to create a culture “of the people, by the people, for the people.”³ The underpinning of this new interpretation is the dual constitutional ideal embedded in the Chinese Constitution: the Chinese People should be masters in both political and cultural areas. Given this ideal, both political and cultural speech are rightly protected by the Chinese Constitution. Free speech serves political and cultural democracy.

Some may doubt the wisdom of taking the Chinese Constitution so seriously, since the Chinese government has long treated the document as a rubber stamp or window-dressing for its actions. Further, each person is entitled to advocate whatever free speech theory he favors, whether it stems from Chinese culture and tradition, or from certain personally held values, goals, philosophical or moral beliefs. In short, a free speech theory

1. See LIN FENG, CONSTITUTIONAL LAW IN CHINA 269, 269 n.106 (2000); QIAN-FAN ZHANG, THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS 225 (2012); He Weifang et al., *An Open Letter to the CCP Politburo Standing Committee Regarding Media Censorship*, in IN THE NAME OF JUSTICE 181, 184 (He Weifang ed., 2012); LIN LAIFAN (林来梵), CONG XIANFA GUIFAN DAO GUIFAN XIANFA (从宪法规范到规范宪法) [FROM CONSTITUTIONAL NORMS TO THE NORMS OF THE CONSTITUTION] 137 (2001); CAI DINGJIAN (蔡定剑), XIANFA JINGJIE (宪法精解) [COMMENTARY ON THE CONSTITUTION] 219–24 (2004).

2. XIANFA art. 35 (1982) (China).

3. The article uses “culture” as Raymond Williams defines it. Raymond Williams famously referred to culture as “a whole way of life.” See RAYMOND WILLIAMS, CULTURE AND SOCIETY: 1780–1950, at xvi (1958). Terry Eagleton further described Williams’s understanding as containing three senses of meanings: (1) a body of intellectual and artistic work and processes of making and sharing in this work; (2) the complex of lived manners, habits, morals and values; and (3) as the whole way of life of a group of people, which means “the totality of interacting artistic, economic, social, political, ideological elements which composes a society’s lived experiences and which defines it as this society and not as some other.” TERRY EAGLETON, THE IDEA OF CULTURE 35 (2000). By claiming free speech should also be a right to cultural construction, this article means: (1) free speech should enable and empower ordinary people to create various intellectual and artistic works; (2) it should let the people have a say in deciding the morals, norms and values of a society; (3) free speech should also guarantee that people themselves can define who they are and what their way of life is.

for China need not derive from the Chinese Constitution. Yet a theory based on the Chinese Constitution has the strongest base on which to advocate for free speech in China, for the following reasons:

First, since there have been some encouraging signs suggesting that the lack of implementation of the Chinese Constitution may be soon improved, we must prepare in advance. It is true that the Chinese Constitution is still judicially unenforceable even today.⁴ The Chinese courts cannot cite provisions of the Chinese Constitution when deciding cases,⁵ nor does China have a non-judicial institution like the Constitutional Council of France (*Conseil Constitutionnel*) to supervise its implementation.⁶ Yet two recent developments indicate that this unpleasant state might soon change. First, in the conference celebrating the 30th anniversary of the current Constitution in 2012, China's current president Xi Jinping expressively identified the lack of "oversight mechanisms and pertinent systems to ensure the implementation of the Constitution" as the primary issue plaguing constitutionalism in China.⁷ Moreover, by linking

4. In what has been deemed China's "Marbury v. Madison," the Supreme People's Court issued in the 2001 *Qi Yuling* cases, thereby granting courts the authority to cite and interpret the Chinese Constitution. See Guanyu yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shou Jiaoyu de Jiben Quanli Shifou Ying Chengdan Minshi Zeren de Pifu (关于以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利是否应承担民事责任的批复) [Official Reply on whether the Civil Liabilities Shall Be Borne for Infringement on a Citizen's Constitutionally-Protected Basic Right of Receiving Education by Means of Infringing on Her Right of Name] (promulgated by the Sup. People's Ct., July 24, 2001, effective Aug. 13, 2001, repealed Dec. 24, 2008), SUP. PEOPLE'S CT. GAZ., May 1, 2001, at 152, http://www.law-lib.com/law/law_view.asp?id=15994 [<https://perma.cc/QK88-A95Z>]. This reply has been widely read as an attempt to establish American-style judicial review in China. However, on December 8th 2008, the SPC issued a document that declaring the *reply of Qi Yuling* invalid without offering more explanation. See Guanyu Feizhi 2007 Nian Di Yiqian Fabu de Youguan Sifa Jieshi (Di Qi Pi) de Jueding (关于废止 2007 年底以前发布的有关司法解释[第七批]的决定) [The Decision Concerning the Abolishment of Judicial Interpretations Issued Before the End of 2007 (7th Batch)] (promulgated by the Sup. People's Ct., Dec. 8, 2008, effective Dec. 24, 2008) § 26, SUP. PEOPLE'S CT. GAZ., Feb. 1, 2009, at 7, <http://old.chinacourt.org/html/article/200812/24/337161.shtml> [<https://perma.cc/S4ZU-V6HW>]. For additional discussion, see Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case*, 43 SUFFOLK U. L. REV. 669 (2010); Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 COLUM. J. ASIAN L. 1 (2012).

5. See sources cited *supra* note 4.

6. For further discussion on whether China's institution and mechanism of constitutional implementation should be in the NPC, see WANG ZHENMIN (王振民), ZHONGGUO WEIXIAN SHENCHA ZHIDU (中国违宪审查制度) [CHINA'S CONSTITUTIONAL REVIEW SYSTEM] 99-116 (2004); Tong Zhiwei (童之伟), *Xianfa Shiyong Ying Yixun Xianfa Benshen Guiding de Lu Jing* (宪法适用应依循宪法本身规定的路径) [*The Constitution's Application Should Follow the Path Stipulated by the Constitution Itself*], 6 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI.] 22 (2008); Zhai Xiaobo (翟小波), *Daiyi Jiguan Zhishang de Renmin Xianzheng* (代议机关至上的人民宪政) [*People's Constitutional Governance Under the Parliamentary Supremacy System*], 2 QINGHUA FAXUE (清华法学) [TSINGHUA L. REV.] 35 (2007).

7. XI JINPING, *Commemorate the 30th Anniversary of the Promulgation and*

a successful implementation of the Constitution to some of China’s supreme goals and ideals, Xi has demonstrated the government’s commitment to confronting and solving this problem.⁸ Second, in 2014, for the first time in history, the Party chose “rule of law” as the topic of their Plenum and issued its “Decision on Major Issues Concerning Comprehensively Advancing Rule of Law” afterwards.⁹ Again, strengthening “the implementation of the Constitution” was one of the key topics of the Plenum. More importantly, discussions in the Plenum have canvassed an unprecedentedly wide range of judicial reform and also highlighted the role of the National People’s Congress (NPC) and its Standing Committee in supervising implementation of the Constitution.¹⁰ Put together, the

Implementation of the Current Constitution, in THE GOVERNANCE OF CHINA 149, 152–53 (2014) (“The life of the Constitution is in its implementation, and so is its authority. We must persistently ensure the implementation of the Constitution, and raise the comprehensive implementation of the Constitution to a new level.”).

8. *Id.* at 151–52:

[W]e can see that the Constitution is closely bound up with the future of the country and the destiny of the people. Safeguarding the authority of the Constitution is safeguarding the authority of the common will of the Party and the people. Upholding the dignity of the Constitution is upholding the dignity of the common will of the Party and the people. Ensuring the implementation of the Constitution is ensuring the people’s fundamental interests. As long as we respect and implement the Constitution the people will be able to masters of the country, and cause of the Party and the state will be able to progress smoothly. If the Constitution is disregarded, weakened or even sabotaged, the people’s rights and freedoms cannot be guaranteed, and the cause of the Party and the state will suffer. Therefore, precious inspirations from long-term practice must be cherished. We should be more active in taking the initiative in abiding by the principles prescribed by the Constitution, carrying forward its essence and fulfilling the duties it prescribes.

9. See Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding (中共中央关于全面推进依法治国若干重大问题的决定) [Decision on Major Issues Concerning Comprehensively Advancing Rule of Law] (promulgated by the CPC Cent. Comm., Oct. 23, 2014), http://news.xinhuanet.com/politics/2014-10/28/c_1113015330.htm [<https://perma.cc/5RAN-QCPO>], translated in Jeremy Daum & Rogier Creemers, *CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward*, CHINA COPYRIGHT AND MEDIA (Oct. 30, 2014), <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/> [<https://perma.cc/G79M-G4WR>] [hereinafter *Advancing the Rule of Law*]. See also Zhongguo Gongchandang Dishiliujie Zhongyang Weiyuanhui Disanci Quantu Huiyi Gongbao (中国共产党第十八届中央委员会第四次全体会议公报) [Communique of the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China], translated in Compilation and Translation Bureau of the Cent. Comm. of the Communist Party of China, *Communique of the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China*, CHINA.ORG.CN (Dec. 2, 2014), http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm [<https://perma.cc/HY7K-CFSP>].

10. See *Advancing the Rule of Law*, *supra* note 9. To strengthen the role of the NPC in implementing the Constitution, the Decision stated it would:

[p]erfect the constitutional supervision system of the National People’s Con-

above two developments signal that China has started the long march to implement its Constitution.

Of course, the struggle for implementation is far from over, and it would be naïve to assume otherwise. Still, recent events signal an opportunity for change that all advocates should seize upon. While continuing to advocate for mechanisms of constitutional implementation and constitutional review in China (either through the Supreme People's Court or the NPC), we should not forget the equal importance of interpreting and constructing China's own "living constitution." Taking the Chinese Constitution seriously, and committing time and attention to discerning its complete meaning, is the first step towards invigorating constitutional implementation in China.

Second, despite the present lack of implementation, free speech lawyers, scholars, activists and ordinary citizens already invoke the Chinese Constitution when asserting their rights or advocating for legal change. The Constitution has become an essential part of the Chinese people's rhetoric, strategy, argument, and even daily life. A free speech theory founded on the text of the Constitution would render such use of the Constitution more sophisticated, convincing and inspiring. While criticizing the government for neglecting the Constitution, scholars, lawyers and activists must take the Constitution seriously themselves. The government's negligence and inaction does not excuse us from our duty to interpret and protect this important document. More than simply repeating that "the Constitution protects free speech" or that "restricting free speech violates the Constitution," investing serious efforts in developing our understanding of the document is vital. We must elaborate what kinds of speech are protected by the Constitution and why they receive this protection. This effort is valuable even if its results are, at the present moment, merely theoretical. A better understanding of the Constitution will educate and cultivate the people as well as their government. After all, the government is not the only actor able to shape and interpret the Constitution; "the people themselves" are also indispensable.¹¹ If "We the

gress and its Standing Committee, complete procedures and mechanisms for constitutional interpretation. [It would also s]trengthen filing and review systems and capacity building, bring all normative documents into the scope of filing and review, cancel and correct normative documents that violate the Constitution or the law according to the law, [and it stated that] it is prohibited that localities formulate and issue documents of a legislative nature.

Id. Some notable judicial reforms proposed by the Decision include establishing circuit courts, establishing a system for recording, reporting, and investigating the responsibility of leading cadres when they interfere with or get involved in judicial activities, changing the case filing review system to a case filing registration system, establishing the systems for procuratorates to raise public interest lawsuits, strengthening the judicial protection of human rights, and strengthening and standardizing judicial interpretation and case guidance system, etc. *Id.*

11. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 3–8 (2004); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 25–33 (Jack M. Balkin & Reva

Chinese People” can take the Constitution seriously first, it will foster a culture that respects and cherishes the Constitution; in return, the resulting constitutional culture could influence and tame the government.¹² Fulfilling our constitutional duty does not guarantee the betterment of law or even ensure robust constitutionalism in China, but failing to do so may preclude that vision altogether.

Third, as Robert Cover famously wrote, “For every Constitution there is an epic.”¹³ The Chinese Constitution is no exception. China’s history, tradition and philosophy were incorporated into the document in the course of its drafting.¹⁴ The Chinese Constitution is not only the *superior* law and *higher* law;¹⁵ it is also “our law”—it summarizes “our achievement and the product of our efforts as a people, which involves

B. Siegel eds., 2009).

12. For discussion of a constitutional culture, see Robert C. Post, *The Supreme Court, 2002 Term: Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 41 (2003) (“Constitutional culture comes in many forms, ranging from the conviction of ordinary citizens about the meaning of their Constitution to the considered constitutional interpretations of those authorized to make law based upon these interpretations.”).

13. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

14. 5 MAO TSE-TUNG, *On the Draft Constitution of the People’s Republic of China*, in SELECTED WORKS OF MAO TSE-TUNG 141, 142–43 (1965) (arguing that “summarizing the past” was one of two reasons why the 1954 Constitution was supported by the people):

First, it sums up the experience of the past, especially that in our revolution and construction over the last five years. It sums up our experience in the people’s revolution led by the proletariat against imperialism, feudalism and bureaucrat-capitalism as well as our experience in social reform, economic construction, cultural construction and government work over the last few years. Besides, it sums up the experience in constitution-making since the last years of the Ching Dynasty, that is, from the Nineteen Constitutional Articles in the final days of the Ching Dynasty to the Provisional Constitution of the Republic of China in 1912, the various constitutions and draft constitutions under the governments of the Northern warlords, the Provisional Constitution of the Republic of China in the Period Under Political Tutelage of the reactionary Chiang Kai-shek regime and right up to Chiang Kai-shek’s bogus constitution. One of these was positive in nature and the others negative. Thus the Provisional Constitution of the Republic of China in 1912 was a fairly good one for its time. Of course it had its imperfections and faults and was bourgeois in nature, but there was something revolutionary and democratic about it. It was concise and is said to have been drafted in haste, taking only a month from the time of its framing to its adoption. As for the other constitutions and draft constitutions, they were altogether reactionary. This Draft Constitution of ours is chiefly a summing-up of our experience in revolution and construction, but at the same time it is a synthesis of domestic and international experience. Our constitution is of a socialist type. It is based mainly on our own experience but has drawn upon what is good in the constitutions of the Soviet Union and the People’s Democracies.

Id.

15. *But cf.* Paul Gewirtz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 H.K. L.J. 201, 208 (2001).

a collective identification with those who came before us and with those who will come after us.”¹⁶ As the next section will discuss, many studies on free speech in China have already begun to explore China’s history, tradition, philosophy and culture for inspiration and resources. But free speech advocates need not look outside the Constitution for such content; as this article will show, this content has already been assimilated into the Preamble, the structure, and every chapter, article and word of the Constitution. Compared to theories based on abstract concepts such as collectivism¹⁷ or Confucian values,¹⁸ a free speech theory developed from and supported by the Chinese Constitution is more concrete, direct and relevant. So constructing China’s free speech theory from the Chinese Constitution is more than a merely legalistic tactic. Rather, it incorporates China’s unique history and tradition into its account.

Identifying China’s “free speech clause” is the first step in developing a theory of free speech for China. Robert Post once defined the major function of a free speech theory as articulating the purposes and values free speech should serve.¹⁹ In this sense, setting forth a new “free speech clause” not only expands the kinds of speech the Chinese Constitution protects, but also explains why these forms of speech deserve constitutional protection due to their value and purpose. Answers to these questions are indispensable to finding China’s own path to promote free speech.

Thus, to construct a complete “free speech clause” in the Chinese Constitution, and more importantly, to construct a uniquely Chinese theory of free speech, this article proceeds in two parts. The first presents a “horizontal” or “holistic” study of the current Constitution—the 1982 Constitution—in China. Besides the clause(s) related to freedom of speech, I will also examine the Preamble, the other chapters of the Constitution, and the overall structure and logic of the document as a whole. The second part of this article analyzes the Chinese Constitution “vertically,” that is, historically. By studying China’s three earlier Constitutions (the 1954 Constitution, the 1975 Constitution, and the 1978 Constitution) as well as the newly discovered 1953 Draft, we will see how the Constitution has been shaped over time and why it has taken its present form. By tracing the development and changes of relevant clauses, a vertical

16. Jack M. Balkin, *The American Constitution as “Our Law,”* 25 *YALE J. L. & HUMAN.* 113, 113 (2013) (citing JACK M. BALKIN, *LIVING ORIGINALISM* 60 (2011)). For a further discussion of the constitution as “our law,” see JACK M. BALKIN, *LIVING ORIGINALISM* 59–73 (2011).

17. See Peter Lin, *Between Theory and Practice: The Possibility of the Right to Free Speech in People’s Republic Of China*, 4 *J. CHINESE. L.* 257 (1990).

18. See R. P. Peerenboom, *What’s Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 *HARV. HUM. RTS. J.* 29 (1993); Andrew J. Nathan, *Sources of Chinese Rights Thinking*, in *HUMAN RIGHTS IN CONTEMPORARY CHINA* 125, 125–64 (R. Randle Edwards et al. eds., 1986) [hereinafter Nathan, *Chinese Rights*].

19. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 4–6 (2012).

reading also reveals that China’s unique understanding of free speech can be found throughout the development of its Constitution.

B. *Beyond the “Politico-Centrism” in Free Speech Thinking*

Over the past few decades, a growing body of literature on the constitutional protection of free speech (and rights in general) in China has arisen.²⁰ Many of them have turned to China’s history, tradition, philosophy and context for inspiration and recourse.

For example, in his article “Between Theory and Practice: The Possibility of a Right to Free Speech in the People’s Republic of China,” scholar Peter Lin argued that the key to promoting China’s freedom of speech lay in its profound collectivist tradition.²¹ This is unlike promoting the prevailing “natural rights theory” in western democracies, which contends that individuals are naturally endowed with fundamental rights—a natural rights theorist may thus conclude that a lack of individualism is responsible for the lack of free speech protection in contemporary China.²² Peter Lin, however, finds this distinction between “liberal individualism” and “socialist collectivism” both “fictive” and misleading.²³

In his view, China’s collectivism is not a threat to free speech but a resource that could be used rather than discredited. Rather than conceptualizing freedom of speech as an individual right against the state, Peter Lin rooted his “pragmatist” understanding of free speech in the Chinese collectivist tradition, which viewed free speech as a right that “the state provides to its citizens by way of political practices that are sensitive to the values, interests, and aspirations of all segments of the society, and justifiable in accordance with the standard of rationality generally accepted in the society.”²⁴ In other words, China’s free speech should be constructed as a right in service of, and subject to, the collective interests of the whole society. China struggles with free speech not because it is too collectivist, but because it is not collectivist enough. Lin argues that, as the Chinese government has always branded itself as representing the nation’s interests, it should allow the people to voice their concerns so that the Party-State can learn what these interests really are.²⁵

20. See R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra* note 18, at 41–76; Ellen R. Eliasoph, *Free Speech in China*, 7 YALE J. WORLD PUB. ORD. 287 (1981); Owen M. Fiss, *Two Constitutions*, 11 YALE J. INT’L L. 492 (1986) [hereinafter Fiss, *Two Constitutions*]; Lin, *supra* note 17; Andrew J. Nathan, *Political Rights in Chinese Constitutions*, in HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra* note 18, at 77, 77–124; Nathan, *Chinese Rights*, *supra* note 18, at 125–64; Peerenboom, *supra* note 18; Roy L. Sturgeon, *China’s Homegrown Free-Speech Tradition: Imperial Past and Modern Present*. And Post-Modern Future?, 26 FLA. J. INT’L L. 291 (2014).

21. Lin, *supra* note 17, at 257–58.

22. *Id.* at 260–62.

23. *Id.* at 262–63.

24. *Id.* at 265.

25. *Id.* at 273.

Law professor Randall Peerenboom also tried to develop a theory of rights “with Chinese characteristics” and based on the “Chinese culture, traditions, and historical and economic conditions” in his article “What’s Wrong with Chinese Rights: Toward a Theory of Right with Chinese Characteristics.”²⁶ Similar to Lin, Peerenboom is also against imposing “natural rights theory” on China.²⁷ For Peerenboom, due to the “pragmatic, anti-foundational character of much of Chinese philosophy,” a truly Chinese rights theory should be “contingent” and “communitarian” instead of “inalienable” and individualistic.²⁸ More specifically, Peerenboom summarizes several major differences between the western and Chinese understandings of rights.²⁹ He suggests that rights in China tend to be more harmonious than those in Western cultures, which means a theory of rights should serve as a “resource, a starting point, for resolving conflicts” rather than “simply as minimalist protections against the state and others.”³⁰ Furthermore, a Chinese theory envisions rights as more “relational,”³¹ involving “reliance on informal means for conflict resolution,”³² with “prominence given to economic rights,”³³ and as “instrumental”³⁴ and less “deontological.”³⁵ In Peerenboom’s view, his theory of rights is not only more suited to China’s unique political and cultural context; it also makes it easier to hold the Chinese government accountable, for “at minimum, a country must stand up to scrutiny on its own terms: it must be able to withstand criticism of both its theory (or underlying philosophies) and empirical practice.”³⁶

Likewise, political scientist Andrew Nathan also highlighted four tenets as the “sources of Chinese rights thinking”: (1) in light of both domestic (i.e., Legalist and Confucian) and foreign (i.e., Marxist) influences, law is the will of the state and rights are the state’s creation;³⁷ (2) individual interests are inseparable from, and must defer to, societal interests;³⁸ (3) rights exist “not to protect the individual against the state but to enable the individual to function more effectively to strengthen the state”;³⁹ (4) rights protection is a utilitarian effort justified by the social utility those rights provide.⁴⁰

26. Peerenboom, *supra* note 18, at 53.

27. *Id.* at 30.

28. *Id.* at 57.

29. *Id.* at 53–55.

30. *Id.* at 54.

31. *Id.*

32. *Id.* at 54–55.

33. *Id.* at 55.

34. *Id.*

35. *Id.*

36. *Id.* at 50.

37. Nathan, *Chinese Rights*, *supra* note 18, at 130.

38. *Id.* at 143.

39. *Id.* at 148.

40. *Id.* at 154.

A recent article by scholar Roy L. Sturgeon tried to revive another Chinese tradition in service of contemporary free speech protection in China: "using the past to criticize the present and improve the future."⁴¹ The author presented six free speech controversies from Chinese history, spanning from the Qin Dynasty to the 1990s.⁴² As cautionary tales, these examples showed that "repressions of criticism and dissent are signs of intellectually backward and frightened governments,"⁴³ and that by giving more space for free speech, the Party-State could reduce the possibility of unrest and "gain honest, independent feedback on what it is doing right, wrong, and ought to do."⁴⁴

Different from the scholars who look to history and tradition to begin their analysis, law professor and constitutional scholar Owen Fiss limits his analysis of the Chinese Constitution to the text itself. Fiss published his well-known article on the document, "Two Constitutions," in 1986, only four years after China's current Constitution ("the 1982 Constitution") was ratified. Fiss reasoned that promoting free speech in China must be based on and in accordance with the text the Chinese Constitution, not the constitution or theory of any other country.⁴⁵ As the title of Fiss's article indicates, the Chinese Constitution and the U.S. Constitution are "two constitutions," not one. Fiss argued in particular against any approach that interprets China's free speech through the lens of American legal theory. Treating Article 35 as China's "First Amendment" is problematic, he wrote, for "article 35 tells only part of the story,"⁴⁶ and we will lose sight of other important articles if we keep looking for the equivalent of the First Amendment in the Chinese Constitution. Fiss called attention to Article 38, 51, 53, and 54, provisions that may limit the scope of free speech protection.⁴⁷ In their individual capacities, Article 38 guarantees the right to dignity,⁴⁸ Article 51 states that the exercise of individual rights should not interfere with the interests of the state,⁴⁹ Article 53 concerns citizens' duty to "abide by the Constitution and the

41. Sturgeon, *supra* note 20, at 298.

42. *Id.* at 300–14. These six controversies are: (1) Qin Shi Huang's burning of books and burying of scholars (Fen Shu Keng Ru, 焚书坑儒); (2) the story of Qin Hui (秦桧) vs. Yue Fei (岳飞) in the Southern Song dynasty; (3) the Donglin (东林党) incident in the Ming dynasty; (4) Mao Zedong's Yan'an Forum on Literature and Art; (5) the story of Fang Lizhi (方励之); and (6) the case of Wei Jingsheng (魏京生). *Id.* at 300–14.

43. *Id.* at 314.

44. *Id.* at 315.

45. Fiss, *Two Constitutions*, *supra* note 20, at 493.

46. *Id.* at 493–94.

47. *Id.*

48. XIANFA art. 38 (1982) (China) ("The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited.").

49. XIANFA art. 51 (1982) (China) ("Citizens of the People's Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens.").

law, keep State secrets, protect public property, observe labor discipline and public order and respect social ethics,"⁵⁰ and Article 54 concerns citizens' duties to "safeguard the security, honor and interests of the motherland."⁵¹ Only by reading these sections together, Fiss suggested, will we see the full picture of free speech in China.

While the work of Lin, Peerenboom, Sturgeon and Fiss present compelling theories of constitutional rights in China, they share one limitation: each takes a "politico-centered" perspective in conceptualizing China's problem of free speech.⁵² For example, Lin explicitly defines freedom of speech as a political practice⁵³ and its value the creation of an unfettered marketplace of political views from which the government can learn the true collective interests of society.⁵⁴ Sturgeon also views free speech as a political right;⁵⁵ all six of his "cautionary tales" concern political speech; the justification he provides for free speech are also based on political values (i.e., therapeutic discourse and intellectual capital).⁵⁶ Fiss's comparative study is also based on the differences between Chinese and American regimes, and as a political right, the different logics and functions of free speech in each country.⁵⁷ Generally speaking, these scholars put political speech at the center of free speech protection and justify constitutional protection mainly with certain political values free speech advances. In short, these scholars conceive free speech primarily as a political right. Consequently, they tend to downplay or even neglect a crucial aspect—the cultural aspect—in Chinese free speech thinking and advocacy.

50. XIANFA art. 53 (1982) (China) ("Citizens of the People's Republic of China must abide by the Constitution and the law, keep State secrets, protect public property, observe labor discipline and public order and respect social ethics.").

51. XIANFA art. 54 (1982) (China) ("It is the duty of citizens of the People's Republic of China to safeguard the security, honor and interests of the motherland; they must not commit acts detrimental to the security, honor and interests of the motherland.").

52. The term "politico-centrism" is borrowed from Professor Jack Balkin. See J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1985–86 (1995) (book review):

In particular, an encounter with popular culture might tend to counteract the tendency, common to certain academics, politicians, and even a few self-styled revolutionaries, to overstress the importance of politics to the life of ordinary citizens. We might even coin a new word to describe this phenomenon: Let us call it politico-centrism. If ethnocentrism is the world seen through the eyes of a cultural chauvinist, politico-centrism is the world seen through the eyes of a political junkie.

Id. See also Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

53. Lin, *supra* note 17, at 258.

54. *Id.* at 270.

55. Sturgeon, *supra* note 20, at 296 n.11.

56. *Id.* at 319–20.

57. Fiss, *Two Constitutions*, *supra* note 20, at 500–03.

This “politico-centrism” in free speech thinking is correlated to the view that treats Article 35 alone as China’s “free speech clause.” It blinds people from seeing anything but the provision that safeguards political expression. In return, treating Article 35 alone as China’s “free speech clause” reinforces the view that free speech in the Chinese Constitution is all about political expressions.

This article aims to challenge—more accurately, to supplement—this “politico-centered” understanding of free speech in China. Rejecting the popular monolithic view, this article proposes a dual understanding of free speech. It argues that free speech protections in China should be applied to all expressions that could help the Chinese people to be masters in political and cultural areas. To be clear, I fully recognize the importance of political speech and the political values free speech may further.⁵⁸ I also share other theorists’ zeal to improve China’s protection of political expression. But it is one thing to formulate a strategy for political action; it is another to interpret the text of the Constitution. When developing a legal strategy or campaigning for change, we are justified in prioritizing certain kinds of speech and putting others aside; when interpreting the Constitution, however, we must broaden our vision to discern the complete, accurate and true meaning of the law.

I. READING THE CHINESE CONSTITUTION HORIZONTALLY

By reading the Constitution holistically, this section seeks to uncover the constitutional *ethos*—the Chinese People are masters of the

58. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (2d ed. 2000) [hereinafter MEIKLEJOHN, *FREE SPEECH*]; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961) [hereinafter Meiklejohn, *The First Amendment*]. In Meiklejohn’s view, public speech is primarily political speech. Free speech basically protects the right of voters and its purpose is to help them to vote better:

The First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game, whose search for truth expresses nothing more than a private intellectual curiosity or an equally private delight and pride in mental achievement. It was written to clear the way for thinking which serves the general welfare. It offers defense to men who plan and advocate and incite toward corporate action for the common good. . . . [E]very relevant idea of fact or value must have full consideration, whatever may be the dangers which that activity involves. . . . So long as his active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged. That freedom is the basic postulate of a society which is governed by the votes of its citizens.

MEIKLEJOHN, *FREE SPEECH*, *supra* at 45–46. See also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (famously arguing that the First Amendment should only cover “explicitly and predominantly political speech”); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121–66 (1993) (articulating a “Two-Tier First Amendment” protection scheme in which political speech enjoys first-tier protection while non-political speech receives secondary or lessened protection).

country—embedded in the Chinese Constitution. This *ethos* is two-fold; it demands that the Chinese people should become masters not only in political area but in cultural area as well. In light of this *ethos*, China’s “free speech clause” should protect all speech, whether political or cultural, that might further this dual ideal.

A. *The Preamble and the Ethos of “The People Are Masters of the Country”*

1. “First Things First”: The Binding Force of a Constitutional Preamble

Where should a holistic reading of the Chinese Constitution begin? At the beginning, as both logic and nature prescribe. Like many constitutions in the world, China’s Constitution opens with a Preamble, and so this is where our survey begins.

The “first things first” adage partly explains the importance of a preamble—as does the equally popular adage, “location, location, location.” As Professor Akhil Amar once described the Preamble to the U.S. Constitution: “With simple words placed in the document’s most prominent location, the Preamble laid the foundation for all that followed.”⁵⁹ Similarly, Sanford Levinson regarded the same Preamble as “*the single most important part of the Constitution*,” one which “announce[d] the *point of the entire enterprise*.”⁶⁰ To a great extent, this sentiment applies equally to the Preamble to the Chinese Constitution. China’s Preamble, too, by definition sits at the “document’s most prominent location.” It not only “lay[s] the foundation for all that follow[s],”⁶¹ but also “announces the *point of the entire enterprise*.”⁶²

In Chinese legal academia, however, great controversy has arisen over what role, if any, the Preamble should play in constitutional interpretation. The participants of this debate fall into two groups, one arguing that the Preamble has no binding force, and the other insisting that the Preamble play some role in constitutional interpretation (while disagreeing amongst themselves as to what this role should be).

Professor Zhang Qianfan of Peking University, arguably the most prominent figure in the first camp, views the Preamble to the Chinese Constitution as an essentially political statement, rather than one with legal force.⁶³ For him, the Preamble is declaratory and mainly functions as propaganda rather than a foundation for judicially enforceable legal

59. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 5 (2005).

60. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 13 (2006) (emphasis in original).

61. AMAR, *supra* note 59.

62. LEVINSON, *supra* note 60 (emphasis in original).

63. Zhang Qianfan (张千帆), *Xianfa Xuyan ji qi Xiaoli Zhengyi* (宪法序言及其效力争议) [*The Controversy over the Binding Force of the Preamble of the Constitution*], 6 *YANHUANG CHUNQIU* (炎黄春秋) 1, 2–3 (2013) [hereinafter Zhang, *Preamble Controversy*].

rights and duties.⁶⁴ Consider, for example, the first two sentences of the Preamble: “China is a country with one of the longest histories in the world. The people of all of China’s nationalities have jointly created a culture of grandeur and have a glorious revolutionary tradition.” For Zhang Qianfan, these two sentences exemplify the nature of the Preamble as rhetorical flourish—as window-dressing espousing abstract ideals. “No one,” he has stated, “could see any kind of legal force” in these words.⁶⁵ In other words, the Preamble may be many things, but law it is certainly not. Hence, in his famous theory of “the selective implementation of the Chinese Constitution,” Professor Zhang labeled the entire Preamble “unsuitable for implementation.”⁶⁶ In Professor Zhang’s view, the Preamble has no place in the construction and implementation of the Chinese Constitution.

Professor Han Dayuan from Renmin University champions the opposing view. Professor Han does not deny that the Preamble contains grand historical narratives and abstract ideals, but he also does not believe that such content disqualifies it from contributing to constitutional interpretation.⁶⁷ For him, the integrity of the Constitution is at stake;⁶⁸ the Chinese Constitution must be read as an indivisible and coherent document.⁶⁹

Han’s emphasis on integrity exposes one grave problem in the theory of “selective implementation”: who has the authority and capability to tell people which provisions should be implemented and which should not? The Party leaders, the Standing Committee of the NPC, the Supreme People’s Court, or constitutional scholars like Professor Zhang Qianfan? The answer, of course, is that no one has been granted such authority, and as such the concept of disregarding certain sections of the Constitution as unfit or unintended for implementation is a dangerous one. The idea of disregarding the entire Preamble or of implementing the Chinese Constitution selectively is a slippery slope. If certain provisions can be so ignored, constitutional interpretation may quickly become a game of “picking your favorite provisions and eliminating those you dislike.” No constitution can survive such an arbitrary reading.

Still, Han’s integrity-based reading of the Constitution remains more or less defensive. It is primarily an argument for *not* neglecting the Preamble (or any other any part of the Constitution), rather than a

64. Zhang Qianfan (张千帆), *Lun Xianfa de Xuanze Shiyong* (论宪法的选择适用) [On the Selective Implementation of the Constitution], 5 ZHONGWAI FAXUE (中外法学) [PEKING U. L.J.] 887, 898–99 (2012) [hereinafter Zhang, *Selective Implementation*]; CAI, *supra* note 1, at 100–01.

65. Zhang, *Preamble Controversy*, *supra* note 63, at 7.

66. Zhang, *Selective Implementation*, *supra* note 64, at 902.

67. HAN DAYUAN (韩大元) & HU JINGUANG (胡锦光), ZHONGGUO XIANFA (中国宪法) [THE CHINESE CONSTITUTION] 101–04 (2006).

68. HAN DAYUAN (韩大元), XIANFAXUE JICHU LILUN (宪法学基础理论) [BASIC CONSTITUTIONAL THEORY] 177 (2008).

69. HAN & HU, *supra* note 67, at 104.

positive argument for what impacts and insights the Preamble can provide to constitutional interpretation. Although Professor Han employed the Constitutions of France, Japan and New Zealand to demonstrate how a preamble can play “an indispensable role” in constitutional interpretation, he failed to offer more detailed guidance as to how should we interpret China’s Preamble in particular and what role these words should play in our understanding of the rest of the Constitution.⁷⁰

The following paragraphs seek to answer the questions left by Professor Han. Using the typology proposed by Liav Orgad, I will show how China’s Preamble can serve as “an interpretative preamble” in guiding our understanding of the Constitution as a whole.

After examining the constitutions of fifty countries, Israeli scholar Liav Orgad identified the five major topics featured in most preambles: the sovereignty, historical narrative, supreme goals, national identity, and god or religion.⁷¹ As Orgad further explains: (1) most preambles identify the source of sovereign, the most prominent example being the “We the People” opening the U.S. Constitution;⁷² (2) most preambles tell a story about the country’s history, heritage or tradition;⁷³ (3) many outline a country’s fundamental ideal or goal;⁷⁴ (4) most preambles often define national identity, setting forth a national creed, faith or philosophy;⁷⁵ and (5) some preambles also refer to God or a national religion.⁷⁶

Given these commonalities, Orgad summarizes the three major functions a given preamble may serve: (1) the ceremonial-symbolic function; (2) the interpretive function; and (3) the substantive function.⁷⁷ A substantive preamble may very well function as “an independent source for constitutional rights.”⁷⁸ Orgad categorized the Preamble to the Constitution of France (1958) and the Preamble to the Indian Constitution as classic examples in this regard.⁷⁹ A substantive preamble has the strongest legal force, because it basically functions as any other provision in the constitution’s main body.

On the other end of the spectrum, a ceremonial-symbolic preamble has the weakest or no binding force. Its main purpose, as Orgad sees it, is “to consolidate national identity.”⁸⁰ The origin of this type of preamble can be traced to Plato’s *Laws*, in which Plato argued that a preamble’s value lies in its ability “to convince the people why laws are morally

70. *Id.* at 103.

71. Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT’L J. CONST. L. 714, 716–18 (2010).

72. *Id.* at 716.

73. *Id.* at 717.

74. *Id.*

75. *Id.*

76. *Id.* at 717–18.

77. *Id.* at 722–31.

78. *Id.* at 715.

79. *Id.* at 726–28.

80. *Id.* at 715.

good.”⁸¹ As its name suggests, this type of preamble is mainly symbolic, and therein lies its purpose. As discussed, Professor Zhang Qianfang perceives the Preamble to the Chinese Constitution as just such a preamble.

The interpretive preamble lies somewhere in between the substantive preamble and the ceremonial-symbolic preamble. According to Orgad, an interpretive preamble is that “granted a guiding role in statutory and constitutional interpretation.”⁸² He cites, as a prime example, section 39 of the Constitution of South Africa, which requires that courts interpreting the nation’s Bill of Rights must do so in light of the words and spirit embodied in its Preamble, namely, “the values that underlie an open and democratic society based on human dignity, equality and freedom.”⁸³

In terms of Orgad’s typology, most agree the Preamble of the Chinese Constitution serves a ceremonial-symbolic function. In the meantime, few would argue that China’s Preamble serves a substantive function, as its language neither indicates nor implies that it could serve as an independent source for constitutional rights and obligations. The question then arises: could the Preamble of the Chinese Constitution also serve as an interpretive one? If yes, how does it fulfill that purpose and play “a guiding role in constitutional interpretation”? The next section explores these questions.

2. China’s Constitutional Ethos: “The People Are Masters of the Country”

China’s Preamble could serve as an interpretive preamble because it embodies China’s constitutional *ethos*. This *ethos* allows us to make ethical arguments when interpreting the Chinese Constitution. Again borrowing Cover’s famous saying—that “[f]or every Constitution there is an epic”⁸⁴—the constitutional *ethos* embedded in the Preamble is the most refined and concise version of China’s epic.

The concepts of constitutional *ethos* and ethical argument are borrowed from Professor Philip Bobbitt.⁸⁵ In his book *Constitutional Fate*,

81. *Id.* at 722.

82. *Id.* at 715.

83. *Id.* at 724; S. AFR. CONST., 1996 ch. 2, § 39:

Interpretation of Bill of Rights: 39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

84. Cover, *supra* note 13, at 4.

85. See PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 93–119 (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE]; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 20–22 (2006) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION].

Bobbitt identifies five modalities of constitutional arguments in America: historical, textual, structural, prudential, and doctrinal.⁸⁶ In Bobbitt's classification, ethical argument relies "on a characterization of American institutions and the role within them of the American people."⁸⁷ In his later book, Bobbitt further explained ethical argument as one that "denotes an appeal to those elements of the American cultural *ethos* that are reflected in the Constitution."⁸⁸ In Bobbitt's view, the constitutional *ethos* of United States is the idea of limited government.⁸⁹

Borrowing Bobbitt's framework, and in particular his concept of ethical argument, I define constitutional *ethos* as the fundamental character and identity of a nation, one that embodies national ideals, commitments, aspirations and traditions. A nation's constitutional *ethos* concerns the country's past, present and future. It reflects who its people are and what they stand for.

In recent years, some Chinese legal scholars have interpreted the Chinese Constitution with something resembling ethical argument. Professor Chen Duanhong's study is the most notable in this regard.⁹⁰ It argues that the Preamble to the Chinese Constitution can be broken down into five major points. In sequence: (1) the Chinese people as led by the Communist Party of China; (2) socialism; (3) democratic centralism; (4) the socialist modernization; and (5) the protection of fundamental rights.⁹¹ Professor Chen deems these the "Five Fundamental Laws" and argues that the essence and spirit of the Chinese Constitution, as fundamental law and higher law, are best crystalized here.⁹² For this reason, Chen believes that the "Five Fundamental Laws" should govern our understanding and interpretation of the Chinese Constitution.

My interpretation of China's constitutional *ethos* is different. In my view, the constitutional *ethos* embedded in our Preamble can be condensed into a single sentence: "**the People are masters of the country**" (人民当家作主; *Ren Min Dang Jia Zuo Zhu*). This is China's epic, in its most concise form. In the eyes of the founders of the PRC, this *ethos* is what they sacrificed and fought for. It not only distinguishes the People's Republic of China from other countries, it also enunciates the difference between the People's Republic and any other dynasty in Chinese history. This *ethos* is our national ideal. It defines who we are and what we stand for.

86. BOBBITT, CONSTITUTIONAL FATE, *supra* note 85, at 7.

87. *Id.* at 94.

88. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 85, at 20.

89. BOBBITT, CONSTITUTIONAL FATE, *supra* note 85, at 100–01.

90. Chen Duanhong (陈端洪), *Lun Xianfa Zuowei Guojia de Genben Fa yu Gaoji Fa* (论宪法作为国家的根本法与高级法) [*On Constitution as Fundamental Law and Higher Law of the Nation*], 4 *ZHONGWAI FAXUE* (中外法学) [PEKING U. L.J.] 485 (2008).

91. *Id.* at 494–98.

92. *Id.* at 486–90.

In addition to the Preamble, “the People are masters of the country” *ethos* has appeared in other significant places. Consider, for example, the First Plenary Session of the Chinese People’s Political Consultative Conference on September 21st, 1949—just ten days before the Founding Ceremony of the People’s Republic. As revolutionary heroes and democratic parties leaders gathered in Beijing to celebrate the birth of the new China, they witnessed Mao’s opening speech, titled, “**The Chinese People Have Stood Up!**”⁹³ The message conveyed by this short sentence is clear. “People have stood up” equates to “the people have become masters of the country.” These words conceptualize the founding of the People’s Republic as a watershed moment. Prior history saw the Chinese people oppressed and exploited, but in the future ahead, the people would become their own masters. This simple but powerful sentence defined, at this moment in China’s history, the constitutional *ethos* of the new China. It declared that the “new China” was a nation whose people governed and mastered their own affairs.

This *ethos* is also epitomized in China’s national anthem, “March of the Volunteers,”⁹⁴ which in its opening sentence calls out, “Arise, we who refuse to be slaves.” Similar to the metaphor of “standing up,” “arise” is also based on the master-slave dichotomy. It connotes the movements of masters, not of slaves. Written during the Sino-Japanese War, “March of the Volunteers” declared that “[t]he peoples of China are at their most critical time” and called, accordingly, for the Chinese people to unite against the invading enemy: “With our very flesh and blood / Let us build our new Great Wall!” The anthem explains that the Chinese people must fight—in order be their own masters instead of the slaves of others. In wartime, this song inspired millions of people to do just that. In peacetime, the government of the PRC chose “March of the Volunteers” as the national anthem because the spirit of “[a]rise, we who refuse to be slaves” was as relevant as ever before. It described perfectly the *ethos* of a people who were the masters of their country—in wartime and in peace.

93. 5 MAO TSE-TUNG, *The Chinese People Have Stood Up!*, in *SELECTED WORKS OF MAO TSE-TUNG*, *supra* note 14, at 15, 15–18.

94. The full lyrics of “March of Volunteers” are as follows:

Arise, we who refuse to be slaves;
 With our very flesh and blood
 Let us build our new Great Wall!
 The peoples of China are at their most critical time,
 Everybody must roar defiance.
 Arise! Arise! Arise!
 Millions of hearts with one mind,
 Brave the enemy’s gunfire,
 March on! Brave the enemy’s gunfire,
 March on! March on! March on, on!

National Anthem, ST. COUNCIL, CHINA (Aug. 26, 2014, 3:40 PM), http://english.gov.cn/archive/china_abc/2014/08/27/content_281474983873455.htm [https://perma.cc/VLK5-ECKF].

3. A Textual Analysis of the Preamble to the Chinese Constitution

Let us now turn to the Preamble of Chinese Constitution, where the Chinese *ethos* has been most powerfully articulated.

The Preamble contains thirteen paragraphs and 1792 Chinese characters. For the purpose of this analysis, I will divide it into four parts: paragraphs one through five, paragraph six, paragraphs seven through twelve, and paragraph thirteen.

Part I is a narrative setting out China's history before the founding of the PRC in 1949. As Benedetto Croce insightfully captured, "all history is contemporary history." Part I should be read from this perspective. Its account of Chinese history prior to 1949 not only concerns China's past, but speaks also to its present and future. How history is constructed determines how today and tomorrow are understood. In this sense, part I is the most important part of the Preamble.

The first five paragraphs of the Preamble state:

China is a country with one of the longest histories in the world. The people of all of China's nationalities have jointly created a culture of grandeur and have a glorious revolutionary tradition.

After 1840, feudal China was gradually turned into a semi-colonial and semi-feudal country. The Chinese people waged many successive heroic struggles for national independence and liberation and for democracy and freedom.

Great and earthshaking historical changes have taken place in China in the 20th century.

The Revolution of 1911, led by Dr. Sun Yat-sen, abolished the feudal monarchy and gave birth to the Republic of China. But the historic mission of the Chinese people to overthrow imperialism and feudalism remained unaccomplished.

After waging protracted and arduous struggles, armed and otherwise, along a zigzag course, the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism and bureaucrat-capitalism, won a great victory in the New-Democratic Revolution and founded the People's Republic of China. **Since then the Chinese people have taken control of state power and become masters of the country.**⁹⁵

The Preamble may surprise many readers with its opening lines. It does not begin with any particular moment or event, but instead with the following two sentences: "China is a country with one of the longest histories in the world. The people of all of China's nationalities have jointly created a culture of grandeur and have a glorious revolutionary tradition." Without a doubt, the key words here are "history" and "culture." Indeed, their use may lead readers to wonder what "China" really means

95. XIANFA pmbL (1982) (China) (emphasis added).

as it appears in this paragraph. As Professor Jiang Shigong has pointed out, “China” as used here likely refers to a historical and cultural China, rather than a political China.⁹⁶ This paragraph characterized China first as a historical and cultural community rather than a political community.⁹⁷ It conceives of China as a community crafted by, and now held together by, its common culture and history. Indeed, it echoes Lucian Pye’s famous observation: “China is a civilization pretending to be a state.”⁹⁸

This historical and cultural China has existed far longer than the People’s Republic of China, or indeed any other dynasty in Chinese history. Accordingly, the conception of China as a historical and cultural community is larger and more inclusive than a political one might be, across both time and geography. Chinese people who live in Taiwan or Hong Kong may not feel a strong belonging to the current political China—that is, the People’s Republic of China—but they may nonetheless embrace a strong sense of identity with Chinese culture and history. By focusing on culture and history, the Preamble established a profound, solid and enduring foundation for the whole Constitution. Meanwhile, by crediting the creation of China’s grand culture and glorious tradition to the “the people of all of China’s nationalities,” the first paragraph explicitly identifies the Chinese people as the sovereignty—as the masters of the country.

The Preamble’s next four paragraphs continue the historical narrative. Together, they tell a story of how the Chinese people have strived to become “the masters of the country.” The first specific historical moment mentioned is the year of 1840—quite a late moment, given China’s long history. Why 1840? What makes this year so special that the much longer history preceding it could be omitted? Anyone who is familiar with Chinese history will note that 1840 was the time of the First Opium War, a turning point in the modern history of China. According to the Preamble, it marked China’s devolution into “a semi-colonial and semi-feudal country” from an independent country. The great “Central Kingdom” fell, and the Chinese people began to lose their status as the masters of their country. To use Xi Jinping’s words, 1840 marked the beginning of China’s “struggles in the over 170 years since the Opium War.”⁹⁹

On the other hand, 1840 was also the time when the Chinese people began to struggle for “national independence and liberation and for democracy and freedom.” The inscription of the Monument of People’s

96. JIANG SHIGONG (强世功), LIFAZHE DE FALIXUE (立法者的法理学) [LEGISLATOR’S JURISPRUDENCE] 94–95 (2007).

97. *Id.* at 95.

98. Lucian W. Pye, *China: Erratic State, Frustrated Society*, 69 FOREIGN AFF. 56, 58 (1990).

99. See XI JINPING, *Achieving Rejuvenation Is the Dream of the Chinese People*, in THE GOVERNANCE OF CHINA, *supra* note 7, at 37, 37, 39 n.4; see also *Chasing the Chinese Dream*, ECONOMIST (May 4, 2013), <http://www.economist.com/news/briefing/21577063-chinas-new-leader-has-been-quick-consolidate-his-power-what-does-he-now-want-his> [https://perma.cc/9ZXB-C44A].

Heroes in Tiananmen Square endorses this view, announcing: "Eternal glory to the heroes of the people who from 1840 laid down their lives in the many struggles against domestic and foreign enemies and for national independence and the freedom and well-being of the people!"¹⁰⁰ As we can see, the Party-State has also identified 1840 as a momentous year in China's history, and for them a key starting point in the long struggle for freedom.

Thus, the significance of 1840 is twofold: first, it is the beginning of China's "century of humiliation"; second, and more importantly, it marks the year that the Chinese people began the struggle to become the masters of their country once more. The rhetoric of "the rejuvenation of the Chinese nation" and "the Chinese Dream" fits this narrative as well,¹⁰¹ since the so-called "great renewal" or "great rejuvenation" requires that China recover from the "century of humiliation" that began in 1840. The year of 1840 is also the beginning of a century of struggle and revolution.¹⁰²

Among those admirable struggles of the twentieth century, the Preamble also highly praises Dr. Sun Yat-sen's Revolution of 1911, for it "abolished the feudal monarchy and gave birth to the Republic of China." The Revolution of 1911, however, has still been deemed incomplete or "unaccomplished" for its failure to help the Chinese people get their country back. Due to the constitutional *ethos*, the highest standard upheld by the Chinese Constitution to judge a revolution or a historical event is whether it can help the people become the masters of their country again.

The real "great and earthshaking historical change" did not occur until 1949, when Mao Zedong and other revolutionary heroes ushered in a new era by overthrowing "the rule of imperialism, feudalism and bureaucrat-capitalism." Why does the Preamble consider the founding of People's Republic different from any prior revolution or political movement? No word is more explicit or simpler than the last sentence of part I of the Preamble: "**Since then the Chinese people have taken control of state power and become masters of the country.**"

This analysis of part I lays the foundation for understanding the rest of Preamble. Part II (paragraph six) summarizes the achievements

100. The full inscription was drafted by Mao Zedong and written by Zhou Enlai, and reads:

Eternal glory to the heroes of the people who laid down their lives in the people's war of liberation and the people's revolution in the past three years!
 Eternal glory to the heroes of the people who laid down their lives in the people's war of liberation and the people's revolution in the past thirty years!
 Eternal glory to the heroes of the people who from 1840 laid down their lives in the many struggles against domestic and foreign enemies and for national independence and the freedom and well-being of the people!

5 MAO TSE-TUNG, *Eternal Glory to the Heroes of the People!*, in *SELECTED WORKS OF MAO TSE-TUNG*, *supra* note 14, at 22, 22.

101. XI, *supra* note 99, at 37-38.

102. JIANG, *supra* note 96, at 96-99.

of post-1949 socialist construction efforts in areas such as the transition from a new-democratic to a socialist society, national defense, economic development, industry, agriculture, education, science and culture.¹⁰³ In part III (paragraphs seven through twelve), paragraph seven opens by confirming the leadership of the Party and setting out the nation's goals in general.¹⁰⁴ Paragraphs eight through twelve list the PRC's tasks as to national enemies (paragraph eight),¹⁰⁵ the motherland's reunification

103. XIANFA pmbl. (1982) (amended 2004) (China):

After the founding of the People's Republic, China gradually achieved its transition from a New-Democratic to a socialist society. The socialist transformation of the private ownership of the means of production has been completed, the system of exploitation of man by man abolished and the socialist system established. The people's democratic dictatorship led by the working class and based on the alliance of workers and peasants, which is in essence the dictatorship of the proletariat, has been consolidated and developed. The Chinese people and the Chinese People's Liberation Army have defeated imperialist and hegemonist aggression, sabotage and armed provocations and have thereby safeguarded China's national independence and security and strengthened its national defence. Major successes have been achieved in economic development. An independent and relatively comprehensive socialist system of industry has basically been established. There has been a marked increase in agricultural production. Significant advances have been made in educational, scientific and cultural undertakings, while education in socialist ideology has produced noteworthy results. The life of the people has improved considerably.

104. *Id.* (as amended 2004):

The victory in China's new-democratic revolution and the successes in its socialist cause have been achieved by the Chinese people of all nationalities under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, by upholding truth, correcting errors and surmounting numerous difficulties and hardships. China will be in the primary stage of socialism for a long time to come. The basic task of the nation is to concentrate its effort on socialist modernization along the road of Chinese-style socialism. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road, persevere in reform and opening to the outside world, steadily improve socialist institutions, develop the socialist market economy, develop socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize the country's industry, agriculture, national defence and science and technology step by step and promote the coordinated development of the material, political and spiritual civilizations, to turn China into a socialist country that is prosperous, powerful, democratic and culturally advanced.

105. *Id.*:

The exploiting classes as such have been abolished in our country. However, class struggle will continue to exist within certain bounds for a long time to come. The Chinese people must fight against those forces and elements, both at home and abroad, that are hostile to China's socialist system and try to undermine it.

(paragraph nine),¹⁰⁶ the united front (paragraph ten),¹⁰⁷ the relationships among different racial and ethnic groups (paragraph eleven),¹⁰⁸ and foreign relations (paragraph twelve).¹⁰⁹ Finally, part IV (paragraph thirteen) establishes the Constitution's supreme legal authority as fundamental law and highest law.¹¹⁰ It identifies the two major functions of the Consti-

106. *Id.* ("Taiwan is part of the sacred territory of the People's Republic of China. It is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.").

107. *Id.*:

In building socialism it is essential to rely on workers, peasants and intellectuals and to unite all forces that can be united. In the long years of revolution and construction, there has been formed under the leadership of the Communist Party of China a broad patriotic united front which is composed of the democratic parties and people's organizations and which embraces all socialist working people, all builders of socialism, all patriots who support socialism, and all patriots who stand for the reunification of the motherland. This united front will continue to be consolidated and developed. The Chinese People's Political Consultative Conference, a broadly based representative organization of the united front which has played a significant historical role, will play a still more important role in the country's political and social life, in promoting friendship with other countries and in the struggle for socialist modernization and for the reunification and unity of the country. The system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time to come.

108. *Id.*:

The People's Republic of China is a unitary multi-national State created jointly by the people of all its nationalities. Socialist relations of equality, unity and mutual assistance have been established among the nationalities and will continue to be strengthened. In the struggle to safeguard the unity of the nationalities, it is necessary to combat big-nation chauvinism, mainly Han chauvinism, and to combat local national chauvinism. The State will do its utmost to promote the common prosperity of all the nationalities.

109. *Id.*:

China's achievements in revolution and construction are inseparable from the support of the people of the world. The future of China is closely linked to the future of the world. China consistently carries out an independent foreign policy and adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries. China consistently opposes imperialism, hegemonism and colonialism, works to strengthen unity with the people of other countries, supports the oppressed nations and the developing countries in their just struggle to win and preserve national independence and develop their national economies, and strives to safeguard world peace and promote the cause of human progress.

110. *Id.*:

This Constitution, in legal form, affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the State; it is the fundamental law of the State and has supreme legal authority. The people of all nationalities, all State organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution

tution: first, it "affirms the achievements of the struggles of the Chinese people of all nationalities"; second, it "defines the basic system and tasks of the States." It also requires that all people, State organs, organizations and institutions "uphold the dignity of the Constitution and ensure its implementation."¹¹¹

In sum, the Preamble tells us two things. First, "People are masters of the country" does not only summarize the history of China, it also outlines the goals and governing ideals for China's future. The Preamble effectively condenses China's thousand years of history into a story manifesting its chosen *ethos*: how the Chinese people have pursued the ideal of "the people should be become masters of their country." Throughout history, this *ethos* has inspired millions of Chinese people to fight, struggle and sacrifice. It is the very ideal on which the People's Republic has been built. At the same time, this *ethos* concerns China's present and future. It is an unfinished project.

Second, the Preamble especially highlights the cultural aspect of the constitutional *ethos*. By defining China primarily as a cultural community and stressing the importance of a common culture and history, it directs the Chinese people, as the masters of this political and cultural community, to govern their own affairs not only in the political arena but in the cultural arena as well.

B. *The Structure of the Chinese Constitution: People First, State Second*

Our analysis of the Preamble behind us, we now face the main body of the Constitution. Before jumping to any specific provision too quickly, the holistic perspective requires us to consider the overall structure of the Constitution first. The Chinese Constitution includes four chapters: "General Principles," "The Fundamental Rights and Duties of Citizens," "The Structure of the State," and "The National Flag, the National Anthem, the National Emblem and the Capital." By considering why these chapters are divided as such and arranged in this order, we may discern the purpose and values of free speech protection in the Chinese Constitution.

The 1982 Constitution presently in effect is the fourth Constitution of the People's Republic of China. It was preceded by the 1954 Constitution, the 1975 Constitution, and the 1978 Constitution. All four Constitutions contain four chapters of similarly divided content: the General Principles, the Structure of the State, the Citizens' Fundamental Rights and Duties, and a chapter about the national flag, anthem, emblem and capital. The constitutions differ, however, in the ordering of these four chapters.

More specifically, the present Constitution differs from the ordering shared by the first three: "The General Principles" as Chapter I, "The Structure of the State" as Chapter II, "The Fundamental Rights and

and ensure its implementation.

111. *Id.*

Duties of Citizens” as Chapter III, and “The National Flag, the National Anthem, the National Emblem and the Capital” as Chapter IV. By contrast, the 1982 Constitution switched the positions of Chapter II and Chapter III, placing “The Fundamental Rights and Duties of Citizens” as Chapter II before “The Structure of the State” as Chapter III.

This change must be understood in light of the “the People are masters of the country” *ethos*. The switch of Chapters II and III was not only a logically coherent structural improvement. More importantly, it underscored the purposes and values that free speech, as well as other fundamental rights in Constitution, should advance.

Under this new structure, the Preamble sets forth the constitutional *ethos* of “the People are masters of the country,” which should govern how we interpret the Chinese Constitution. Then as its name suggests, Chapter I lays down the Constitution’s “General Principles.” In contrast to the poetic and abstract language of the Preamble, Chapter I makes concrete and legally enforceable the more abstract ideals and principles set out in the Preamble. In short, it has “translated” those ideals and principles into legal rights. Article 2 is a prime example in this regard. It translates the *ethos* of “People are masters of the country” when it states: “All power in the People’s Republic of China belongs to the people. The people administer State affairs and manage economic and cultural undertakings and social affairs through various channels and in various ways in accordance with the provisions of law.”¹¹² Moreover, since the Preamble particularly highlights the cultural aspect of the constitutional *ethos*, Article 2 has also particularly manifested the idea that “people should be masters in cultural area” by stating that people should “administer cultural undertakings.”

By moving the chapter on “The Fundamental Rights and Duties of Citizens” forward, the 1982 Constitution sends a clear message: people first, state second. Chapter III “The Structure of the State” provides for State organs at various levels of governance, allocate powers among them, and prescribes the necessary protocols for their function and cooperation. It is important, however, that this chapter comes only after Chapter II first set forth the rights of the people. As state organs become increasingly bureaucratic and complex, they may become less responsive to the people they govern—perhaps so much so as to betray the *ethos* that “the people are masters of their country.” Given this risk, placing “The Fundamental Rights and Duties of Citizens” first serves as a warning. It reminds us that the government and the structure of the State are merely a means to an end. “The Chinese people” are China’s sovereignty, and the Constitution serves to help them better master their country. Indeed, as many readers may notice, the Chinese Constitution often inserts the word “People’s” into the name of its State organs, such as the People’s Congress, the People’s Court and the People’s Procuratorate.¹¹³ This habit affirms the drafters’ efforts to emphasize that State organs at all levels are

112. XIANFA art. 2 (1982) (China).

113. *See id.* art. 57; *id.* art. 123; *id.* art. 129.

always the People’s government. After all, this is a “People’s Republic,” and the structure of Constitution should comply with the nation’s *ethos*.

Other historical documents evidence this reading as well. When the Secretariat of the Constitution Draft Committee was established in September 1980, moving the chapter on fundamental rights forward was among its top few proposals.¹¹⁴ Further, the Secretariat’s report in February, 1982 explicitly stated that the 1982 Constitution adopted such a change in structure in order to show that “the state institutions in our country are established for the interests of the people.”¹¹⁵

Returning to our discussion of free speech, the altered structure of the 1982 Constitution can shed new light on how we interpret the fundamental rights safeguarded by Chapter II. These rights receive constitutional protection because they help the people to better master their own country. To a certain degree, the rationale here is similar to the self-government theory of free speech, which justifies constitutional protection of free speech on the grounds that free expression enables democratic self-government.¹¹⁶ Freedom of expression can arm citizens with the information on public affairs required to participate in self-government, as well as safeguarding forums for the exchange of ideas and the productive work of reasoned debate.¹¹⁷ Self-government theorists like Alexander Meiklejohn thus understand freedom of expression as serving a fundamentally educational purpose. A similar rationale supports the idea that the fundamental rights guaranteed in Chapter II serve to help the Chinese citizens become the masters of the country. Through the exercise of these rights, an individual becomes a citizen, and the mass become a citizenry. In sum, fundamental rights are protected because they serve the national *ethos*, and all rights that can serve the *ethos* deserve protection.

Finally, Chapter IV concerns the national flag, national emblem and the capital. If the Preamble and the previous three chapters built the country’s bones, flesh and soul, Chapter IV concerns its appearance. The four chapters together complete the construction of the Chinese Constitution.

C. *China’s Complete “Free Speech Clause”*: Articles 35, 41 and 47

Since the constitutional *ethos* requires the Chinese people to be masters in both political and cultural areas, its “free speech clause” should protect all speech that could serve this dual ideal. To begin our analysis with this broadening view is to read Chapter II—the Chinese “Bill of Rights”—with different eyes.

Article 35 is a readily apparent candidate. It safeguards the “freedom of speech, of the press, of assembly, of association, of procession

114. XU CHONGDE (许崇德), *ZHONGHUA RENMIN GONGHEGUO XIANFASHI* (中华人民共和国宪法史) [HISTORY OF THE CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA] 355 (2005).

115. *Id.* at 389.

116. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 1–27 (1st ed. 1948).

117. Meiklejohn, *The First Amendment*, *supra* note 58, at 255.

and of demonstration”—perhaps the six most common forms of political expression. Article 35 is a typical “free speech clause” in that it takes the most expected form of free speech protection. No wonder most scholars’ search for China’s “free speech clause” ends here. They believed that they have already found what they were looking for.

Article 35 is no doubt a “free speech clause,” but is it the “free speech clause”? Does no other provision in Chapter II concern freedom of speech? A holistic reading of the Constitution requires us to go beyond such a clause-bounded view in our constitutional interpretation. As Professor Amar has pointed out, the tendency of most is to read a constitution as a series of “distinct and carefully worded clauses.”¹¹⁸ Since the clause is the most common unit legal scholars consider, many have become accustomed to concluding that “Article A is about x” or that “Article B protects the right to y.” With this mindset, scholars might accept that one clause could protect several rights, but few are familiar with the notion that several clauses may concern one right.

Yet the *ethos* of the Chinese Constitution—and especially its cultural aspect—tells us that China’s “free speech clause” is grander and more complicated than Article 35. We must continue searching from where others have stopped.

And so we move forward through the Constitution and land on Article 41 which provides:

Citizens of the People’s Republic of China have the right to criticize and make suggestions regarding any State organ or functionary. Citizens have the right to make to relevant State organs complaints or charges against, or exposures of, any State organ or functionary for violation of law or dereliction of duty; but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited.

The State organ concerned must, in a responsible manner and by ascertaining the facts, deal with the complaints, charges or exposures made by citizens. No one may suppress such complaints, charges and exposures or retaliate against the citizens making them.

Citizens who have suffered losses as a result of infringement of their civic rights by any State organ or functionary have the right to compensation in accordance with the provisions of law.¹¹⁹

Article 41 accomplishes four main objectives. First, it allows citizens to criticize and make suggestions to any State organ or functionary; Second, it enables citizens to make complaints and charges against government officials;¹²⁰ Third, it prescribes the duties of State organs facing

118. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999). See also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11–41 (1980); cf. *Preface to PROCESSES OF CONSTITUTIONAL DECISION-MAKING: CASES AND MATERIALS*, at xxxiii (Paul Brest et al. eds., 5th ed. 2006).

119. XIANFA art. 41 (1982) (China).

120. Professor Benjamin L. Liebman conducted an in-depth analysis of Article 41’s right to file complaints (*Shensu*), arguing that by providing citizens with a channel to challenge legal decisions outside the legal system, the right to file complaints may

such complaints and charges. Fourth, it guarantees citizens' right to seek compensation for the infringement of their rights.

Yet isn't Article 41, especially through its first three objectives, *also* about political expression? In service of the constitutional *ethos*, Article 41 serves to establish a channel between the government and the people. By granting the people various means to supervise its government, Article 41 ensures the government is held accountable and remains responsive to the voice of the people. In other words, by guaranteeing people several ways to voice their concerns, Article 41 ensures that the government is a real "People's government," and that the Chinese people can truly be masters of their country. In this way, Article 41 functions as a support and supplement to Article 35, and as such should be included in China's "free speech clause."

Another provision, Article 47, deserves our particular attention. It provides:

Citizens of the People's Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The State encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work.¹²¹

For years, Article 47 has never entered legal scholars' sights as a clause related to free speech. Some scholars have characterized Article 47 as China's "academic freedom clause."¹²² Other than that, it has seldom been mentioned in scholarly works.

Yet only the "People are masters of the country" *ethos* can shed new light on the significance of Article 47. Recall that the very first two sentences of the Preamble depicted China primarily as "a country with one of the longest histories in the world" and as "a culture of grandeur." By defining China as such, it follows logically that, as the masters of this cultural community, the Chinese people must become the masters in cultural area as well.

This cultural aspect of the *ethos* explains why Article 2 demands the Chinese people not only administer political affairs but also administer "cultural undertakings." It also explains why Article 47 has been created, because it is the very provision that guarantees Chinese citizens' ability "to be masters in cultural area" and to manage "cultural undertakings." Notably, Article 47 safeguards the freedom and rights of ordinary citizens, not just scholars, artists or scientists. Besides guaranteeing ordinary citizens' right to "to engage in scientific research, literary and artistic

in fact cause tension with the rule of law. See Benjamin L. Liebman, *Article 41 and the Right to Appeal* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-407, 2014), <http://ssrn.com/abstract=2492802>.

121. XIANFA art. 47 (1982) (China).

122. See Wang Zhi (王德志), *Lun Woguo Xueshu Ziyou de Xianfa Jichu* (论我国学术自由的宪法基础) [*On the Basis of the Constitution of Academic Freedom*], 5 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI.] 5 (2012).

creation and other cultural pursuits,” it also commands the government to “encourage[]s and assist[]s creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work.” Article 35, by contrast, places no such specific requirement on government duties.

This commitment to cultural democracy is deeply rooted in the Chinese tradition. In early 1940s, Mao Zedong expressly stated that the Chinese revolution was a dual one: it was both a political and a cultural revolution.¹²³ The new China, he said, must be a China with not only new politics but also a new culture.¹²⁴ And the key feature of that new culture was democracy.¹²⁵ In Mao’s own words, this new democratic culture “should serve the toiling masses of workers and peasants who make up more than 90 per cent of the nation’s population and should gradually **become their very own.**”¹²⁶

As we see, in the development of a democratic culture, “serving the masses” is only the first stage. More importantly, this culture must “gradually become their very own.” In other words, a democratic culture should be a culture that is not only “for the people” but also “of the people and by the people.”¹²⁷ By guaranteeing ordinary people’s right

123. 2 MAO TSE-TUNG, *On New Democracy*, in *SELECTED WORKS OF MAO TSE-TUNG* 339, 340 (1965).

According to the editor’s note, “On New Democracy” was written for the first issue of magazine “The Chinese Culture,” (*Zhong Guo Wen Hua*). *Id.* at 382 n.1. Mao further elaborated this dual revolutionary ideal as follows:

For many years we Communists have struggled for a cultural revolution as well as for a political and economic revolution, and our aim is to build a new society and a new state for the Chinese nation. That new society and new state will have not only a new politics and a new economy but a new culture. In other words, not only do we want to change a China that is politically oppressed and economically exploited into a China that is politically free and economically prosperous, we also want to change the China which is being kept ignorant and backward under the sway of the old culture into an enlightened and progressive China under the sway of a new culture. In short, we want to build a new China. Our aim in the cultural sphere is to build a new Chinese national culture.

Id. at 340.

124. *Id.* at 340.

125. *Id.* at 381–82.

126. *Id.* at 381 (emphasis added).

127. In late 2011, the Sixth Plenum of 17th Party Congress chose cultural construction as the topic and later issued *Zhonggong Zhongyang Guanyu Shenhua Wenhua Tizhi Gaige, Tuidong Shehui Zhuyi Wenhua Dafazhan Dafarong Rougan Zhongda Wenti de Jueding* (中共中央关于深化文化体制改革推动社会主义文化大发展大繁荣若干重大问题的决定) [Decision of the CPC Central Committee on Major Issues Pertaining to Deepening Reform of the Cultural System and Promoting the Great Development and Flourishing of Socialist Culture] (promulgated by the Cent. Comm. of the Communist Party of China, Oct. 18, 2011), CLI.5.160202(EN) (Lawinfochina). The Decision declared, “let the people play the main role in developing culture; uphold the principle that cultural development is for the people, by the people and benefits the people.” *Id.* It signaled that the Party-State tried to revive the ideal of democratic culture and has begun China’s long march toward cultural re-construction.

to cultural construction, Article 47 is particularly designed to promote a culture “of the people, by the people, for the people.”

A brief scan of the other articles in Chapter II allows us to conclude that Article 47 is the last piece of the “free speech clause” puzzle. China’s “free speech clause” includes not one but three provisions; it protects all speech in service of the Chinese people’s continuing efforts to become the masters of their country. To advance the political aspect of *ethos*, Article 35 and Article 41 safeguard common forms of political expression and the citizens’ right to supervise their government. To advance the cultural aspect of *ethos*, Article 47 guarantees ordinary people’s right to cultural construction. It empowers and enables the Chinese people to participate in, create and decide the culture in which they live. As the Preamble narrated, “the people of all of China’s nationalities have jointly created a culture of grandeur.” Article 47 serves to help the Chinese people to make China’s culture achieve “grandeur” again.

II. READING THE CONSTITUTION VERTICALLY

Our horizontal reading of the Constitution behind us, we will next analyze the document vertically, that is, historically. We will expand our analysis to include four predecessors of the current Constitution: the 1954 Constitution, the 1975 Constitution, the 1978 Constitution, and the newly discovered 1953 Constitution draft. By tracing the evolution of the predecessors to Articles 35, 41, and 47 in these earlier documents, we will see how China’s “free speech clause” reached its current form. We will also see that, while its progress has been far from linear, the dual ideal justifying the protection of free speech—the people should be masters in both the political and cultural areas—can be found throughout the evolution of the Chinese Constitution.

Reading the Constitution vertically aims to challenge the popular narrative, that is, the narrative of discontinuity. Generally speaking, the popular view treats the 1954 and 1982 Constitutions as the two “good” constitutions, and the 1975 and 1978 as the two “bad.”¹²⁸ This view holds that the 1975 and 1978 Constitutions departed from or even betrayed the spirit of the 1954 Constitution;¹²⁹ luckily, the 1982 Constitution has corrected this wrong and returned to the right path set out by our first Constitution.¹³⁰ As a result of this popular reading, the 1975 and 1978 Constitutions have all but disappeared from public and academic discourse. In fact, many discuss the 1954 Constitution as if it were the sole predecessor to the present Constitution. The 1975 and 1978 Constitutions have become the two black sheep of the family: nobody wants to talk about them and everyone pretends they never existed.

128. XU, *supra* note 114, at 311–12, 314.

129. *Id.* at 311–12, 314; HAN & HU, *supra* note 67, at 50–53; HAN, *supra* note 68, at 155–58.

130. HAN, *supra* note 68, at 158–61; HAN & HU, *supra* note 67, at 55.

In contrast, our vertical reading emphasizes continuity and connection. Though I do not intend to rehabilitate the 1975 and 1978 Constitutions, these two “bad” or “wrong” Constitutions did not appear from nowhere. I wish to acknowledge their existence and make some effort to understand their origins. Various underlying ties connect our four Constitutions, whether one wants to admit it or not. The following section argues that a more plausible way to analyze the development of the Chinese Constitution is to view each of the four Constitutions as sitting on a continuum.¹³¹ On this continuum, the 1954 and 1982 Constitutions are more to the “right” in terms of Chinese political ideology, while the 1975 and 1978 Constitutions are closer to the “left” end. Like a pendulum, no matter how freely these four Constitutions swing between the two extremes, there is always a pivot or equilibrium position. And this pivot is the *ethos* of “the People are masters of the country.” The development of the Chinese Constitution has taken a zigzag path. While some Constitutions are closer to the pivot, and some Constitutions are not, certain ideas and principles connect them together across time.

For convenience, each of the iterations of Article 35 across the different Constitutions will be called the “political expression clause,” for each protects common forms of political expression. The past counterparts to Article 41 will be called the “right to supervise clause,” because they all guarantee various channels by which the citizenry may supervise and hold accountable State organs and public officials. Finally, since Article 47 mainly concerns ordinary citizens’ right to cultural construction, so it is referred to as the “right to cultural construction clause.”

A. *China’s First Constitution: The 1954 Constitution*

The 1954 Constitution is not only the first constitution of the People’s Republic of China, but likely the most beloved. It has been acclaimed and embraced across ideological lines. Like a glorious and successful ancestor that everyone in the family looks up to, all later three Constitutions tried to establish legitimacy by claiming to have “inherited and developed” the 1954 Constitution.

This tactic is particularly evident in the 1982 Constitution, perhaps because of the need to rid itself of the overhanging shadows of the 1975 and 1978 Constitutions. In the NPC’s 1982 “Report on Drafting the

131. For a narrative that also emphasizes continuity and connection, see William C. Jones, *The Constitution of the People’s Republic of China*, 63 WASH. U. L. Q. 707 (1985). Although agreeing that the Chinese Constitution has been irrelevant to “the actual government of China,” *id.* at 710, William Jones argues that all four Chinese Constitutions shared one particular function or significance, namely, “Constitutions also tend to show the direction that their promulgators plan to in governing China. This will take the form both of indications of actions that the new government plans to take and of a basic ideological statement.” *Id.* at 713. By identifying this function, Jones then argues that the development of Chinese Constitution should be understood as a continuum, or in his own words “[a] Chinese Constitution must, in consequence, be seen as part of a process and can only be understood if one has some of this development.” *Id.* at 715–16.

Constitution of the People’s Republic of China,” then-Chairman of the Standing Committee, Peng Zhen, explicitly stated that “the 1954 Constitution is an excellent Constitution” and that the current draft had “inherited and developed” its basic principles.¹³² Likewise, Xi Jinping made the same point in his speech on the conference celebrating the 30th anniversary of the 1982 Constitution.¹³³ Tracing China’s own path toward constitutionalism, Xi identified the 1954 Constitution as the foundation.¹³⁴ Xi even highly praised the Common Program of the Chinese People’s Political Consultative Conference in 1949 (the “Common Program”), which served as a *de facto* or temporary constitution from 1949 to 1954.¹³⁵ Yet Xi uttered not even a single word about the 1975 and the 1978 Constitutions.

The following section examines the “free speech clause” in the 1954 Constitution and in so doing demonstrates why so many people see this document as the prototype of the 1982 Constitution.

1. The “Political Expression Clause” in the 1954 Constitution

Article 87 of the 1954 Constitution contains that document’s political expression clause. It provides:

Citizens of the People’s Republic of China enjoy freedom of speech, freedom of the press, freedom of assembly, freedom of association, freedom of procession and freedom of demonstration. To ensure that citizens can enjoy these freedoms, the State provides the necessary material facilities.¹³⁶

In many ways, Article 35 of the current Constitution derives itself from Article 87 of the 1954 Constitution. It borrows the first sentence verbatim, and it safeguards, in the same order, the same six most common types of political expression: speech, press, assembly, association, procession, and demonstration.

These two articles also appear in the same relative place within each Constitution. The provisions prior to each—Article 34 of the 1982 Constitution¹³⁷ and Article 86 of the 1954 Constitution¹³⁸—both safeguard

132. For Peng Zhen’s report, see ZHONGGUO XIANFA WENXIAN TONGBIAN (中国宪法文献通编) [THE COMPILATION OF THE DOCUMENTS OF THE CHINESE CONSTITUTION] 57 (Wang Peiyong (王培英) ed., 2007).

133. Xi, *supra* note 7, at 149–58.

134. *Id.* at 149.

135. *Id.*

136. XIANFA art. 87 (1954) (China).

137. XIANFA art. 34 (1982) (China):

All citizens of the People’s Republic of China who have reached the age of eighteen have the right to vote and stand for election, regardless of nationality, race, sex, occupation, family background, religious belief, education, property status, or length of residence, except persons deprived of political rights according to law.

138. XIANFA art. 86 (1954) (China):

All citizens of the People’s Republic of China who have reached the age of eighteen have the right to vote and stand for election, irrespective of their nationality, race, sex, occupation, social origin, religious belief, education, property status, or length of residence, except insane persons and persons

Chinese citizen's right to vote, while the provisions that follow them—Article 36 of 1982 Constitution¹³⁹ and Article 88 of 1954 Constitution¹⁴⁰—both protect religious freedom.

The only distinction between the two political expression clauses lies in the second sentence of Article 87, which prescribes the State's duty in providing "the necessary material facilities" to safeguard the rights protected—a detail missing from the 1982 Constitution. By adding that detail, the 1954 Constitution highlighted the government's role as "an activist state";¹⁴¹ it also implied that free speech was not only a negative liberty, but a positive liberty as well.¹⁴² This small difference aside, the political expression clauses of the 1954 and 1982 Constitutions are essentially the same.

2. The "Right to Supervise Clause" in the 1954 Constitution

The "right to supervise clause" in the 1954 Constitution is Article 97, which requires:

Citizens of the People's Republic of China have the right to make written or oral complaints to organs of State at any level against any person working in an organ of State for transgression of law or neglect of duty. People suffering loss by reason of infringement of their rights as citizens by persons working in organs of State have the right to compensation.¹⁴³

Compared to its counterpart in the 1982 Constitution, Article 41, Article 97 of the 1954 Constitution is narrower. As discussed, the "right to supervise clause" in the 1982 Constitution sets out the following four rights and duties: (1) the "right to criticize and make suggestions regarding any State organ or functionary"; (2) the right to make complaints or charges regarding "any State organ or functionary for violation of law or dereliction of duty"; (3) when facing such charges or complaints, the government's duty to respond "in a responsible manner and by ascertaining the facts" (and a prohibition against suppression or retaliation); (4) the right to seek compensation for losses caused by the State organ or functionary.¹⁴⁴

Of the above four protections, only two can be found in Article 97. The "right to supervise clause" in the 1954 Constitution guaranteed only the first and the fourth of the above, that is, the right to complain and make charges and the right to seek compensation from the government.

deprived by law of the right to vote and stand for election. Women have equal rights with men to vote and stand for election.

139. XIANFA art. 36 (1982) (China).

140. XIANFA art. 88 (1954) (China) ("Citizens of the People's Republic of China enjoy freedom of religious belief.").

141. For a discussion of the activist state, see OWEN M. FISS, *THE IRONY OF FREE SPEECH* 27–49 (1996); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

142. For a discussion of "positive" and "negative" freedom and liberty, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118–34 (1969).

143. XIANFA art. 97 (1954) (China).

144. XIANFA art. 41 (1982) (China).

In this regard, by adding the protection of citizens’ right to criticize and the requirement of the State’s duty, the 1982 Constitution strengthens citizens’ ability to hold its government accountable. It is, for that reason, more consistent with the national *ethos* that “the People are masters of the country.”

3. The “Right to Cultural Construction Clause” in the 1954 Constitution

In the 1954 Constitution, Article 95 safeguards the right to cultural construction. Similar to the “political expression clauses” in the 1954 and 1982 Constitutions, the “right to cultural construction” clauses of each share many common features. Article 95 in the 1954 Constitution states:

The People’s Republic of China guarantees citizens’ freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The State encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work.¹⁴⁵

Similar to its counterpart in the current Constitution, Article 95 sets forth two major provisions. First, it guarantees Chinese citizens the freedom to engage in “scientific research, literary and artistic creation and other cultural pursuits.” Second, it requires that the State “encourage and assist” citizens’ creative endeavors.

Moreover, the “right to cultural construction clauses” are sandwiched between similar provisions in each Constitution. The preceding provisions—Article 94 of the 1954 Constitution¹⁴⁶ and Article 46 of the 1982 Constitution¹⁴⁷—protect the right to education; the subsequent provisions—Article 96 of the 1954 Constitution¹⁴⁸ and Article 48 of the 1982 Constitution¹⁴⁹—safeguard women’s right to equality.

145. XIANFA art. 95 (1954) (China).

146. *Id.* art. 94:

Citizens of the People’s Republic of China have the right to education. To ensure that citizens can enjoy this right, the state establishes and gradually expands schools of various types and other cultural and educational institutions. The state pays special attention to the physical and mental development of young people.

147. XIANFA art. 46 (1982) (China) (“Citizens of the People’s Republic of China have the duty as well as the right to receive education. The State promotes the all-round development of children and young people, morally, intellectually and physically.”).

148. XIANFA art. 96 (1954) (China) (“Women in the People’s Republic of China enjoy equal rights with men in all spheres of political, economic, cultural, social and family life. The state protects marriage, the family, and the mother and child.”).

149. XIANFA art. 48 (1982) (China):

Women in the People’s Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life. The State protects the rights and interests of women, applies the principle of equal pay for equal work to men and women alike and trains and selects cadres from among women.

The difference between these two “right to cultural construction clauses” lies in their wording. While the 1954 Constitution states that “the government guarantees citizens’ freedom to engage in scientific research and literary and artistic creation,” the 1982 Constitution expresses the same content with the words, “the Chinese citizens have the freedom to engage in scientific research, literary and artistic creation.” Although the second articulation does not mean China has accepted “natural rights theory,” it nonetheless indicates a potential shift in rights theory between the drafting of the two documents. Article 47—the current “right to cultural construction clause”—is formulated in a way that is more rights-protective.

We have now seen that both the 1954 and the 1982 Constitutions’ “free speech clauses” contain a “political expression clause, a “right to supervise clause,” and a “right to cultural construction clause.” Further, aside from small differences in scope and language, the meaning and purpose of the two “free speech clauses” are largely the same. With regard to free speech protection, then, the 1954 Constitution was indeed the prototype for the 1982 Constitution.

B. *The Constitution of Cultural Revolution: The 1975 Constitution*

Among the three earlier Constitutions, the 1975 Constitution deserves our special attention, for according to the conventional narrative, it is where the discontinuity and disconnection began.

Focusing on the “free speech clause” in the 1975 Constitution, this section argues that, since the idea of “the proletariat dictatorship” had replaced the *ethos* of “People are masters of the country,” all free speech-related clauses in the 1975 Constitution have been “upgraded” to more radical and aggressive versions. This is why the 1975 Constitution differed so drastically from its predecessor; it is also primarily responsible for the chaos and anarchy of the Cultural Revolution.

Born during the craze of “the ten-year disaster,” the 1975 Constitution has been deemed “the product of the Cultural Revolution,” one that manifests the ideas and agendas of extreme leftists.¹⁵⁰ In post-Cultural Revolution China, on the one hand, people firmly denounce the 1975 Constitution. On the other hand, however, they have been afraid or unwilling to discuss it. Scholars seldom engage in any kind of comprehensive analysis of the 1975 Constitution, and for that reason no theory satisfactorily explains why and how the drafters of the 1975 Constitution went wrong. Instead, everyone condemns this “black sheep” and then forgets it as quickly as possible. Xi Jinping’s speech on the 30th Anniversary of the 1982 Constitution exemplified this attitude: the best way to deal with the 1975 Constitution is not to talk about it.¹⁵¹

But this is not a responsible attitude with which to face past mistakes. Nor is it tenable to pretend that the 1975 Constitution can be

150. CAI, *supra* note 1, at 51; XU, *supra* note 114, at 311.

151. See XI, *supra* note 7.

so easily erased from our constitutional history. Sprung from the same background and tradition, the four Constitutions share more similarities and connections than most care to admit.¹⁵² Only by confronting and thereby understanding these similarities can we stop from repeating past mistakes.

1. The “Political Expression Clause” in the 1975 Constitution

The 1975 Constitution is the shortest of the four Constitutions. Its Chapter III, “Fundamental Rights and Duties of Citizens,” contains only four provisions, the shortest “Bill of Rights” in China’s constitutional history. The political expression clause can be found in Article 28, which sets forth:

Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike, and enjoy freedom to believe in religion and freedom not to believe in religion and to propagate atheism.

The citizens’ freedom of person and their homes shall be inviolable. No citizen may be arrested except by decision of a people’s court or with the sanction of a public security organ.¹⁵³

Article 28 covers a lot of ground. In addition to freedom of speech, it also safeguards freedom of religion, freedom of correspondence, freedom of person and of the home, as well as due process. In the current

152. For instance, just like the 1982 Constitution, the 1975 Constitution also claimed that it inherited and developed principles underlying the communist revolution and 1954 Constitution. XIANFA pmbl. (1975). In his report on drafting the 1975 Constitution to the Plenum of Fourth NPC, then-Vice Premier Zhang Chunqiao used the exact same words as Peng Zhen did in 1982. See ZHONGGUO XIANFA WENXIAN TONGBIAN, *supra* note 132, at 189. Another perspective to discern the similarities and connections is the role of Mao Zedong. It is well known that another name of the 1936 Constitution of Soviet Union is “the Stalin Constitution.” See J. Arch Getty, *State and Society under Stalin: Constitutions and Elections in the 1930s*, 50 SLAVIC REV. 18, 18–35 (1991). Similarly, many have suggested that the 1954 Constitution should be named “the Mao Zedong Constitution.” See Wu Guangxiang (吴光祥), Mao Zedong Jujue Ba Xianfa Ming Mingwei “Mao Zedong Xianfa” (毛泽东拒绝把宪法命名为“毛泽东宪法”) [*Mao Refused to Name the Constitution as “Mao Zedong Constitution”*], 10 XIESHANG LUNTAN (协商论坛) [F. OF COOPERATION] 57 (2014). Although Mao explicitly refused this proposal, it illustrated Mao’s profound impact and his supreme authority at that time. If the 1954 Constitution could be called “the Mao Zedong Constitution,” why can’t the 1975 Constitution? Mao was still alive when the 1975 Constitution was promulgated. Compared with his status two decades earlier, Mao’s influence and control was even more unchallengeable during the Cultural Revolution. More importantly, Mao himself viewed the Cultural Revolution as one of his two most important lifetime achievements (the other one is winning the democratic revolution, thereby establishing the People’s Republic). See MAO ZEDONG ZHUAN: 1949–76 (毛泽东传: 1949-1976) [BIOGRAPHY OF MAO ZEDONG: 1949-1976], at 1781–82 (Jin Chongji (金冲及) & Pang Xianzhi (逢先知) eds., 2003). One can imagine how serious and devoted Mao was when drafting the 1975 Constitution, the very document that he hoped to consolidate one of his most important legacies. Thus, we might ask why the 1954 and 1975 Constitutions—the two “Mao Zedong” Constitutions—became so different.

153. XIANFA art. 28 (1975) (China).

Constitution, these freedoms are safeguarded by at least five independent clauses. The 1975 Constitution, to the contrary, condensed these protections to a single clause.

Our focus is the first sentence, and more specifically the language spanning from “freedom of speech” to “the freedom to strike.”

Apart from freedom of correspondence, the political expression clause in the 1975 Constitution enumerated seven forms of political expression: speech, press, assembly, association, procession, demonstration, and strike. Six out of these seven were also protected by the 1954 Constitution and are presently protected by the 1982 Constitution. The only unique right here protected is the freedom to strike.

This is the very first time the right to strike was included in the Chinese Constitution. Needless to say, since strikes generally champion the interests of the working class, the right to strike is fundamental to the ideology of almost all socialist or communist parties in the world.¹⁵⁴ China and the Chinese Communist Party (CCP) are no exception. The Constitution of the CCP identified its party as “the vanguard both of the Chinese working class and of the Chinese people and the Chinese nation.”¹⁵⁵ Article 1 of the Chinese Constitution also describes the regime of PRC as “a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants.”¹⁵⁶

Setting aside the practicability of a constitutional right to strike, its inclusion in the 1975 Constitution is at a minimum of great symbolic importance. In China’s context, when the Party-State gives more emphasis on their identity as representing the working class and the proletariat (e.g., the Great Proletarian Cultural Revolution), it indicates that they are moving in a leftist direction. In contrast, when the Party-State deemphasizes this identity (e.g., the Three Represents), it indicates the opposite. For this reason, adding the right to strike to its “political expression clause” highlighted the leftist and radical tone of the 1975 Constitution.¹⁵⁷

154. See FRIEDRICH ENGEL, *THE CONDITION OF THE WORKING CLASS IN ENGLAND* 241–73 (W. O. Henderson & W. H. Chaloner eds. and trans., 1958) (1845):

They [strikes] may be only engagements, but they prove conclusively that the decisive battle between the proletariat and the bourgeoisie is approaching. These stoppages of work are a training ground for the industrial proletariat and preparation for the great campaign which draws inevitably nearer. Strikes are the manifestoes by which particular groups of trade unionists pledge their adherence to the cause of the working class.

Id.; KARL MARX, *Strikes and Combinations of Workers*, in *THE POVERTY OF PHILOSOPHY* 166–75 (International Publishers trans., 1963) (1847).

155. ZHONGGUO GONGCHANDANG ZHANGCHENG (中国共产党章程) [THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA] (promulgated by the Ninth Nat’l Cong. Communist Party, effective Apr. 14, 1969, revised by the Eighteenth Nat’l Cong. Communist Party, Nov. 14, 2012), at General Program, <http://english.cpc.people.com.cn/206972/206981/8188065.html> [<https://perma.cc/39MP-ZW9Y>].

156. XIANFA art. 1 (1982) (China).

157. According to Zhang Chunqiao’s report to the NPC, to include the right to strike into the 1975 Constitution was directly dictated by Mao Zedong. ZHONGGUO XIANFA WENXIAN TONGBIAN, *supra* note 132, at 190:

2. The "Right to Supervise Clause" in the 1975 Constitution

Like the "political expression clause," the "right to supervise clause" was also condensed into a single umbrella provision in the 1975 Constitution. Article 27 provides:

All citizens who have reached the age of eighteen have the right to vote and stand for election, with the exception of persons deprived of these rights by law.

Citizens have the right to work and the right to education. Working people have the right to rest and the right to material assistance in old age and in case of illness or disability.

Citizens have the right to lodge to organs of State at any level written or oral complaints of transgression of law or neglect of duty on the part of any person working in an organ of State. No one shall attempt to hinder or obstruct the making of such complaints or retaliate.

Women enjoy equal rights with men in all respects.

The state protects marriage, the family, and the mother and child.

The state protects the just rights and interests of overseas Chinese.¹⁵⁸

Article 27 is even more dense than Article 28. It features six sections, with the right to supervise sitting in the third. It covers a wide range of topics, including the right to vote, the right to receive education, the right to work, women's right to equality, the protection of family, marriage, mother and child, and the rights and interests of Chinese nationals who residing abroad.

Similar to the "right to supervise clause" of the 1954 Constitution, Article 27 here prescribes only two of the four rights and duties set forth by the current Constitution. Both the 1954 and 1975 Constitutions guaranteed citizens' right to lodge complaints against State organs and public officials. However, while retaining the prohibition on government officials hindering that complaint process, the 1975 Constitution deleted the right to seek compensation guaranteed by the 1954 Constitution.¹⁵⁹

Moreover, in accordance with Chairman Mao's proposal, the specification that citizens enjoy freedom to strike has been added to Article 28 of the draft. We are convinced that the revolutionary masses, who have been tempered in the Great Proletarian Cultural Revolution, will apply these provisions still better and "create a political situation in which there are both centralism and democracy, both discipline and freedom, both unity of will and personal ease of mind and liveliness, and so help consolidate the leadership of the Communist Party of China over the state and consolidate the dictatorship of the proletariat."

158. XIANFA art. 27 (1975) (China).

159. Just as the inclusion of "the right to strike," deletion of "the right to seek compensation" might also be symbolic and ideological. As Jerome Cohen analyzed, allowing people to receive money for the loss of rights may be too bourgeois or too capitalist for radicals and leftists. See Jerome Alan Cohen, *China's Changing Constitution*, 1978 CHINA Q. 794, 823.

If focused only on Article 27, one might conclude that, at least in terms of scope and strength, little difference exists between the 1954 and 1975 “right to supervise clauses.” Yet as the following paragraphs will show, a holistic rather than “clause-bound” reading reveals that the 1975 Constitution in fact marked a radical departure from its predecessors.

3. Missing or Upgraded?: The “Right to Cultural Construction Clause” in the 1975 Constitution

Let us now turn to the “right to cultural construction clause.” Surprisingly, a quick read of the 1975 Constitution suggests no such clause exists, in Chapter III or any other part of the document. But is this important right really missing from the document entirely?

Yes and no. It is missing in the sense that the 1975 Constitution indeed contains no counterpart or equivalent to the “right to cultural construction clause” we see in today’s Constitution. But it is present in the sense that the same right safeguarded by a “right to cultural construction clause” is instead protected here by a stronger and more radical formulation. The “right to cultural construction clause” has been “upgraded” by the 1975 Constitution.

This “upgraded” version of the “right to cultural construction clause” is found in Article 12, which reads:

The proletariat must exercise all-around dictatorship over the bourgeoisie in the superstructure, including all spheres of culture. Culture and education, literature and art, physical education, health work and scientific research work must all serve proletarian politics, serve the workers, peasants and soldiers, and be combined with productive labor.¹⁶⁰

The first characteristic of Article 12 worthy of our attention is its position. Article 12 lies in the Chapter of “General Principles,” not in the Chapter of “Fundamental Rights and Duties of Citizens” (where in the other Constitutions we find the “right to cultural construction clause”). As its name indicates, the “General Principles” chapter concerns higher and more abstract ideas, rather than particular rights and duties. By “upgrading” Article 12 to a “general principle,” the 1975 Constitution does more than safeguard a specific right. It establishes a principle that guides our understanding of the entire 1975 Constitution. Therefore, the right to cultural construction in Article 12 indeed reached a status of unprecedented importance.

The key phrase in Article 12 is “the proletariat dictatorship in the superstructure.” Why the focus on “superstructure”? The answer is closely related to the reason why Mao Zedong waged the Cultural Revolution in the first place. To briefly explain, Marxist theory divides human society into two major spheres: the base and the superstructure. Strictly Marxist definitions consider the former to contain the force of production and the relations of production, and the latter to include culture, religion, law,

160. XIANFA art. 12 (1975) (China).

politics, and philosophy.¹⁶¹ Nowadays people usually use the former to refer to areas that are more concrete, while use the latter to refer to areas of culture and ideology.¹⁶²

After the founding of the PRC in 1949, "a people's democratic state led by the working class and based on the alliance of workers and peasants"¹⁶³ was established in the political sphere. In the economic sphere, too, State ownership and collective ownership of the means of production were also consolidated. In terms of Marxist theory, the above two achievements indicate that the proletariat dictatorship had already been preliminarily established in the base. People had already become masters in areas of the base.

But in Mao's view, the people of China had not yet become the masters of the country in the fullest sense. After the victory of the revolution, Mao increasingly felt that there was still one area not yet mastered by the people. This area is the very one specified by Article 12: "all spheres of culture." For Mao, the cultural area was still controlled by the bourgeoisie even after the founding of the PRC. It was the last area that needed to be revolutionized. This "failure" in cultural area troubled Mao. It directly contradicted his egalitarian ideal, and he feared this would undermine

161. See KARL MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* 11–12 (N. I. Stone trans., University Microfilms International 1981) (1859):

In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material power of production. The sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. The model of production in material life determines the general character of the social, political and spiritual processes of life. It is not consciousness of men that determines their existences, but, on the contrary, their social existence determines their consciousness. At a certain state of their development, the material forces of production in society come in conflict with the existing relations of production, or—what is but a legal expression for the same thing—with the property relations within which they had been at work before. From forms of development of the forces of production these relations turn into their fetters. Then comes the period of social revolution. With the change of economic foundation the entire immense superstructure is more or less rapidly transformed. In considering such transformations the distinction should always be made between the material transformation of the economic conditions of production which can be determined with the precision of natural science, and the legal, political, religious, aesthetic or philosophic—in short ideological forms in which men become conscious of this conflict and fight it out. Just as our opinion of an individual is not based on what he thinks of himself, so can we not judge of such a period of transformation by its own consciousness; on the contrary, this consciousness must rather be explained from the contradictions of material life, from the existing conflict between the social forces of production and the relations of production.

162. CRAIG CALHOUN, *DICTIONARY OF THE SOCIAL SCIENCES* 34 (Craig Calhoun et al. eds., 2002).

163. XIANFA pmb. (1982) (China).

the foundation of the People's Republic. Before the Cultural Revolution, Mao had already waged several campaigns to take the cultural area back, such as the "Thought Reform Movement" among intellectuals and scholars,¹⁶⁴ the campaign to criticize the film *The Life of Wu Hsun* (*Wu Xun Zhuan*),¹⁶⁵ the campaign targeted at Hu Shih and Yu Ping-po's so-called "bourgeois idealism,"¹⁶⁶ and another focused on the counter-revolutionary Hu Feng clique.¹⁶⁷ The Cultural Revolution is Mao's last and also the biggest move in cultural area.

Article 12, as well as the entire 1975 Constitution, should be understood against this background. Notwithstanding that the 1954 Constitution already incorporated a "right to cultural construction clause," after nearly twenty years observation, Mao believed this "normal" protection was not enough. If it were, why was the cultural area still controlled by the bourgeoisie instead of the proletariat?

As a result, the 1975 Constitution took an important step forward. It used the idea of "the proletariat dictatorship in the superstructure" to replace the *ethos* of "the People are masters of the country."¹⁶⁸ This profound change led to the fundamental difference between Article 12 and the other Constitutions' "right to cultural construction clauses." In essence, the *ethos* of "the people should be masters in cultural area" is a neutral and peaceful concept. It does not presuppose an enemy. It requires only that ordinary citizens actively participate in cultural creation and dissemination. To become the masters of their culture, the Chinese people need not fight with anyone.

On the contrary, the proletariat dictatorship in the superstructure is all about fighting against the enemy.¹⁶⁹ As Mao famously wrote, "Who are our enemies? Who are our friends? This is a question of the first importance for the revolution."¹⁷⁰ By introducing the concept of "enemy," Article 12 reconstructed how people conceived of the cultural area. The cultural area had turned from a marketplace of ideas into a battlefield.¹⁷¹

164. See JOHN KING FAIRBANK, *CHINA: A NEW HISTORY* 359-64 (1992).

165. See 5 MAO TSE-TUNG, *Pay Serious Attention to the Discussion of the Film The Life of Wu Hsun*, in *SELECTED WORKS OF MAO TSE-TUNG*, *supra* note 14, at 57, 57-58.

166. See 5 MAO TSE-TUNG, *Letter Concerning the Study of The Dream of the Red Chamber*, in *SELECTED WORKS OF MAO TSE-TUNG*, *supra* note 14, at 150, 150-51.

167. See 5 MAO TSE-TUNG, *Preface and Editor's Notes to Material on the Counter-Revolutionary Hu Feng Clique*, in *SELECTED WORKS OF MAO TSE-TUNG*, *supra* note 14, at 176, 176-82.

168. Similarly, while Article 1 of the 1954 Constitution defined China's regime as "a people's democratic state," Article 1 of the 1975 Constitution changed it to "a state of the dictatorship of the proletariat." See Jones, *supra* note 131; Cohen, *supra* note 159, at 804.

169. See 5 MAO TSE-TUNG, *On the Correct Handling of Contradictions Among the People*, in *SELECTED WORKS OF MAO TSE-TUNG*, *supra* note 14, at 384, 384-96.

170. 1 MAO TSE-TUNG, *Analysis of the Classes in Chinese Society*, in *SELECTED WORKS OF MAO TSE-TUNG* 13, 13 (1965).

171. For instance, in his "Report on Revision of the Constitution," Zhang Chunqiao frequently invoked the idea of "fronts," which clearly was a metaphor of war and battle.

The overall atmosphere had changed from harmony to hostile. Authorities needed only label an individual an enemy to justify depriving him of his freedom of speech, as well as his other rights, without further process. In Mao's own words, "Indeed this is true, our system does deprive all counter-revolutionaries of freedom of speech and allows this freedom only among the people."¹⁷² He put it even more directly when he stated: "As far as unmistakable counter-revolutionaries and saboteurs of the socialist cause are concerned, the matter is easy, we simply deprive them of their freedom of speech."¹⁷³

Furthermore, Article 12 laid down specific cultural requirements, expressly commanding that all cultural and artistic work "serve proletarian politics." The most "successful" examples of artistic works meeting this mandate are the so-called "Eight Model Operas" (样板戏; Yang Ban Xi), created under the direct leadership of Jiang Qing, Madame Mao and the "Great Flag-carrier of the Proletarian Culture."¹⁷⁴ These eight new Peking Operas were held up as model works because they were revolutionary and "served proletariat politics." During the ten years of the Cultural Revolution, these eight "Model Operas" were the *only* theater works that eight hundred million Chinese people were allowed to see—hence the popular saying, "Eight Model Operas for 800 Million People (八亿人民八部戏)." As we are all aware today, this rigid requirement greatly stifled, rather than promoted, the culture of China.

The bourgeoisie will seize hold of many fronts if the proletariat does not occupy them. Confucius died more than two thousand years ago, yet such rubbish as his never vanishes of itself where the broom of the proletariat does not reach. The draft lays down that "state organizations and state personnel must earnestly study Marxism-Leninism-Mao Zedong Thought," that "the proletariat must exercise all-round dictatorship over the bourgeoisie in the superstructure, including all spheres of culture" and that state organizations and state personnel must maintain close ties with the masses and overcome unhealthy tendencies. It is precisely the purpose of these provisions to call on us to pay keen attention to grasping socialist revolution in the realm of the superstructure and to pay attention to solving problems concerning the relations of production. We must broaden, deepen and persevere in the current movement to criticize Lin Biao and Confucius and occupy all fronts with Marxism.

See Wang, *supra* note 122, at 191.

172. 5 MAO TSE-TUNG, *In Refutation of "Uniformity of Public Opinion,"* in SELECTED WORKS OF MAO TSE-TUNG, *supra* note 14, at 172, 172.

173. MAO TSE-TUNG, *supra* note 169, at 410.

174. For more discussion of the "Eight Model Operas," see XING LU, RHETORIC OF THE CHINESE CULTURAL REVOLUTION: THE IMPACT ON CHINESE THOUGHT, CULTURE, AND COMMUNICATION (2004); Barbara Mittler, "Eight Stage Works for 800 Million People": The Great Proletarian Cultural Revolution in Music—A View from Revolutionary Opera, 26 OPERA Q. 377 (2010).

4. The “Big Four Freedoms”: An Upgraded Version of Political Expression Clause and the Right to Supervise Clause

In contrast to the 1975 Constitution’s dramatic change to the “right to cultural construction clause,” the evolution of the “political expression” and “right to supervise” clauses appears moderate. Did the 1975 Constitution “upgrade” only the cultural aspect of free expression, while leaving its political counterpart untouched?

The answer is no. The political aspect of free speech, too, was radicalized by the 1975 Constitution, whose Article 13 can be viewed as an “upgraded” version of both the “political expression” and the “right to supervise” clauses.

Article 13 is famously known as protecting “the Big Four Freedoms” (四大自由; *Si Da Zi You*): speaking out freely (大鸣; *Da Ming*), airing views fully (大放; *Da Fang*), holding great debates (大辩论; *Da Bian Lun*), and writing big-character posters (大字报; *Da Zi Bao*).¹⁷⁵ It provides:

Speaking out freely, airing views fully, holding great debates and writing big-character posters are new forms of carrying on socialist revolution created by the masses of the people. The state shall ensure to the masses the right to use these forms to create a political situation in which there are both centralism and democracy, both discipline and freedom, both unity of will and personal ease of mind and liveliness, and so help consolidate the leadership of the Communist Party of China over the state and consolidate the dictatorship of the proletariat.¹⁷⁶

The last sentence articulates the purpose of Article 13: to consolidate the leadership of the Party and, more importantly, to consolidate the dictatorship of the proletariat. Again this phrase “the dictatorship of the proletariat” appears. While Article 12 attempted to establish “the dictatorship of the proletariat” in the cultural area, Article 13 aims to do the same in the political one.

As the above analysis of Article 12 suggests, replacing the “the People are masters of the country” *ethos* with “the dictatorship of the proletariat” introduced the concept of an enemy. When there was no imagined “enemy,” the normal political expression clause and the right to supervise clause are sufficient to guarantee political self-government. Together they protect the people’s right to expression and ensure government accountability.

But just as Mao thought an “ordinary” right to the cultural construction clause was insufficient, he believed that these other two clauses, too, failed to ensure a true “people’s government.” Perceiving his government and colleagues as becoming more and more bureaucratic and

175. For a historical study of “the Big Four Freedoms,” see Hua Sheng, *Big Character Posters in China: A Historical Survey*, 4 J. CHINESE. L. 234, 238 (1990) (referring to them as the “Four Great Freedoms”).

176. XIANFA art. 13 (1975) (China).

distant from the people, Mao wrongly concluded that the enemy—the bourgeois and “the capitalist roaders” (走资派; *Zou Zi Pai*)—had controlled the Party-State. Consequently, Mao wanted to arm the people with a more powerful means to supervise bureaucratic Party leaders and public officials.¹⁷⁷ “The Big Four Freedoms,” Mao’s invention, was meant to accomplish just that. Mao hoped that wielding this weapon of mass destruction would help him to achieve the “Great Democracy.”¹⁷⁸ In fact, when Mao attempted to remove Liu Shaoqi from the position of China’s president and to wage the Cultural Revolution, his first move was to write his own Big-Character Poster—“Bombard the Headquarter: My Big-Character Poster.”¹⁷⁹ This was the first time “the Big Four Free-

177. 5 MAO TSE-TUNG, *Be Activists in Promoting the Revolution*, in *SELECTED WORKS OF MAO TSE-TUNG*, *supra* note 14, at 483, 485.

178. See 5 MAO TSE-TUNG, *Speech at the Second Plenary Session of the Eighth Central Committee of the Communist Party of China*, in *SELECTED WORKS OF MAO TSE-TUNG*, *supra* note 14, at 332, 344:

If great democracy is now to be practised again, I am for it. You are afraid of the masses taking to the streets, I am not, not even if hundreds of thousands should do so. “He who is not afraid of death by a thousand cuts dares to unhorse the emperor.” This was a saying of a character in a classical Chinese novel, Wang Hsi-feng, otherwise called Sister Feng. She it was who said this. The great democracy set in motion by the proletariat is directed against class enemies. Enemies of the nation (who are none other than the imperialists and the foreign monopoly capitalists) are class enemies also. Great democracy can be directed against bureaucrats too. I just said that there would still be revolutions ten thousand years from now, so possibly great democracy will have to be practised then. If some people grow tired of life and so become bureaucratic, if, when meeting the masses, they have not a single kind word for them but only take them to task, and if they don’t bother to solve any of the problems the masses may have, they are destined to be overthrown. Now this danger does exist. If you alienate yourself from the masses and fail to solve their problems, the peasants will wield their carrying-poles, the workers will demonstrate in the streets and the students will create disturbances. Whenever such things happen, they must in the first place be taken as good things, and that is how I look at the matter.

Id. at 344.

179. See RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, *MAO’S LAST REVOLUTION* 90 (2006). Mao’s big character poster read:

China’s first Marxist-Leninist big character poster and Commentator’s article on it in *Renmin Ribao* (the *People’s Daily*) are indeed superbly written! Comrades, please read them again. But in the last fifty days or so some leading comrades from the central down to the local levels have acted in a diametrically opposite way. Adopting the reactionary stand of the bourgeoisie, they have enforced a bourgeois dictatorship and struck down the surging movement of the great cultural revolution of the proletariat. They have stood facts on their head and juggled black and white, encircled and suppressed revolutionaries, stifled opinions differing from their own, imposed a white terror, and felt very pleased with themselves. They have puffed up the arrogance of the bourgeoisie and deflated the morale of the proletariat. How poisonous! Viewed in connection with the Right deviation in 1962 and the wrong tendency of 1964 which was “Left” in form but Right in essence, shouldn’t this make one wide awake?

doms” revealed its force and power; it destroyed the nation’s president and dragged the country into a decade of chaos and madness.

Articles 12 and 13 of the 1975 Constitution work together as companions. While the former supports a cultural proletariat dictatorship, the latter seeks to empower the proletariat dictatorship politically. By replacing the *ethos* of “People are masters of the country” with the proletariat dictatorship,¹⁸⁰ the 1975 Constitution manifested the country’s leftist radicalization. This is also the key reason behind the lawlessness and mass rights violations that persisted throughout the Cultural Revolution. With the line between the people and the enemy so subjective and so theoretically arbitrary, everyone faced the risk of being branded an “enemy” and of losing his rights, or indeed even his citizenship, at any time. “The proletariat dictatorship” and the dichotomy between the people and the enemy are like a time bomb planted in the 1975 Constitution. Every time it exploded, it created total chaos and disaster.

C. *Still Living in the Shadow of Cultural Revolution: The 1978 Constitution*

The 1978 Constitution gets mixed reviews. Although most consider it an improvement over the 1975 Constitution, it is still generally labeled a “bad” Constitution.¹⁸¹

This section argues that, though failing to eradicate the root of the Cultural Revolution completely, the “free speech clause” of the 1978 Constitution had begun to abandon the radicalism of its predecessor by deleting “the proletariat dictatorship” and the “Big Four Freedoms” from the Constitution. It largely prefaced the advent of the 1982 Constitution.

At the time of its enactment, China had not walked out from the shadow of the Cultural Revolution—even two years after the arrest of the Gang of Four. The Party’s statement had already declared the end of the Cultural Revolution in 1976, but the then-Party leaders still adhered to the ideologies and policies of the Cultural Revolution. Under Hua Guofeng’s leadership, “the Two Whatever’s” Policy (两个凡是; *Liang Ge Fan Shi*) and the theory of “the continuing revolution under the Dictatorship of the Proletariat” still dominated the public consciousness.¹⁸²

The “Two Whatever’s” policy perfectly encapsulates the zeitgeist that gave rise to the 1978 Constitution. It states: “We will resolutely

Id.

180. See ZHONGGUO XIANFA WENXIAN TONGBIAN, *supra* note 132, at 188 (“In the present revision of the Constitution our main task is to sum up our new experience, consolidate our new victories and express the common desire of the people of our country to persist in continued revolution under the dictatorship of the proletariat.”).

181. Cohen argued that the 1978 Constitution was “a halfway house between the 1975 document on the left the 1954 document on the right.” Cohen, *supra* note 159, at 836.

182. For a detailed account of this period of history, see EZRA F. VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA 184–98 (2011); see also MACFARQUHAR & SCHOENHALS, *supra* note 179, at 450–53.

uphold whatever policy decisions Chairman Mao made, and unswervingly follow whatever instructions Chairman Mao gave.”¹⁸³ As Ye Jianying clearly stated in his report on the drafting of the 1978 Constitution, the drafters’ “guiding principle” was their goal “to completely and accurately realize Chairman Mao’s idea of the Continuing Revolution under the Dictatorship of the Proletariat.”¹⁸⁴ Indeed, this guiding principle is well reflected in the Constitution’s Preamble, which proudly declares that “[t]he triumphant conclusion of the first Great Proletariat Cultural Revolution has ushered in a new period of development in China’s socialist revolution and socialist construction.”¹⁸⁵ The Preamble announces to its readers two important lessons. First, it tells us that the 1978 Constitution considers the Cultural Revolution a great triumph (not a failure or disaster, as public opinion would later conclude). Second, it tells us that the Cultural Revolution was only the “first” Cultural Revolution, and that others, if needed, might follow.

The 1978 Constitution was born in a time of great confusion. On the one hand, Mao was dead, the Gang of Four was in prison, and the public had tired of, and indeed wished to end, the Cultural Revolution. On the other hand, the aftereffects of that revolution persisted. Hua Guofeng and other Party leaders such as Ye Jianying and Wang Dongxing were attempting to get the country back to normal without entirely discrediting Mao’s last revolution.¹⁸⁶ It follows that any analysis of the “free speech clause” of the 1978 Constitution must acknowledge the complexity of that Constitution’s environment.

1. The “Political Expression Clause” in the 1978 Constitution

The “political expression clause” in the 1978 Constitution combined previously distinct articles into a single provision. Merging Article 28 and Article 13 of the 1975 Constitution, Article 45 of the 1978 Constitution provides:

Citizens enjoy freedom of speech, correspondence, the press, association, procession, demonstration and the freedom to strike, and have the right to “speak out freely, air their views fully, hold great debates and write big-character posters.”¹⁸⁷

The first half of Article 45 is the same as its counterpart in the 1975 Constitution. Like the 1975 Constitution, it protects common forms of political expression listed in the 1954 (and, later, the 1982) Constitution, but also incorporates the right to strike.

The second half of the Article is more intriguing in that it places the “Big Four Freedoms” in the same Article as the six common forms of political expression. In merging these protections, Article 45 highlighted the

183. MACFARQUHAR & SCHOENHALS, *supra* note 179, at 452.

184. For Ye Jianying’s report, see ZHONGGUO XIANFA WENXIAN TONGBIAN, *supra* note 132, at 156.

185. XIANFA pmb. (1978) (China).

186. See VOGEL, *supra* note 182, at 188–90.

187. XIANFA art. 45 (1978) (China).

connection between them. As discussed, both the “Big Four Freedoms” and the “political expression clause” concern freedom of political speech. The only difference is that the latter offers moderate protection while the former is both more powerful and more radical. That is, the “Big Four Freedoms” might be viewed as an “upgraded” version of the standard “political expression clause.”

The 1975 Constitution contained in separate Articles (28 and 12, respectively) the ordinary “political expression clause” and the “Big Four Freedoms” protection. As a result, an inattentive reader might think they concern different things. By placing them together in the same Article, the 1978 Constitution underscored their complementarity. While the first sentence guarantees the common or normal forms of political expression, the second sentence protects the more forceful and more radical forms of political expression—those contemplated by the “Big Four Freedoms.”

On the other hand, the “Big Four Freedoms” were also “downgraded” by the 1978 Constitution, which moved them from Chapter I (“General Principles”) to Chapter III (“Citizens’ Fundamental Rights and Duties”). As this article has stressed many times, *location matters*, and this change in position indicates a lowered prestige for the “Big Four Freedoms.” It shows they went from a fundamental principle to a simple right. To a certain degree, this “downgrade” exemplified the overall tonal shift from the 1975 to the 1978 Constitution. Though they still waved the flag of “the Continuing Revolution under the Dictatorship of the Proletariat,” the drafters of the 1978 Constitution simultaneously turned down the volume of the Cultural Revolution.

2. The “Right to Supervise Clause” in the 1978 Constitution

The “right to supervise clause” regained its status as an independent provision in the 1978 Constitution. Article 55 provides:

Citizens have the right to make complaints with organs of the State at any level against any person working in a State organ, enterprise or institution for transgression of law or neglect of duty. Citizens have the right to appeal to organs of State at any level against any infringement of their rights. No one shall suppress such complaints and appeals or retaliate against persons making them.¹⁸⁸

Article 55 echoed its counterpart in the 1975 Constitution by protecting the right to make complaints and prescribing the duties of State organs when facing these complaints. However, Article 55 is the only “right to supervise clause” that specifically identifies citizens’ “right to appeal to organs of State at any level against any infringement of their rights.” This added protection in the 1978 Constitution is perhaps attributable to the events of the Cultural Revolution that preceded it. That decade of chaos saw rights violations at every level, from senior Party leaders like Liu Shaoqi to millions of ordinary citizens. By safeguarding

188. *Id.* art. 55.

the "right to appeal to organs of State at any level," the 1978 Constitution armed its citizens with the necessary means to redress those grievances.¹⁸⁹

Let's not forget that "the Big Four Freedoms" are also a radical form of the right to supervise. In addition to the "normal" channels provided by Article 55, people can also supervise the government through the "Big Four Freedoms" protected by Article 45. The years 1976–1979 were also the heyday of the Democracy Wall in Xidan, Beijing.¹⁹⁰ At that time, people all over the country were using similar forms to express their views, make their complaints and redress their grievances until the "Big Four Freedoms" were deleted from the Constitution.

3. The "Right to Cultural Construction Clause" in the 1978 Constitution

Article 52 of the 1978 Constitution restored the provision, deleted by the 1975 Constitution, that safeguards citizens' right to cultural construction and scientific research. Article 52 says:

Citizens have the freedom to engage in scientific research, literary and artistic creation and other cultural activities. The state encourages and assists the creative endeavors of citizens engaged in science, education, literature, art, journalism, publishing, public health, sports and other cultural works.¹⁹¹

Similar to the "right to cultural construction clauses" in both the 1954 and 1982 Constitutions, Article 52 first guarantees the freedom "to engage in scientific research, literary and artistic creation and other cultural pursuits," and then sets forth the state's duties to "encourage and assist" these endeavors.

What happened to "the dictatorship of proletariat in superstructure"? Article 14 of Chapter I contains a much milder version:

The State upholds the leading position of Marxism-Leninism-Mao Zedong Thought in all spheres of ideology and culture. All cultural undertakings must serve the workers, peasants and soldiers, and serve socialism.

The State applies the policy of "letting a hundred flowers blossom and a hundred schools of thought contend" so as to promote the development of the arts and sciences and bring about a flourishing socialist culture.¹⁹²

First and foremost, a term "the proletariat dictatorship" disappeared. The deletion of this term indicated a sea change in the principles governing the Constitution. The earlier discussion pointed out that "the proletariat dictatorship" was based on an imagined "enemy." It thus

189. Cohen, *supra* note 159, at 823–25.

190. For more detailed discussion, see *THE FIFTH MODERNIZATION: CHINA'S HUMAN RIGHTS MOVEMENT, 1978–1979* (James Seymour ed., 1980); VOGEL, *supra* note 182, at 250–57; Sheng, *supra* note 175, at 245–51; Eliasoph, *supra* note 20, at 293–98.

191. XIANFA art. 52 (1978) (China).

192. *Id.* art. 14.

envisioned the cultural area as a battlefield between an enemy and the people. Under such a mindset, the cultural area was all about defeating and eliminating the enemy; there was no room for different ideas to compete. But by deleting “the proletariat dictatorship,” the 1978 Constitution undermined the foundation of this pugilistic mindset. Although the requirement of “the leading position of Marxism-Leninism-Mao Zedong Thought” was inserted into Article 14, it is far less perilous than “the proletariat dictatorship.” At least, this requirement did not presume an enemy. The cultural area was not a battlefield anymore. In theory, it even provided more space for the protection of unpopular and unorthodox ideas. As long as they did not interfere with “the leading position of Marxism-Leninism-Mao Zedong Thought,” minority ideas were at least permitted.

If that improvement appears unsatisfactory, the second section of Article 14 is more promising. The 1978 Constitution marks the only time that the so-called “Two-Hundreds Policy” (双百方针; *Shuang Bai Fang Zhen*) (“letting a hundred flowers blossom and a hundred schools of thought contend”) appeared in the Chinese Constitution.¹⁹³ The “Two-Hundreds Policy,” as Mao defined it, states that “different forms and styles in art should develop freely and different schools in science should contend freely.”¹⁹⁴ In Mao’s view,

[I]t is harmful to the growth of art and science if administrative measures are used to impose one particular style of art or school of thought and to ban another. Questions of right and wrong in the arts and science should be settled through free discussion in artistic and scientific circles and through practical work in these fields.¹⁹⁵

The “Two-Hundreds Policy” may be the most speech-friendly policy in PRC history. One way to let people truly become masters in cultural area and to promote a culture “of the people, by the people, for the people,” is to let “a hundred flowers blossom and a hundred schools of thought contend.” Of course, the “Two-Hundreds” policy itself does not promise a marketplace of ideas.¹⁹⁶ Yet it indeed provides a textual

193. See generally MAO, *supra* note 169, at 408–14; LU DINGYI (LU TING-YI), LET FLOWERS OF MANY KINDS BLOSSOM, DIVERSE SCHOOLS OF THOUGHT CONTEND! (1957).

194. MAO, *supra* note 169, at 408.

195. *Id.*

196. In many aspects, Mao’s rationale of the “Two Hundreds” is indeed similar to Holmes’s theory of the marketplace of ideas. For example, Mao argued that:

A period of trial is often needed to determine whether something is right or wrong. Throughout history at the outset new and correct things often failed to win recognition from the majority of people and had to develop by twists and turns through struggle. Often, correct and good things were first regarded not as fragrant flowers but as poisonous weeds.

Id. Mao also stated:

It is not only futile but very harmful to use crude methods in dealing with ideological questions among the people, with questions about man’s mental world. You may ban the expression of wrong ideas, but the ideas will still be there. On the other hand, if correct ideas are pampered in hothouses and

foundation to advocate for a multitude of ideas under the Chinese Constitution. Unfortunately, the 1982 Constitution saw this important language removed, and it has not yet been restored.¹⁹⁷

4. The End of the "Big Four Freedoms" in 1980

It is perhaps ironic that the best-known feature of the 1978 Constitution is a provision that was ultimately deleted, rather than any of the provisions that remained. Revising or even rewriting a constitution is not novel in China. After all, we have had four constitutions, and the current Constitution has been amended four times.¹⁹⁸ But the deletion of the "Big Four Freedoms" from the 1978 Constitution was a different matter, and

never exposed to the elements and immunized against disease, they will not win out against erroneous ones. Therefore, it is only by employing the method of discussion, criticism and reasoning that we can really foster correct ideas and overcome wrong ones, and that we can really settle issues.

Id. at 410–11. He added:

It is inevitable that the bourgeoisie and petty bourgeoisie will give expression to their own ideologies. It is inevitable that they will stubbornly assert themselves on political and ideological questions by every possible means. You cannot expect them to do otherwise. We should not use the method of suppression and prevent them from expressing themselves, but should allow them to do so and at the same time argue with them and direct appropriate criticism at them. Undoubtedly, we must criticize wrong ideas of every description. It certainly would not be right to refrain from criticism, look on while wrong ideas spread unchecked and allow them to dominate the field. Mistakes must be criticized and poisonous weeds fought wherever they crop up. However, such criticism should not be dogmatic, and the metaphysical method should not be used, but instead the effort should be made to apply the dialectical method. What is needed is scientific analysis and convincing argument. Dogmatic criticism settles nothing. We are against poisonous weeds of whatever kind, but we must carefully distinguish between what is really a poisonous weed and what is really a fragrant flower. Together with the masses of the people, we must learn to differentiate carefully between the two and use correct methods to fight the poisonous weeds.

Id. at 411.

197. In his "Report on Revision of the Constitution," Peng Zhen explained why the 1982 Constitution deleted "the Two Hundreds Policy" once:

The policy of "letting a hundred flowers blossom and hundred schools of thought contend" is not included in the articles on cultural work. This is based on the following considerations. First, the draft already includes among the rights of citizens freedom of speech and of the press and the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits; in other words, the substance of the "hundred flowers" policy is embodied in legal terms and, moreover, is given a broader interpretation. Second, apart from this policy, there are other basic policies governing work in science and culture, and it is unnecessary and impossible to write them all into the Constitution. There is no doubt that "letting a hundred flowers blossom and a hundred schools of thought contend" is one of the basic principles guiding our scientific and cultural pursuits and that it must be firmly implemented to make socialist science and culture flourish.

See ZHONGGUO XIANFA WENXIAN TONGBIAN, *supra* note 132, at 64.

198. The Constitution was amended in 1988, 1993, 1999, and 2004.

one with a highly targeted purpose: to eradicate a very specific provision quickly and completely. This kind of surgical strike had never happened before, and has never occurred since.

In February of 1980, the Fifth Plenum of the 11th Party Congress recommended that the NPC remove the “Big Four Freedoms” from the Constitution altogether,¹⁹⁹ a proposal quickly passed by the Third Plenum of the Fifth NPC on September 10th.²⁰⁰ The speed with which the Third Plenum acted was unprecedented. As we know today, a new Constitution was soon to be promulgated (in 1982). The NPC certainly had the option to wait two years and simply make sure that the “Big Four Freedoms” were not included in the text of the new Constitution. What justified their urgency?

The NPC gave four reasons why the “Big Four Freedoms” needed to be eradicated so quickly: (1) to promote the socialist democracy; (2) to improve the socialist rule of law; (3) to maintain the stability of the political environment; (4) to better effect the socialist modernization.²⁰¹

Interestingly, a careful look at this list suggests that the first reason offered may be in tension with the other three. Few would disagree that the Cultural Revolution (which birthed the “Big Four Freedoms”) was lawless, unstable, and chaotic, or that it seriously impeded China’s economic growth and modernization. But the NPC goes further by suggesting that this constitutional provision was in fact inimical to democracy itself. The assertion calls for closer scrutiny: are the “Big Four Freedoms” undemocratic, or perhaps somehow *too* democratic?

In Mao’s vision, the “Big Four Freedoms” are foundational to the “Great Democracy.” They may sow chaos and anarchy, but this is the price we pay for true democracy. By contrast, the rights and freedoms protected by the normal “Free Speech Clauses” are insufficient, hollow and inert. They are unable to mobilize and empower the people.

The problem with Mao’s philosophy, however, is that he persisted in envisioning normal politics in terms of revolution.²⁰² Mao once famously wrote, “A single spark can start a prairie fire.”²⁰³ To launch a revolution, a single spark may indeed be what is needed. But after the revolution, and once peace has been won, we may question the wisdom of continually sparking new flames. One reason for the failure of the Cultural Revolution is that Mao persisted in using the revolution’s logic to govern a *post-revolution* country. As the slogan of “the Continuing Revolution under the Dictatorship of the Proletariat” illustrates, the revolution never

199. XU, *supra* note 114, at 343.

200. *Id.*

201. See ZHONGGUO XIANFA WENXIAN TONGBIAN, *supra* note 132, at 178.

202. For the discussion of normal politics and constitutional politics, see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 461–62 (1989); see also 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (2000).

203. See 1 MAO TSE-TUNG, *A Single Spark Can Start a Prairie Fire*, in *SELECTED WORKS OF MAO TSE-TUNG*, *supra* note 170, at 117, 117–27.

ends. The enemy—the bourgeoisie—remained. The “Big Four Freedoms,” then, were Mao’s last attempt to start the fire of revolution and to mobilize the mass. As a result, the fire Mao started this time became uncontrollable.²⁰⁴ Indeed, it nearly destroyed the country he had built.

Thus, the NPC’s decision to delete this phrase from the Constitution was an effort to tame or even end Mao’s “Great Democracy.” It reflected efforts to reach a new balance between the anarchy of an unbridled democracy and the control of the rule of law. Consider again the metaphor of the pendulum: if the 1975 Constitution was the far left of the pendulum’s swing, then the deletion of the “Big Four Freedoms” was part of its swing back to center. It prefaced the advent of the 1982 Constitution. China’s constitutional politics were returning to middle ground again.

D. *The Newly Discovered 1953 Constitution Draft*

Our survey does not end at the 1978 Constitution. An early draft of the 1954 Constitution recently discovered (in 2008) sheds new light on our understanding of the “right to cultural construction clause.” Termed the “1953 Draft” by constitutional scholars,²⁰⁵ this document rectified a widespread misunderstanding of the “right to cultural construction clause,” one which mistakenly interpreted Article 47 as protecting academic freedom or the rights of scholars, scientists and artists.²⁰⁶ In contrast, this section demonstrates that *ordinary citizens*, not scholars or artists, are the real focus of the “right to cultural construction clause.”

1. Different Drafts of the 1954 Constitution

The 1953 Draft was discovered by Professor Han Dayuan in 2008. It is the earliest draft of the 1954 Constitution uncovered thus far. The draft contains only the first part of the finished 1954 Constitution, but that is more than enough for our purposes.

According to Professor Han, the draft was prepared in early 1953 for deliberation by the First NPC.²⁰⁷ Its full title is: “The First Draft of the Constitution Draft of the People’s Republic of China (Part I),” and it was delivered by the General Office of the CCP Central Committee on May 3, 1953.²⁰⁸ At that time, the CCP planned to hold the first meeting of the First NPC in 1953; this draft was prepared particularly for that meeting. The 1953 Draft was only later disregarded when it became clear that there was not enough time to convene the First NPC in 1953.²⁰⁹

204. See WANG SHAOGUANG, *FAILURE OF CHARISMA: THE CULTURAL REVOLUTION IN WUHAN* 266–81 (1995).

205. The 1953 Draft was uncovered by Professor Han Dayuan during his study on the historical documents of the 1954 Constitution. See HAN DAYUAN (韩大元), 1954 XIANFA YU ZHONGGUO XIANZHENG (1954宪法与中国宪政) [THE 1954 CONSTITUTION AND CHINESE CONSTITUTIONALISM] (2008).

206. See Wang, *supra* note 122, at 5.

207. See HAN, *supra* note 205, at 68.

208. *Id.*

209. *Id.*; see also XU, *supra* note 114, at 109–10.

Other than the 1953 Draft, two other drafts of the 1954 Constitution have surfaced: one, the Constitution Draft of the People's Republic of China (the "First Draft"), which was completed in March of 1954 by a small working group referred to as the "Working Group of the Draft Constitution,"²¹⁰ and second, the Constitution Draft of the People's Republic of China, which was passed by the Committee of the Central People's Government and submitted to the First NPC for approval on September 15, 1954.²¹¹

Studies suggest there may have been yet a fourth draft of the 1954 Constitution—one written by Chen Boda, Mao's secretary and a famous Marxist theorist.²¹² In November to December of 1953, Mao instructed Chen to draft a constitutional framework for future discussion. Chen finished his draft, but abandoned it because both Mao and the Working Group of the Draft Constitution thought it immature and problematic.²¹³ Chen's draft has never been seen. This is probably because, working as Mao's secretary for years, Chen always burned or destroyed early drafts of finished work.²¹⁴ As a result, we do not know in what respects Chen's draft was problematic, or how the final 1954 Constitution improved upon it.

Yet given that the 1953 Draft was finished in early 1953, and Chen Boda's in December of the same year, the former remains the earliest known draft of the 1954 Constitution. It is therefore the best source of information as to China's very first Constitution at its earliest stage.

2. Article 20: The Right of the Few vs. the Right of the Many

Article 20 of the 1953 Draft sets forth:

Chinese citizens enjoy the freedom and rights of thoughts, of speech, of assembly, of association, of religion, of procession and of demonstration. To guarantee that the freedom and rights of the press, of assembly and of association can be really exercised by citizens, and to ensure that **scientists and artists** can fully engage in creative endeavors conducive to the interests of the people and the country, the State should provide necessary material and other support.²¹⁵

At first sight, there seems to be nothing special about Article 20. It appears to be a combination of the "political expression clause" and the "right to cultural construction clause."

Yet closer examination reveals the difference. Consider the groups named in the second part of Article 20. While the "right to cultural construction clause" protects the rights of ordinary citizens, Article 20 focuses on the rights of scientists and artists. The latter safeguards the rights of scientists and artists "engaging in creative endeavors," not the rights of

210. For the full text, see HAN, *supra* note 205, at 430–44.

211. For the full text, see *id.* at 445–60.

212. *Id.* at 66.

213. *Id.* at 72.

214. *Id.* at 54.

215. *Id.* at 70.

ordinary people. It is not a problem of the same right exercised by different people; it is about two different rights.

The right protected by Article 20 of the 1953 Draft is essentially elitist and “undemocratic.” By contrast, the nature of the “right to cultural construction clause” is populist and democratic. The former right is a freedom enjoyed only by a small group of people; the latter one attempts to empower as many people as possible. In a sense, the “right to cultural construction clause” challenges or democratizes the cultural monopoly once enjoyed by the scientists and artists.

As mentioned earlier, some scholars have labeled Article 47 of the present Constitution China’s “academic freedom clause.”²¹⁶ But the 1953 Draft reveals the misunderstanding inherent in this label. The second part of Article 20 of the 1953 Draft, with its explicit reference to “scientists and artists,” could indeed be deemed as protecting academic freedom. But by changing the subject from “scientists and artists” to Chinese citizens, the “right to cultural construction clause” concerns something quite the opposite.

On one hand, academic freedom and Article 20 of the 1953 Draft are based on what Professor Robert Post called the value of “democratic competence.”²¹⁷ Post defines democratic competence as requiring scholars to produce reliable disciplinary and expert knowledge to render ordinary citizens more “competent” to democratic self-government.²¹⁸ To achieve this goal, a democratic society first requires that its scientists and scholars be “competent.” In other words, the privilege of academic freedom is reserved for those who pass a minimum threshold for eligibility. Anyone seeking to exercise this right must first show that he is “qualified,” as “academic freedom protects scholarly speech only when it complies with ‘professional norms.’”²¹⁹ Scientists and scholars must be trained for years, their works tested by the most vigorous standards. As seen in the operation of top academic journals, the academic world is by nature discriminative and selective, separating the best works from the worst and seeking primarily to exclude rather than include.²²⁰ This is the rationale of Article 20. Not everyone can be a scientist or artist. Since only a small group of people who possess certain talent, training, and knowledge can claim a right to the freedom it protects, Article 20 is by nature “elitist” and “undemocratic.”

In contrast, the “right to cultural construction clause” functions to advance the “the People are masters of the country” *ethos*. By referring not to “scientists and artists” in particular, but instead to “the Chinese citizens” generally, the “right to cultural construction” clause (i.e., Article 47 of the 1982 Constitution and Article 95 of the 1954 Constitution) reflects

216. Wang, *supra* note 122.

217. Post, *supra* note 19, at 33–60.

218. *Id.* at 34.

219. *Id.* at 67.

220. *Id.*

a more inclusive and egalitarian spirit. The “academic freedom clause” has become a “right to cultural construction clause.” This shift does not deny the importance of academic freedom. Further, it does not suppose that the works created by ordinary people can completely replace the work of vetted scientists or artists. Rather, it endorses a particular ideal—that people should be masters in the cultural area. It believes that “the greatest menace to freedom is an inert people.”²²¹ Thus the purpose of the “right to cultural construction clause” is to enable and empower ordinary people, not only cultural or political elites, to decide, engage in and contribute to their nation’s culture. Its aim is to promote a culture “of the people, by the people, for the people.”

In this sense, Article 20 of the 1953 Draft serves to show us what the “right to cultural construction clause” is NOT. It tells us that this academic-focused protection was ultimately rejected by the drafters in favor of a more egalitarian commitment. We don’t know why such a change happened due to the lack of historical documents. But we do know a change indeed occurred, and we should take that into account when interpreting the right to cultural construction clause.

CONCLUSION

In light of the constitutional *ethos* “the People are masters of the country,” this article has constructed a new “free speech clause” under the Chinese Constitution. This *ethos* manifests a dual ideal: that the Chinese people should be masters in both political and cultural areas. As a fundamental right, free speech works in service of this dual ideal.

Articles 35, 41 and 47 have been fashioned to accomplish just that. This trinity constitutes a complete “free speech clause” under the Chinese Constitution. It protects all expressions, both political and cultural, in promotion of China’s constitutional *ethos*. These three provisions guarantee the common forms of political expression; namely, citizens’ right to supervise and hold accountable their government, and citizens’ rights of cultural construction and scientific research. It envisions free speech not only as a political right, but also as a right to cultural construction.

This *ethos* and this understanding of free speech run throughout China’s constitutional history. The 1954 Constitution and the 1982 Constitution represent a “normal” and balanced position. The 1975 and 1978 Constitutions, however, are more “radical.” Influenced by the Cultural Revolution, “the proletariat dictatorship” replaced the *ethos* of “the People are masters of the country.” The protection of political expression and the right to supervise had been “upgraded” to “the Big Four Freedoms;” meanwhile, the right to cultural construction had been pushed to extreme by “the proletariat dictatorship in superstructure” and “all works must serve the proletarian politics.” These changes both fed and were fed by the chaos and anarchy of the Cultural Revolution. The 1982 Constitution

221. *Whitney v. California*, 274 U.S. 357, 376 (1927).

ended the chaos and restored the nation's *ethos* of “People are masters of the country.” The Chinese political pendulum has finally returned to its center.

Today, people both in and outside China stress the necessity and urgency of promoting constitutionalism. As discussed earlier, an essential prerequisite to its implementation is to study the Constitution seriously and construct a complete theory of its meaning. Focusing on free speech, this article seeks to construct China's own “living constitution” based on the text of the Chinese Constitution as well as China's unique tradition. Some people may agree with my interpretation and some may not. Either way, the Constitution wins. The worst intellectual environment for a constitution is characterized not by disagreement, but by apathy. My goal is not to convince all readers of my interpretation, but to encourage active and continued discussion of the Constitution's meaning. As long as we keep agreeing and disagreeing with each other, we can create an “interpretive community”²²² and a constitutional culture, which may give rise to our own “living constitutionalism” in China one day.

222. See Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982).

