
DR. WU'S CONSTITUTION

It would be fine if all human interests could be recognized and protected by the law, but in actual fact they constantly come into conflict, and under every type of situations [sic] some interests have got to be sacrificed in order that others may receive full attention at the hands of the law. In law, as in life generally, we have to learn that "for everything we have we give up something else"; and we must be taught "to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect."

— Dr. John Jingxiong Wu¹

INTRODUCTION

On August 17, 1933, the front page of the *China Press*, a Shanghai daily newspaper, announced the arrival of a new constitution for the Republic of China.² This was an important moment. Revolutionary forces had founded the Republic two decades earlier.³ Since then, the country had been governed by a series of constitutions, many of which were expressly designed to be temporary.⁴ The national political situation during that period was both unstable and authoritarian.⁵ In the early 1930s, an increasingly influential group of political dissidents, alarmed by what they perceived as a "national crisis," demanded that the ruling Kuomintang Party put together a permanent constitution guaranteeing a more representative form of government.⁶ Struggling to hang on to its power, the Kuomintang acquiesced.⁷

The man tasked to produce the first draft of that constitution was Dr. John Jingxiong Wu. At thirty-four years old, he had already tallied up an impressive list of accomplishments.⁸ After completing graduate-level studies in the United States and Europe, he published a string of articles in U.S. and Chinese law reviews. He served for several years as a professor at the Comparative Law School of China and as a judge for the Provisional Court of Shanghai. His mentors included leading U.S. scholar and Harvard Law School Professor Felix Frankfurter. For more than ten years, he carried on a wide-ranging correspondence with Justice Oliver Wendell Holmes, Jr., of the U.S. Supreme Court.

¹ JOHN C.H. WU, *THE ART OF LAW* 1 (1936).

² *First Draft of Constitution of China Issued by Committee*, CHINA PRESS, Aug. 17, 1933, at 1.

³ See JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 273–74 (2d ed. 1999).

⁴ Jerome Alan Cohen, *China's Changing Constitution*, 76 CHINA Q. 794, 795–96 (1978).

⁵ See generally *infra* section I.A, pp. 2305–08.

⁶ LLOYD E. EASTMAN, *THE ABORTIVE REVOLUTION: CHINA UNDER NATIONALIST RULE, 1927–1937*, at 160–65 (1974).

⁷ *Id.* at 160–61, 166.

⁸ For a discussion of the material in this paragraph, see *infra* section I.B, pp. 2308–11.

Dr. Wu drafted a constitution whose length seemed to reflect the scope of the problems it was meant to solve. Weighing in at more than 200 articles, it covered issues abstract and aspirational — “[m]an and woman, in the spirit of equality and of mutual help, shall unite their efforts to foster family happiness”⁹ — and extremely granular — judges on the National Affairs Court were to have “studied law, political science, or economics in a college” before taking the bench.¹⁰ The *China Weekly Review* commended the draft constitution for being “as practical and flexible as it is panoramic in scope.”¹¹ The *Review* added that “the John Wu Draft is important historically because it embodies the courageous attempt of the Chinese people to establish a common-wealth on a solid basis of justice and equality.”¹²

One of the notable characteristics of Wu’s constitution was the approach it took to civil liberties. The constitution provided a robust range of “fundamental rights,”¹³ but it also expressly allowed the government to infringe on those rights if necessary to accomplish the goal of “preserv[ing] public interests.”¹⁴ This general framework — providing not only for civil liberties but also for their restriction — is common today, and it was used in many national constitutions that Wu might have looked to when completing his work in the 1930s.¹⁵ But Wu’s approach was unusual. The spread of rights he guaranteed was relatively wide, yet the limits he placed on their restriction were relatively weak. The approach proved influential. Wu’s framework for fundamental rights endured a multiyear drafting process that scrapped many other parts of his constitution,¹⁶ and it still appears in the constitution of the Republic of China (Taiwan).¹⁷

Why this conflicted approach to civil liberties? The literature on the constitutional drafting process provides two possible explanations. One theory is that the entire constitution was designed mainly as a method of entrenching and legitimating the authoritarian power already wielded by Generalissimo Chiang Kai-shek and his Kuomintang Party.¹⁸ Wu’s approach to fundamental rights would be consistent with this theory,

⁹ Permanent Constitution of Republic of China (The John Wu Draft) art. 17 [hereinafter Wu Constitution], translated in *First Draft of Constitution of China Issued by Committee*, *supra* note 2.

¹⁰ *Id.* art. 206(3).

¹¹ M.C. Liang, *Significant Features of the First Draft-Constitution of China*, CHINA WKLY. REV., Sept. 16, 1933, at 128.

¹² *Id.*

¹³ See Wu Constitution, *supra* note 9, ch. 1.

¹⁴ See *id.* art. 38.

¹⁵ See *infra* pp. 2312–13.

¹⁶ See *Appendix: Draft of the Constitution of the Republic of China*, 10 T’IEN HSIA MONTHLY 493, 494 (1940).

¹⁷ See MINGUO XIANFA art. 23 (1947) (Taiwan).

¹⁸ See EASTMAN, *supra* note 6, at 179.

since it placed relatively few restrictions on government power. An alternate explanation, developed most fully by Thomas Greiff, is that Wu simply took a model of fundamental rights that was common in Western, “liberal” countries and wrote it into the Chinese constitution.¹⁹ The fact that the constitution placed relatively little restraint on government action, then, did not reflect an individual failure of Wu’s to respect fundamental rights. Rather, it was symptomatic of a larger problem with how liberal philosophy had evolved worldwide.²⁰

This Note advances a third theory. The constitution wasn’t a sham, at least not for Wu, nor can it be fully explained by broader, transnational philosophical trends. Rather, the constitution’s approach to fundamental rights reflected a context-specific trade-off in values and an intentional decision to prioritize some governance interests over others. By looking to Wu’s extensive scholarly and personal writings in the decade surrounding his constitution-drafting, this Note argues that Wu might have cared about civil liberties, but he simply cared about other issues more, namely, strengthening national security and reforming Chinese legal culture. “In law, as in life generally,” Wu once wrote, “we have to learn that ‘for everything we have we give up something else.’”²¹

In investigating Wu’s thoughts about constitutional design, this Note joins three larger scholarly conversations. First, this research expands the historical record about the constitutional drafting process in Republican-era China. Probably the most influential account of the episode in English-language scholarship is still Professor Lloyd Eastman’s *The Abortive Revolution*, published in 1974. Eastman argues that the primary goal of the constitution was to firm up Generalissimo Chiang’s authoritarian power.²² In this narrative, Wu’s document functioned as something modern scholars of comparative constitutional law call a “sham constitution” — a constitution that “fail[s] to constrain or even describe the powers of the state.”²³ Wu’s approach to civil liberties is consistent with the idea of a sham constitution in that Wu drafted a constitution that guaranteed civil liberties without actually placing much restriction on Generalissimo Chiang’s behavior. This Note demonstrates that situating Wu’s weak protection of civil liberties within the larger project of creating an authoritarian constitution is not necessarily the best explanation for Wu’s decisionmaking process. Wu could have settled on a relatively toothless approach to civil liberties without being motivated by a desire to solidify Generalissimo Chiang’s control over government.

¹⁹ See Thomas E. Greiff, *The Principle of Human Rights in Nationalist China: John C.H. Wu and the Ideological Origins of the 1946 Constitution*, 103 CHINA Q. 441, 441 (1985).

²⁰ *Id.* at 442–43.

²¹ WU, *supra* note 1.

²² See EASTMAN, *supra* note 6, at 166–67.

²³ David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 865–66 (2013).

Second, and more broadly, this Note contributes to the ongoing effort to develop a more nuanced picture of Republican-era China. Professor Frank Dikötter has described the period as a particularly difficult one to define.²⁴ The traditional narrative presents the dominant cultural threads as corruption and infighting between various factions battling over control following the collapse of the Qing Dynasty.²⁵ Scholarship over the last few decades, however, has increasingly recognized that the period also witnessed a surge in international exchanges in fields including religion,²⁶ urban planning,²⁷ business,²⁸ and political thought.²⁹ This Note, through its focus on Wu — a scholar trained in the United States, France, and Germany, who held a research position at Harvard Law School and carried on a multiyear correspondence with a sitting Justice on the U.S. Supreme Court — adds another piece of evidence in support of Dikötter's observation that Republican-era China "might very well be qualified as a golden age of engagement with the world."³⁰ This Note also expands on a thesis, put forward by Professor William Kirby, that in Republican-era China, "[n]othing mattered more" than foreign relations.³¹ Kirby focuses his analysis on diplomatic history, but his observation that Chinese diplomats during the Republican period were motivated by a desire to restore China's power against foreign nations and to "overhaul Chinese culture"³² appears to apply with almost equal force to Wu's thinking about constitutional design.

Finally, this Note provides a fuller portrait of Wu's legal philosophy and personality. As Professor Valentina Vadi has observed, research into the thoughts and experiences of historical lawyers "can inspire and teach," and "'provide inspiration and encouragement' especially in times of adversity."³³ Wu is a particularly fruitful focus of this kind of work. One reason is that he was highly influential.³⁴ Another is that he has

²⁴ See FRANK DIKÖTTER, *THE AGE OF OPENNESS* 2–3 (2008).

²⁵ *Id.* at 1.

²⁶ See, e.g., Richard Madsen, *Hierarchical Modernization: Tianjin's Gong Shang College as a Model for Catholic Community in North China*, in *BECOMING CHINESE* 161, 166–71 (Wen-hsin Yeh ed., 2000).

²⁷ See William C. Kirby, *Engineering China: Birth of the Developmental State, 1928–1937*, in *BECOMING CHINESE*, *supra* note 26, at 137, 139–41.

²⁸ See, e.g., WILLIAM C. KIRBY, *GERMANY AND REPUBLICAN CHINA* 3–4 (1984).

²⁹ See EDMUND S.K. FUNG, *IN SEARCH OF CHINESE DEMOCRACY* 11–12 (2000).

³⁰ DIKÖTTER, *supra* note 24, at 3.

³¹ William C. Kirby, *The Internationalization of China: Foreign Relations at Home and Abroad in the Republican Era*, 150 *CHINA Q.* 433, 433 (1997).

³² *Id.* at 434.

³³ Valentina Vadi, *International Law and Its Histories: Methodological Risks and Opportunities*, 58 *HARV. INT'L L.J.* 311, 344 (2017) (alteration omitted) (quoting David Sugarman, *From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship*, 42 *J.L. & SOC'Y* 7, 8 (2015)).

³⁴ See Li Xiuqing, *John C.H. Wu at the University of Michigan School of Law*, 58 *J. LEGAL EDUC.* 545, 547 (Nicholas C. Howson trans., 2008).

not been the subject of much scholarly attention yet, especially in English-language publications. There are exceptions — many of them discussed later — but the body of work remains small and disproportionate to Wu’s achievements. There are a few potential explanations for this gap. He published prolifically in English, which made his work relatively inaccessible to many scholars in China and Taiwan.³⁵ Additionally, his work took a turn toward the theological later in life, which may have obscured his earlier role as a leading legal scholar.³⁶ Whatever the reason, the gap is only recently beginning to be filled, with most of the work appearing in Chinese-language journals.³⁷ This Note contributes to this growing body of scholarship.

In its analysis of the experiences and personality of Wu, this Note builds on a foundation laid by Professors William Alford and Shen Yuanyuan. In their biographical sketch of Wu, one of the few English-language sources to examine him in detail, they attempt to explain Wu’s sudden turn to religiosity in the middle of an extraordinarily successful legal career.³⁸ They convincingly diagnose the conversion as a product of frustrated ambition: Wu started out with certain expectations about how he might use the law as a tool for social reform but eventually became exhausted by what he perceived as a lack of success.³⁹ As Alford and Shen put it, Wu’s professional experiences in the law convinced him that, for both the individual and the nation, “spiritual rejuvenation must precede more secular forms of rebuilding.”⁴⁰ This Note fleshes out this thesis in more detail. Specifically, it explores the ways in which drafting the constitution, which forced Wu to choose among several competing policy goals, might have served as one stage in a process of disillusionment.

This Note proceeds in three parts. Part I provides a brief historical description of Republican-era China and a synopsis of Wu’s career. Part II describes how Wu took a conflicted approach to civil liberties in drafting his constitution and summarizes the most detailed explanations that have appeared so far in the literature. Part III advances an alternative theory for why Wu, a “cosmopolitan” and “liberal” thinker,⁴¹ might have drafted a constitution that left fundamental rights relatively unprotected from government interference.

³⁵ See *id.*; Sun Wei (孙伟), Wu Jingxiong Yanjiu Zongshu (吴经熊研究综述) [*A Review of the Studies of John C.H. Wu*], 23 Ningbo Daxue Xuebao (Renwen Kexue Ban) (宁波大学学报 (人文科学版)) [J. NINGBO U. (LIBERAL ARTS ED.)] 1, 4 (2010).

³⁶ See *id.*

³⁷ See, e.g., *id.*; Zeng Jianyuan (曾建元), Kuayue Dong Yu Xi (跨越东与西 — 吴经熊的人与法律思想素描) [*Spanning East to West — A Sketch of Wu Jingxiong and His Legal Thought*], 1 QINGHUA FAXUE (清华法学) [QINGHUA L.], 2004, at 81.

³⁸ William P. Alford & Shen Yuanyuan, “Law Is My Idol”: John C. H. Wu and the Role of Legality and Spirituality in the Effort to “Modernise” China, in *ESSAYS IN HONOUR OF WANG TIEYA* 43, 51–53 (Ronald St. John Macdonald ed., 1994).

³⁹ *Id.* at 52.

⁴⁰ *Id.*

⁴¹ Greiff, *supra* note 19, at 442.

I. HISTORICAL BACKGROUND

A. *National Historical Backdrop*

To understand the environment in which Wu drafted his constitution, we need to connect a few strands of history in Republican-era China. The first is the high-level political situation. The second is the decades-long attempt to ratify a permanent constitution. The third is the ongoing incursion into Chinese territory by foreign states. The objective of this section is to provide a brief historical primer to readers unacquainted with the era.

The Republican era of China stretched from 1912 to 1949, beginning with the fall of the Qing Dynasty and ending with the establishment of the People's Republic of China. The era was troubled by sustained political instability. In the capital, various political and military leaders fought over command of the central governmental apparatus.⁴² Further afield, many regions of Chinese territory were effectively controlled by local "warlords."⁴³

The most successful attempt to unite the Chinese territory under a single, meaningful authority occurred in 1928. Over the first half of that year, Generalissimo Chiang and his Kuomintang Party, supported by an alliance of sympathetic warlords, managed to oust the military leader who controlled Beijing.⁴⁴ Generalissimo Chiang then took control of the national government and exercised power in a manner that sometimes failed to display even the "trappings of a democracy."⁴⁵ According to Kuomintang leadership, a six-year "tutelage" period of one-party rule was necessary to prepare the people to participate in democratic constitutionalism.⁴⁶ In the interim, the Kuomintang worked diligently to maintain social control, using techniques both legal (for example, a comprehensive piece of censorship legislation prohibiting criticism of the Kuomintang Party⁴⁷) and extralegal (Eastman writes that "[a]ssassinations, midnight arrests, and summary executions became a common occurrence"⁴⁸).

Early in the 1930s, opponents to Kuomintang one-party rule began pushing forcefully for the promulgation of a permanent national constitution. The Party had proven incompetent in the face of a long list of threats to national well-being, including local insurgencies, natural

⁴² See generally SPENCE, *supra* note 3, at 271–83.

⁴³ *Id.* at 283–84; cf. DONALD G. GILLIN, WARLORD at 25, 29 (1967) (describing governance of one Chinese province).

⁴⁴ SPENCE, *supra* note 3, at 344–46.

⁴⁵ See *id.* at 346.

⁴⁶ EASTMAN, *supra* note 6, at 143.

⁴⁷ *Id.* at 25–26.

⁴⁸ *Id.* at 21.

disasters, and invasions by Japan.⁴⁹ Reformers argued that it was only through the introduction of democratic structures of government that the Chinese state would be able to find the stability and social cohesion that it needed to survive.⁵⁰ The Kuomintang leadership, already “in a state of near panic,” agreed to convene a national conference that would explore methods of integrating non-party members into positions of governmental power.⁵¹ By cracking open a formal space for influential political leaders to voice discontent with one-party rule, this conference triggered a long chain of events that resulted in the Kuomintang Party authorizing the national legislative body to begin drafting a new constitution.⁵² Wu, “[w]idely known for his legal acumen,” was selected by Kuomintang officials to prepare the first draft.⁵³

Writing a constitution was a task that Chinese politicians had been struggling with for nearly two decades. The first provisional constitution for the Republic of China was promulgated in 1912, only one month after the fall of the Qing Dynasty.⁵⁴ That constitution was replaced two years later with a “constitutional compact” devised by an assembly of politicians convened by the President;⁵⁵ the document was notable mainly for centralizing “virtually unlimited power” in the office of the President.⁵⁶ A new constitution was drafted in 1923.⁵⁷ By that point, however, the central government’s power “did not run far beyond” Beijing.⁵⁸ What’s more, according to Professor Jerome Cohen, the primary objective of that constitution was not really to design a form of government responsive to the wants and needs of the Chinese people, but simply to convince foreign powers that China did, in fact, have a form of government “familiar to the west.”⁵⁹ The final draft of the provisional constitution was promulgated in 1931,⁶⁰ just two years before Wu started work on his draft of the permanent constitution.

The drafting process for the permanent constitution ended up dragging on for more than ten years. Wu released the first draft in 1933.⁶¹ Several rounds of editing ensued, no longer led by Wu,⁶² and the

⁴⁹ *Id.* at 159.

⁵⁰ See FUNG, *supra* note 29, at 85–86.

⁵¹ EASTMAN, *supra* note 6, at 160–61.

⁵² See *id.* at 160–66.

⁵³ Alford & Yuanyuan, *supra* note 38, at 50.

⁵⁴ See SPENCE, *supra* note 3, at 271, 274.

⁵⁵ See *id.* at 279.

⁵⁶ *Id.*

⁵⁷ Cohen, *supra* note 4, at 795.

⁵⁸ *Id.* at 795–96.

⁵⁹ *Id.* at 796.

⁶⁰ *Id.*

⁶¹ See Wu Constitution, *supra* note 9.

⁶² EASTMAN, *supra* note 6, at 170–72, 176–78.

government released a “final” draft in 1937.⁶³ During World War II, however, constitutional design took a back seat to national security, and it wasn't until 1946 that a permanent constitution for the Republic of China was finally ratified.⁶⁴ When the Kuomintang Party fled to Taiwan in 1949, it took its constitution with it.⁶⁵ Today, the constitution of the Republic of China (Taiwan) is still recognizably rooted in the original draft put out by Wu in 1933.⁶⁶ The approach to fundamental rights remains the same: a large range of rights are guaranteed, all of which can be restricted “as may be necessary . . . to advance public welfare.”⁶⁷

An important backdrop to these political and constitutional developments was the ongoing struggle by the Chinese state to protect its territorial independence. For approximately a century leading up to Wu's drafting of the constitution, Chinese governments faced three types of challenges to their sovereignty: treaties that granted expansive residency and employment privileges to foreigners in China, treaties that entitled foreigners living in China to be subject to the laws of their own home countries, and treaties (or invasions) that resulted in loss of territory to foreign powers.⁶⁸ In 1842, at the conclusion of the First Opium War, the Emperor of the Qing dynasty ratified the Treaty of Nanjing with the United Kingdom.⁶⁹ The treaty transferred possession of Hong Kong to the United Kingdom and allowed for British citizens to reside and do business in five treaty ports.⁷⁰ Over the next two years, similar treaties were signed with the United States and with France.⁷¹ Those treaties did not involve any direct relinquishment of territory, but, importantly, they did allow for extraterritoriality — “the right to be judged by one's own national law in criminal cases on Chinese soil.”⁷² The following decades saw a “slew of treaties” with extraterritoriality provisions between China and other nations.⁷³ As a result, by the turn of the twentieth century, many Chinese cities were populated by foreigners who enjoyed various business privileges and were almost never subject to Chinese law.⁷⁴

⁶³ John C. H. Wu, *Notes on the Final Draft Constitution*, 10 T'IENT HSIA MONTHLY 409, 409 n.1 (1940).

⁶⁴ See Cohen, *supra* note 4, at 797.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See MINGUO XIANFA art. 23 (1947) (Taiwan).

⁶⁸ See PAR KRISTOFFER CASSEL, *GROUNDINGS OF JUDGMENT* 4–5 (2012); SPENCE, *supra* note 3, at 159–63.

⁶⁹ SPENCE, *supra* note 3, at 159.

⁷⁰ *Id.* at 160–61.

⁷¹ *Id.* at 162–63.

⁷² *Id.* at 163.

⁷³ CASSEL, *supra* note 68, at 4.

⁷⁴ *Id.* at 5.

In the 1910s, additional pressure on Chinese territorial independence started to come from Japan. In 1915, the Japanese government demanded greater economic rights for its citizens living in several regions of China.⁷⁵ Then, in the aftermath of World War I, Japan successfully negotiated with several European nations for the power to station police and military officers in several Chinese cities.⁷⁶ Both of these moves provoked strong anti-Japanese sentiment among the Chinese people.⁷⁷ In 1931, Japanese military forces launched a successful campaign to seize full control of Manchuria, a region in northeastern China near Beijing, and installed the former emperor of the Qing Dynasty as the “chief executive” of a nominally independent state of Manchukuo.⁷⁸ This loss of territory, in Eastman’s view, was one of many crises in the early 1930s that compelled the Kuomintang Party to yield to demands for governmental reform.⁷⁹

B. Wu’s Personal History

Wu once compared his life to a restless night. “It seems as though you want to go to sleep,” he wrote in his autobiography, “but just as you are dozing off, people come round to change the bed for you. Suppose such a thing happens a dozen times in a single night, how would you feel?”⁸⁰ His professional and personal histories were a recurring loop of disorientation and adaptation. “How many times have I found that the environment which I had taken to be a part of nature, and the majestic systems of thought which I had taken to be a part of the eternal order of things, were nothing more than illusions and bubbles!”⁸¹

Wu was born in 1899 in Ningbo, China, a town near Shanghai.⁸² At sixteen, he enrolled in a three-year program at the prestigious Comparative Law School of China,⁸³ and after he finished, he moved to the United States and began work on a J.D. at the University of Michigan Law School.⁸⁴ Before graduating, he published in the *Michigan Law Review* an annotated collection of translations of ancient Chinese legal texts.⁸⁵

⁷⁵ SPENCE, *supra* note 3, at 281.

⁷⁶ *Id.* at 288.

⁷⁷ *Id.* at 281, 299–300.

⁷⁸ *Id.* at 369–71.

⁷⁹ See EASTMAN, *supra* note 6, at 159–63.

⁸⁰ JOHN C. H. WU, BEYOND EAST AND WEST 5 (1951).

⁸¹ *Id.*

⁸² Zeng, *supra* note 37, at 120; Xiaomeng Zhang, *John C.H. Wu and His Comparative Law Pursuit*, 41 INT’L J. LEGAL INFO. 196, 198–99 (2013).

⁸³ Zhang, *supra* note 82, at 201. For background information on the School, see generally Alison W. Conner, *The Comparative Law School of China*, in UNDERSTANDING CHINA’S LEGAL SYSTEM 210 (C. Stephen Hsu ed., 2003).

⁸⁴ See Li, *supra* note 34, at 553; Zhang, *supra* note 82, at 201.

⁸⁵ Zhang, *supra* note 82, at 202; see also John Wu, *Readings from Ancient Chinese Codes and Other Sources of Chinese Law and Legal Ideas*, 19 MICH. L. REV. 502 (1920–1921).

The piece was important in his life mostly because it unexpectedly served as the starting point for an intense and long-lasting friendship with Justice Holmes of the U.S. Supreme Court. Wu sent a copy of the article to Justice Holmes, expecting only a “polite acknowledgement written by the hand of a secretary.”⁸⁶ But Justice Holmes wrote back with detailed feedback.⁸⁷ Over the next ten years, the two men would exchange more than 100 letters.⁸⁸

The correspondence between Wu and Justice Holmes provides a personal, immediate account of Wu’s early professional experiences. We know that he embarked on his career with exceptionally high expectations for himself. In one of his first letters to Justice Holmes, written when he was twenty-two years old, Wu explained that “[a]s a Chinese I have a country to save, I have a people to enlighten, I have a race to uplift, I have a civilization to modernize.”⁸⁹ Two years later, he emphasized that “my ambition is to bring *Renaissance* to my people, to unite Western civilization with Eastern culture, to infuse a new meaning into the life of an old nation, and to enlarge human possibilities during this earthly existence!”⁹⁰ We also know that he often struggled with feelings of failure. At twenty-eight years old, he wrote to Justice Holmes that “[i]t grieves me much to think that I have not yet produced anything which can be said to be a real contribution to the science of law.”⁹¹ Two years later, he complained of a “crushing feeling of worthlessness of my life and of everything that I do.”⁹²

After finishing his degree at Michigan, Wu earned a fellowship from the Carnegie Endowment of International Peace — one of only six candidates worldwide selected for the fellowship — to continue his studies at the University of Paris.⁹³ After finishing a dissertation (written in French), Wu traveled to Berlin to study under Professor Rudolf Stammler, an influential legal philosopher.⁹⁴ He then spent one year as a research fellow at Harvard Law School,⁹⁵ where he befriended then-Professor Felix Frankfurter.⁹⁶ “My special study this year will be the

⁸⁶ WU, *supra* note 80, at 88.

⁸⁷ *Some Unpublished Letters of Justice Holmes*, 1 T’IEN HSIA MONTHLY 251, 252 (1935).

⁸⁸ See Letters from John Wu to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Nov. 23, 1921, to Apr. 2, 1933), *transcribed in* Mark DeWolfe Howe, Research Materials Relating to Life of Oliver Wendell Holmes, Jr., 1858–1968 (on file with the Harvard Law School Library) [hereinafter Wu Letters]; *Some Unpublished Letters of Justice Holmes*, *supra* note 87, at 251.

⁸⁹ Wu Letters, *supra* note 88, at 2.

⁹⁰ *Id.* at 47.

⁹¹ *Id.* at 96.

⁹² *Id.* at 131.

⁹³ Zhang, *supra* note 82, at 205 & n.42.

⁹⁴ See *id.* at 205.

⁹⁵ *Id.* at 206.

⁹⁶ See *id.*; Wu Letters, *supra* note 88, at 53.

principles and technique of codification,” Wu wrote to Justice Holmes.⁹⁷ “I have the past history of codes of the European countries before me; China should learn from the experience of other nations.”⁹⁸

Wu returned to China in 1924, where he held a series of high-profile posts in academia and government. He first accepted a job as an instructor at the Comparative Law School, where, in his first two years, he taught a dozen different courses.⁹⁹ The job wasn’t fully satisfying. “I am one of the best paid professors in the whole country,” Wu wrote to Justice Holmes, “[b]ut alas! [S]omething fails me, — the contact with rare spirits in the law.”¹⁰⁰ He felt trapped in what he considered to be an intellectual backwater. Describing the city of Shanghai to Justice Holmes, he pronounced it to be the “most miserable part of this miserable world.”¹⁰¹

In 1927, Wu entered public service. On New Years Day, he was appointed to a seat on the newly formed Shanghai Provisional Court, which had jurisdiction over all cases in Shanghai in which the defendant was a Chinese citizen.¹⁰² He called this time “the happiest year of my public life.”¹⁰³ But he still worried he was failing to reach his potential. Writing to Justice Holmes, Wu explained that, although he considered himself quite well-regarded in the community, “popularity begins to worry me; for a really great man could not possibly be as popular as I am; not, at least, when he is still living.”¹⁰⁴ He resigned one year later.¹⁰⁵ He went on to hold a variety of short-term governmental posts,¹⁰⁶ and for a few months, he served as a research fellow at Harvard Law School.¹⁰⁷ During this time he published his first monograph, *Juridical Essays and Studies*.¹⁰⁸ Professor John Wigmore, in a review, said that “[a]s a legal philosopher, [Wu] now stands in the front rank.”¹⁰⁹

In late 1930, Wu resigned from public service and entered private practice, where he spent a very lucrative few years before being tapped to draft the constitution of the Republic of China.¹¹⁰ What do his writings tell us about the drafting process? In some ways, quite a bit. In 1937, he co-edited a lengthy, Chinese-language text titled *History of the*

⁹⁷ Wu Letters, *supra* note 88, at 31.

⁹⁸ *Id.*

⁹⁹ *Id.* at 88; Zhang, *supra* note 82, at 207.

¹⁰⁰ Wu Letters, *supra* note 88, at 80.

¹⁰¹ *Id.* at 69, 71.

¹⁰² *Id.* at 90–91.

¹⁰³ WU, *supra* note 80, at 114.

¹⁰⁴ Wu Letters, *supra* note 88, at 99.

¹⁰⁵ *Id.* at 102.

¹⁰⁶ *Id.* at 102, 105.

¹⁰⁷ WU, *supra* note 80, at 120.

¹⁰⁸ John H. Wigmore, Book Review, 24 ILL. L. REV. 119, 119 (1929).

¹⁰⁹ *Id.*

¹¹⁰ See WU, *supra* note 80, at 133, 137.

Establishment of the Chinese Constitution, which explored in great detail the process through which the constitution had been developed.¹¹¹ In an English-language article published in the *T'ien Hsia Monthly*, he provided an extended description of how he envisioned the constitution would operate.¹¹² But the modern reader is left with little insight into Wu's thoughts as he drafted the document. Unlike his letters from his time on the faculty at the Comparative Law School or as a judge on the Provisional Court, his personal writings from the period reveal fairly little about his feelings about his professional life. In his letters to Justice Holmes, Wu mentioned that he had been appointed Vice-Chairman of the Constitution Drafting Commission but did not elaborate on the content of the work or whether he found it fulfilling.¹¹³ His autobiography covers the period of time in which he worked on the constitution, but he focuses almost exclusively on his family life.¹¹⁴

After stepping away from the drafting process, Wu continued to work as a legal scholar. In 1936 he published *The Art of Law*, a collection of essays.¹¹⁵ Roscoe Pound, Dean of Harvard Law School at the time, wrote in a review that Wu had "a subtle mind" and commented that "[t]he widest and most intimate acquaintance with letters, philosophy, politics, jurisprudence, and comparative law is revealed on every page."¹¹⁶ Over the following decades, Wu's life and scholarship took a turn to the theological.¹¹⁷ He served as the ambassador from the Republic of China to the Vatican from 1947 to 1949.¹¹⁸ Much of his autobiography is focused on his discovery of the importance of religion,¹¹⁹ and a major thread of his scholarship from later in life is focused on law and religion.¹²⁰ Looking back on his career in the law, Wu apparently felt a mix of regret and embarrassment. "A well with no water in it, a cloud driven before the storm, I thought myself a clever man."¹²¹

¹¹¹ WU JINGXIONG & HUANG GONGJUE (吳經熊 & 黃公覺), ZHONGGUO ZHIXIANSHI (中國製憲史) [HISTORY OF THE ESTABLISHMENT OF THE CHINESE CONSTITUTION] (1937).

¹¹² Wu, *supra* note 63, *passim*.

¹¹³ Wu Letters, *supra* note 88, at 137.

¹¹⁴ See, e.g., WU, *supra* note 80, at 137.

¹¹⁵ Roscoe Pound, Book Review, 50 HARV. L. REV. 847, 847 (1937).

¹¹⁶ *Id.*

¹¹⁷ WU, *supra* note 80, at 137 (discussing his conversion to Catholicism in 1937).

¹¹⁸ Marvine Howe, Obituary, *John C.H. Wu of Taiwan*, 86; *Diplomat [and] Legal Scholar*, N.Y. TIMES (Feb. 10, 1986), <https://nyti.ms/29CgYm3> [<https://perma.cc/7L9Q-7Y28>].

¹¹⁹ See, e.g., WU, *supra* note 80, at 3–4.

¹²⁰ See, e.g., John C. H. Wu, *Religion and Law in the American Way of Life*, 31 CONN. B.J. 17, 17 (1957); John C. H. Wu, *Toward a Christian Philosophy of Law*, 37 WOMEN LAW. J., Fall 1951, at 34, 35.

¹²¹ WU, *supra* note 80, at 3.

II. THE PUZZLE AND PREVIOUS EXPLANATIONS

One notable characteristic of Wu's draft constitution is its approach to civil liberties. The document seems energetic about identifying "fundamental rights" but unenthusiastic about protecting them. This Part frames this apparently contradictory framework more sharply and describes the two leading explanations that appear in the literature.

The approach Wu took to civil liberties is somewhat ambivalent. On one hand, he committed himself to identifying a wide range of fundamental rights. He listed more than twenty rights in the constitution, including speech,¹²² assembly,¹²³ religion,¹²⁴ and secrecy of correspondence.¹²⁵ He delved particularly deeply into criminal procedure, dedicating four paragraphs to the matter.¹²⁶

But Wu was reluctant to make these rights especially strong. Nearly every right was qualified by the disclaimer that it could be exercised only "in accordance with law."¹²⁷ The constitution limited the type of "law" that could interfere with fundamental rights, but not by much. A law could infringe on individual rights as long as it was "demanded by the necessity to preserve public interests or avert an emergency."¹²⁸ This standard provided the government with a fair amount of discretion. No textual restrictions were placed on which "public interests" could justify incursions into fundamental rights.¹²⁹ No explanation was given, either, for how stringent the "necessary" standard was intended to be — a question that has long vexed constitutional courts in several countries that have been tasked with interpreting similar language.¹³⁰

In some ways, this type of "conflicted" framework was unremarkable. Among the national constitutions that Wu might have consulted in the early 1930s, many of them guaranteed fundamental rights but also expressly allowed for their limitation.¹³¹ What's more, Wu had lived in

¹²² Wu Constitution, *supra* note 9, art. 30.

¹²³ *Id.* art. 28.

¹²⁴ *Id.* art. 31.

¹²⁵ *Id.* art. 29.

¹²⁶ *Id.* art. 24.

¹²⁷ *See, e.g., id.*

¹²⁸ *Id.* art. 38.

¹²⁹ Article 39 provided that any law infringing on fundamental rights based on a state of emergency must be accompanied by agreement from the federal legislative body. *See id.* art. 39. No similar restrictions existed for laws that were premised on "necessity to preserve public interests." *See id.* art. 38.

¹³⁰ *See generally* AHARON BARAK, PROPORTIONALITY 317–39 (Doron Kalir trans., 2012) (describing how courts in several countries have addressed the "necessity" stage of proportionality analysis).

¹³¹ *See, e.g.,* Arts. 26–29, Costituzione [Cost.] (It.); Constitution of 17 October 1868, arts. 15, 25 (Lux.); Constitución Política de los Estados Unidos Mexicanos, CP, art. 29, Diario Oficial de la Federación [DOF] 05–02–1917 (Mex.) [hereinafter Mexican Constitution]. Today, the approach has become the norm. Professor Stephen Gardbaum writes that "most modern constitutions around the

societies governed by similar systems. Just a few years before Wu arrived in Berlin, the German national legislature had enacted a fundamental law that placed express limits on nearly every right it guaranteed, including the right to travel,¹³² the right to secrecy of communication,¹³³ and the right to “personal liberty” in general.¹³⁴ Earlier versions of the constitution of the Republic of China had also adopted a similar framework. In the 1912, 1923, and 1931 drafts of the Provisional Constitution, for example, nearly all civil liberties could be exercised only “in accordance with law.”¹³⁵

But when Wu’s constitution was published, observers were concerned that it would fail to impose any meaningful restraints on the Kuomintang government. Another member of the drafting committee publicly objected to the framework of guaranteeing rights only “in accordance with the law.” “[T]he constitution’s spirit of protection is lost,” he stated, “and having a constitution will be the same as not having a constitution.”¹³⁶ Wu, writing several years after the release of his constitution, noted that one of the main controversies over the document arose from its approach to fundamental rights. “You give us freedom with one hand, and take it back with the other,” critics had told Wu.¹³⁷ “What have we gained?”¹³⁸

world . . . contain express limits on certain of the rights that they bestow.” Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 798 (2007). Similar frameworks appear in landmark international agreements related to human rights. See, e.g., International Covenant on Civil and Political Rights arts. 12(3), 21, 22(2), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

¹³² *Constitution* art. 111 (William B. Munro & Arthur N. Holcombe trans., 1919), in Charles E. Martin & William H. George, REPRESENTATIVE MODERN CONSTITUTIONS 74, 92 (1923).

¹³³ *Id.* art. 117.

¹³⁴ *Id.* art. 114. In the nineteenth century, Germany was the center of legal debates about the proper balance between individual liberties and police power. See Carlos Bernal Pulido, *The Migration of Proportionality Across Europe*, 11 N.Z. J. PUB. & INT’L L. 483, 489–92 (2013).

¹³⁵ PROVISIONAL CONSTITUTION OF THE POLITICAL TUTELAGE PERIOD, 1 JUNE 1931, arts. 8–10, 12–19, 21–27 [hereinafter 1931 CONSTITUTION], *reprinted in* PAN WEI-TUNG, THE CHINESE CONSTITUTION 247, 248–49 (1945); *see also* CONSTITUTION, 10 OCTOBER 1923, arts. 6–18 [hereinafter 1923 Constitution], *reprinted in* PAN, *supra*, 191, 192–93; PROVISIONAL CONSTITUTION, 11 MARCH 1912, arts. 5–15 [hereinafter 1912 CONSTITUTION], *reprinted in* PAN, *supra*, 150, 150–51. The fundamental rights provisions in earlier draft constitutions are similar to those that appear in Wu’s constitution and almost certainly provided a starting point for his work. But there is reason to be careful about attributing too much of Wu’s work to inertia. In other portions of his constitution, he was willing to depart dramatically from the provisional constitutions that had come before. To take one example, Wu created a unicameral national legislature. See Wu Constitution, *supra* note 9, art. 43. The 1923 Provisional Constitution had called for a bicameral legislature. 1923 Constitution, *supra*, art. 40, at 197. The 1931 Provisional Constitution made no mention of a national legislative body at all. See 1931 Constitution, *supra*. In the context of civil liberties, Wu made small but meaningful adjustments to the constitutions that had come before. He added new fundamental rights and he strengthened others. See *infra* p. 2314.

¹³⁶ EASTMAN, *supra* note 6, at 170 (quoting ZHANG ZHIBEN (張知本), ZHONGGUO LIXIAN GUSHI (中國立憲故事) [STORY OF THE ESTABLISHMENT OF A CONSTITUTION IN CHINA] (1966)).

¹³⁷ Wu, *supra* note 63, at 415.

¹³⁸ *Id.*

They had a point. A close examination of Wu's constitution reveals that, even compared to other constitutions that contemplated restrictions on fundamental rights, including the Chinese constitutions that had come before it, Wu's document contained a relatively sharp tension between creating rights and leaving them unprotected. The number of rights he created was not exceptional, but it was still quite high. As one point of comparison, his constitution guarantees several rights not available under the U.S. Constitution, including the right to vote.¹³⁹ More to the point, he expanded the list of rights provided in earlier constitutions of the Republic of China. Wu's draft contained several rights that did not appear in the 1931 Provisional Constitution, including freedom of religion¹⁴⁰ and writing¹⁴¹ and the power to supervise public finances.¹⁴² Moreover, various political rights such as voting and referendum were newly granted to all Chinese citizens; in the 1931 Provisional Constitution, those rights had been confined to people living in geographic regions whose political leaders had, among other prerequisites, demonstrated a commitment to the Kuomintang cause.¹⁴³

At the same time, Wu left the government fairly wide discretion to invade those rights. He did not adopt several methods of cabining government action that existed in contemporaneous constitutions. The constitution of Mexico, for example, erected special procedural hurdles for legislation that infringed on individual liberties.¹⁴⁴ The constitution of Belgium described substantive limits on ways in which government could restrict certain individual liberties.¹⁴⁵

The draft constitution's seemingly contradictory approach to individual liberties becomes particularly perplexing when paired with Wu's presentation of the constitution as a victory for proponents of civil liberties. Upon seeing a later draft constitution, Wu commented that it contained "as complete a list of the liberties and rights of the people as we can conceive of."¹⁴⁶ He was alert to criticism about the restrictions on civil liberties, but he responded by framing the constitution's approach to civil liberties not as watered-down, but rather as fully

¹³⁹ Compare Wu Constitution, *supra* note 9, art. 23, with Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 82, 100 (2014) ("[T]he U.S. Constitution does not grant the right to vote.").

¹⁴⁰ Wu Constitution, *supra* note 9, art. 31. Freedom of religion did appear in other, earlier constitutions in Republican China. See, e.g., 1912 CONSTITUTION, *supra* note 135, art. 6(7).

¹⁴¹ Wu Constitution, *supra* note 9, art. 30.

¹⁴² *Id.* art. 36.

¹⁴³ See 1931 CONSTITUTION, *supra* note 135, art. 7, at 248; *The Fundamentals of National Reconstruction*, 12 April 1924, art. 8, reprinted in PAN, *supra* note 135, at 210, 211.

¹⁴⁴ Mexican Constitution, *supra* note 131, art. 29.

¹⁴⁵ See, e.g., 1831 CONST. art. 19 (Belg.) (providing that government can regulate freedom of assembly, but cannot require getting permission beforehand); *id.* art. 23 (providing that government can regulate language use, but only in certain contexts).

¹⁴⁶ Wu, *supra* note 63, at 415.

modern, writing that among “national constitutions written in the twentieth century, [none of them] guarantees absolute, unlimited rights for the people.”¹⁴⁷ He went on to describe the constitutions of the United States and postrevolution France, with their almost completely unrestricted rights, as examples of an outdated mode of protecting civil liberties, which most nations had since moved beyond when drafting their own constitutions.¹⁴⁸

How to explain this result — a long list of rights, weakly protected, presented as a victory for advocates of civil liberties? One potential answer is that the guarantees of fundamental rights were a sham. This explanation is consistent with Eastman’s account of the constitutional drafting process. In his view, the driving force behind the constitutional design was “unmistakably authoritarianism,”¹⁴⁹ and, as the drafting process wore on, the dominant goal became “to sustain Generalissimo Chiang’s growing powers.”¹⁵⁰ Eastman doesn’t focus on the provisions of the constitution related to civil liberties — his concentration is the division of power between the various branches of government — but his story provides substantial explanatory force. If the entire constitution was meant to quell discontent from political outsiders and entrench Generalissimo Chiang’s position of dominance, then Wu’s approach to civil liberties appears quite savvy. Political opponents would be mollified by getting a long list of rights; Generalissimo Chiang would be content because those rights wouldn’t really mean much.

This explanation is probably true, but it seems incomplete. Eastman erases Wu from the historical record; by focusing on what the highest-level political operatives wanted to get out of the constitution, Eastman overlooks the fact that other actors in the process might have been motivated by a sincere desire to create a representative form of government. Equally important, the theory fits a little uncomfortably with the constitutional text. Wu’s approach to civil liberties was largely modeled on the framework that appeared in the 1931 Provisional Constitution.¹⁵¹ Of the changes that Wu made, many of them would run counter to a desire to bolster an authoritarian regime. Wu increased the number of people who were given the right to vote¹⁵² and strengthened public oversight of government finances.¹⁵³ He arguably made it more difficult to enact laws that infringed on fundamental rights. The 1931

¹⁴⁷ WU & HUANG, *supra* note 111, at 125.

¹⁴⁸ *Id.*

¹⁴⁹ EASTMAN, *supra* note 6, at 166.

¹⁵⁰ *Id.* at 167.

¹⁵¹ Compare 1931 CONSTITUTION, *supra* note 135, arts. 6–27, with Wu Constitution, *supra* note 9, arts. 23–42.

¹⁵² Wu Constitution, *supra* note 9, art. 23 (abandoning limiting language appearing in 1931 CONSTITUTION, *supra* note 135, art. 8).

¹⁵³ See *supra* p. 2314.

Provisional Constitution included no standard for the circumstances under which the national legislature could invade individual rights.¹⁵⁴ Wu's constitution, although it imposed a fairly weak standard, at least placed some limits on governmental discretion.¹⁵⁵

A less cynical explanation for Wu's approach to civil liberties comes from Thomas Greiff. Writing in the 1980s and responding to Eastman, he diagnosed Wu's constitution as a well-intentioned attempt to "transplant[]" western structures of government to the Chinese context.¹⁵⁶ As Greiff describes it, Wu and his fellow drafters were genuinely interested in drafting a "liberal" constitution for China.¹⁵⁷ They had observed, too, that modern, fully "liberal" constitutions often allowed for legislation that curbed fundamental rights.¹⁵⁸ It was this "modern" version of liberalism that Wu attempted to write into the draft constitution.¹⁵⁹ The problem, however, was that in many of the countries Wu had studied, "modern" liberalism was complemented by a deeply ingrained respect for individualism.¹⁶⁰ The same was not true for China, where several millennia of imperial governments had exercised fairly authoritarian control.¹⁶¹ When modern liberalism was transferred to China, then, it lent itself "without conceptual distortion" to a system of relatively unconstrained government power.¹⁶²

Greiff adds a valuable corrective to Eastman's account in that he includes Wu's perspective as a key source of information about the constitution, but he leaves an important question unanswered. In both his scholarly work and personal correspondence, Wu had reflected deeply on the differences between Chinese, European, and U.S. legal traditions. "In Chinese theory," Wu once wrote, "it is truer to say that all rights are 'limited.'"¹⁶³ Of the Chinese people, he wrote that "[s]elf-limitation is their national trait. They have no sense of infinite self-expansion."¹⁶⁴ Considering Wu's awareness of the unique history of Chinese governance and legal institutions, why did he attempt to import a "liberal" approach to civil liberties that might lend itself to authoritarian tendencies?

The remainder of this Note develops an alternative theory: Wu cared about civil liberties, but he cared about other issues more. This theory is consistent not only with the text of Wu's constitution, but also with his demonstrated mastery of law and philosophy.

¹⁵⁴ See 1931 CONSTITUTION, *supra* note 135.

¹⁵⁵ See Wu Constitution, *supra* note 9, arts. 38–39.

¹⁵⁶ See Greiff, *supra* note 19, at 443.

¹⁵⁷ *Id.* at 441.

¹⁵⁸ See *id.* at 453–55.

¹⁵⁹ See *id.* at 454–55.

¹⁶⁰ See *id.* at 443–45.

¹⁶¹ See *id.* at 450.

¹⁶² *Id.* at 443.

¹⁶³ WU, *supra* note 1, at 60 (quoting *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908)).

¹⁶⁴ *Id.*

III. A REVISED EXPLANATION

An alternative explanation for how Wu could have drafted a constitution with such a conflicted approach to civil liberties is that, although he cared about civil liberties, he was more concerned with other problems. His scholarship from the period reveals a preoccupation with at least two other issues. The first was national security. The second was reforming Chinese legal culture. Both of these concerns appear regularly in his scholarly and personal writing in the years surrounding his drafting of the constitution, and both problems are forcefully addressed by the constitution.

It is worth noting at the outset that Wu appears to have felt genuine concern over issues related to civil liberties. In his very first published article, he praised students in China who had recently begun drumming up public demand for a constitution.¹⁶⁵ He claimed that one of the benefits of securing fundamental rights through democratic constitutional processes was that the people, having “wrung” their rights “from the government at the sword’s point,” would then “guard their rights with jealousy and alertness.”¹⁶⁶ In the same article, he pointed out that freedom of speech, freedom of religion, and due process could each claim deep historical roots in Chinese legal culture.¹⁶⁷ Writing a few years later, Wu agreed with the theory, advanced by Dean Roscoe Pound, that the identification and protection of rights to liberty and property were the indicators of a “matured legal system.”¹⁶⁸

Be that as it may, Wu also thought that national security was one of the primary challenges facing the Republic of China in the 1930s. In his article *Notes on the Final Draft Constitution*, Wu argued that the Qing Dynasty collapsed “[m]ainly because it could not resist foreign invasions,”¹⁶⁹ and that the early Republican regime had failed for the same reason.¹⁷⁰ “So long as the government was not able to resist aggressions,” Wu wrote, “[h]ow could anyone expect the people to have trust in such a government?”¹⁷¹ According to Wu, he had contemplated war to be one of the scenarios in which individual liberties might be curtailed. In his commentary on a later draft of the constitution, for example, Wu explained that the constitution’s guarantee of secrecy of correspondence could not be absolute because it would then fail to

¹⁶⁵ See Wu, *supra* note 85, at 520 n.38.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.* at 521 & n.41, 523 n.46.

¹⁶⁸ John C. H. Wu, *The Province of Jurisprudence Re-determined*, 3 CHINA L. REV. 52, 60–63 (1926).

¹⁶⁹ Wu, *supra* note 63, at 410.

¹⁷⁰ See *id.*

¹⁷¹ *Id.*

accommodate “war time censors inspecting the letters to prevent divul-
gation of military secrets.”¹⁷² Wu wrote that “[w]hat we want is a
workable and living Constitution”¹⁷³ — one that would allow China to
protect itself more fully from foreign invasions.

The text of Wu’s draft constitution reflects his focus on self-defense.
The constitution contained two provisions that emphasized the im-
portance of military power. “The Chinese nation observes righteousness
and peace as its basic principle,” Article 10 provided, “but as against
external aggression the National Government shall have recourse to arms
for resistance.”¹⁷⁴ Article 11 continued: “No territory of the Republic
forcibly occupied by another state shall be ceded through peace negoti-
ation or as a result of a peace treaty.”¹⁷⁵ Compared with the provisions
dealing with civil liberties, which allow for infringement “in accordance
with the law,” the prohibition against cession of territory was absolute.
These provisions relating to national security were dropped during sub-
sequent rounds of drafting — they do not appear in the modern consti-
tution of the Republic of China — but Wu continued to view them as a
prudent step towards guaranteeing China’s territorial independence. In
his essay about a later draft of the constitution, he commented that many
readers of his original draft had viewed the provisions about self-defense
as overly cautious, but that subsequent invasions by Japanese forces
during World War II had revealed the importance of constitutionalizing
the government’s ability and obligation to engage in self-defense.¹⁷⁶

Wu was also committed to uprooting what he viewed as a backward
and stagnant conception of “law” that had dominated Chinese thought
for several millennia. In 1932, one year before he finished his draft of
the constitution, Wu published an article titled *The Struggle Between
Government of Laws and Government of Men in the History of China*.¹⁷⁷
In it, he identified two problems with the traditional Chinese legal order.
First, laws tended to be heavily moral, designed primarily to further
Confucian ideas of proper living.¹⁷⁸ Second, the legal system tended to
be fairly rigid — in Wu’s words, “encoffined and mummified”¹⁷⁹ — and
was focused on replicating the “system of rites and ceremonies” designed
thousands of years earlier to order Confucian society.¹⁸⁰ In Wu’s view,
both of these aspects of the Chinese legal system needed to be reformed.

¹⁷² *Id.* at 416.

¹⁷³ *Id.*

¹⁷⁴ Wu Constitution, *supra* note 9, art. 10.

¹⁷⁵ *Id.* art. 11.

¹⁷⁶ See Wu, *supra* note 63, at 410–11.

¹⁷⁷ John C. H. Wu, *The Struggle Between Government of Laws and Government of Men in the History of China*, 5 CHINA L. REV. 53 (1932).

¹⁷⁸ See *id.* at 66, 68.

¹⁷⁹ *Id.* at 68.

¹⁸⁰ *Id.* at 58, 68.

The overwhelming focus on morality was myopic: “The truth is that law is the servant of a great number of interests,” Wu wrote, “and must not be identified with either morality, religion, economy or politics.”¹⁸¹ Moreover, a legal system needed to be responsive to changing circumstances. Ideally, the law should be “a living organism which constantly adapts itself to an ever changing and ever progressing environment.”¹⁸²

Wu’s draft constitution reflects an effort to create a system of government in which the law could serve a variety of purposes and respond fluidly to changing circumstances. The constitution focused heavily on building a fully representative lawmaking process. The first rights to be identified as “fundamental” were those related to the political process, including “the powers of election, recall, initiative, and referendum.”¹⁸³ One of the only civil liberties that was guaranteed without reservation was the right to petition public departments.¹⁸⁴ Congressional representatives had an affirmative duty to submit policy proposals to the full Congress if desired by a majority of their constituents.¹⁸⁵ Along with ensuring that laws could respond to varying interests via the political process, Wu also made sure those laws could be easily enacted (and therefore revised). There was no system of bicameralism or presentment; the national legislative body had unilateral authority to pass laws,¹⁸⁶ and leaders of the executive branch could attempt to shape the lawmaking process only by attending legislative meetings and registering formal objections to proposed legislation.¹⁸⁷ Even the constitution itself was fairly changeable, amendable via a process that only required one national body.¹⁸⁸

Wu had long been concerned about the need to reform Chinese legal thought. In 1921, more than ten years before he drafted the constitution, Wu wrote to Justice Holmes that “[o]ne of the principal causes of the stagnation of the Chinese civilization is a wrong conception which regards continuity with the past as a sacred duty.”¹⁸⁹ In another letter to Justice Holmes, this one from 1924, Wu wrote that the Chinese people were not a “juristic race.”¹⁹⁰ Importantly, Wu had also long envisioned that he personally would play an important role in modernizing the Chinese legal system. “This century is going to witness a rebirth of this

¹⁸¹ *Id.* at 66.

¹⁸² *Id.* at 68.

¹⁸³ Wu Constitution, *supra* note 9, art. 23.

¹⁸⁴ *Id.* art. 34 (not containing an “in accordance with the law” clause).

¹⁸⁵ *Id.* art. 53.

¹⁸⁶ *See id.* art. 91.

¹⁸⁷ *Id.* arts. 87, 88.

¹⁸⁸ *Id.* art. 200.

¹⁸⁹ Wu Letters, *supra* note 88, at 1–2.

¹⁹⁰ *Id.* at 61–62.

oldest nation of the world,” Wu wrote to Justice Holmes in 1924.¹⁹¹ “I shall play my part in that glorious movement . . . I should like to play the role of a Montesquieu.”¹⁹²

How do Wu’s concerns about national security and Chinese legal culture explain his decision to provide relatively weak protection of civil liberties? Why not achieve all three goals: national security, rule of law, and strong protection of civil liberties? The tension between national security and civil liberties is fairly clear and occurs on at least two levels. In a very concrete sense, the free exercise of civil liberties might get in the way of an effective war effort. More abstractly, civil liberties may become somewhat meaningless if the people do not have a stable, secure environment in which to enjoy them. It is not clear how exactly Wu understood the relationship between national security and civil liberties. But it is inarguable that he contemplated wartime to be one of the contexts in which rights could be reshaped by legislation.¹⁹³ Moreover, in his draft constitution, he created a framework in which, if national security should need to be weighed against individual liberties, national security would almost certainly prevail.

The conflict between civil liberties and overhauling Chinese legal culture is more subtle. The problem with guaranteeing civil liberties too forcefully is that it would have introduced the type of rigidity and morality that typified the old legal regime.¹⁹⁴ Repeatedly in his scholarship, Wu presents the law as a social instrument that lawyers, judges, and thinkers continually work to sharpen over time.¹⁹⁵ He may have been reluctant to entrench any legal rights or structures too deeply — even something as apparently unobjectionable as basic civil liberties. At the very least, he might have seen a tension between a fluid legal system and a robust guarantee of fundamental rights and, put to a choice, opted to attack the structural weaknesses of Chinese legal culture that had long troubled him.

¹⁹¹ *Id.* at 64.

¹⁹² *Id.*

¹⁹³ See Wu, *supra* note 63, at 416; *supra* pp. 2317–18.

¹⁹⁴ A useful comparison comes from the global human rights movement, which tends to describe rights in fairly absolute terms and which several scholars have criticized as outdated and overly moralistic. See, e.g., STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS*, at vii–xv (2013) (critiquing the prevalence of moralizing in the human rights movement); Hilary Charlesworth, *The Mid-life Crisis of the Universal Declaration of Human Rights*, 55 WASH. & LEE L. REV. 781, 781–82 (1998) (critiquing the outdated stance toward women’s rights in the Universal Declaration of Human Rights).

¹⁹⁵ See, e.g., John C. H. Wu, *Problem and Method of Psychological Jurisprudence*, 2 CHINA L. REV. 214, 216 (1925); Wu, *supra* note 168, at 60–63; Wu, *supra* note 177, at 66, 68.

CONCLUSION

In the years leading up to his appointment to the Constitution Drafting Committee, Wu became obsessed with trying to predict the future. “I was . . . addicted to all sorts of fortune-telling,” he wrote in his autobiography.¹⁹⁶ He paid regular visits to a physiognomist, who inspected the shape of his face; he “consulted practically all the famous horoscopists in Shanghai.”¹⁹⁷ He felt an increasing sense of despair about the “chaotic conditions” of Chinese society.¹⁹⁸ Looking back on this period, Wu describes himself as a man who was brittle and prone to outbursts. One afternoon, when he was sitting as a judge on the Provisional Court of Shanghai, his sister invited him to play cards with a few other family members.¹⁹⁹ Over conversation, she ribbed him about his unbending resolve not to accept gifts from litigants.²⁰⁰ “I overturned the table and threw all the cards on the ground,” Wu reported.²⁰¹

“I like your rapture over the law,” Justice Holmes wrote in one of his earlier letters to Wu.²⁰² “I only fear that it may be dimmed as you get into the actualities (in the sense of the hard side) of life.”²⁰³ For Wu, drafting the Constitution of the Republic of China was a remarkable opportunity — the chance to make good on the ambitions he had been sharing with Justice Holmes for more than ten years. But it was a challenging one, too. In his personal and scholarly writings, Wu had identified a number of ways in which Chinese society and legal culture should be reformed. In drafting the constitution, he was put to the difficult task of balancing these various projects against each other. It is impossible to know, of course, based on the available record, what Wu was thinking when he drafted the constitution. But his approach to fundamental rights — enumerating them, but not protecting them much — need not be attributed to the same authoritarian tendencies that shaped much of the constitutional drafting process. An alternative explanation is available. To Wu, civil liberties were important, but other things were, too.

¹⁹⁶ WU, *supra* note 80, at 134.

¹⁹⁷ *Id.* at 134–35.

¹⁹⁸ *Id.* at 135.

¹⁹⁹ *Id.* at 115.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Some Unpublished Letters of Justice Holmes, supra* note 87, at 257.

²⁰³ *Id.*