Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?

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Abstract

The premise of this article is that a nation's constitutional norms must ultimately be supported by its cultural values and political tradition. Although this is one of the basic precepts of constitutional theory, in the case of Korea, the demand for modernization has generally caused Koreans to reject, if not despise, their cultural traditions. By interpreting the political discourse of pre-modern Korea (Chosn) as a form of constitutional discourse, this article attempts to provide a corrective to this situation. It first argues that our conception of constitutionalism must be modified to incorporate non-Western/pre-modern political norms and discursive practices which made it possible to discipline whoever held political power. Next, it shows what the sources of such constitutional norms were in Korea, and in the process, it clarifies the structure of pre-modern East Asian law codes. It then goes on to elucidate the constitutional principles which Chosn bureaucrats and politicians regarded as binding and which they could invoke to discipline their rulers.

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I. Introduction

Most observers of Korea will agree that in recent years Korea has been moving steadily towards becoming a constitutional democracy. Beginning with the constitutional revision that took place in 1987 in response to the citizenry's overwhelming demand for more participation in the political process,[1] Korea started to move away from the authoritarian politics which characterized the better part of its recent past. In 1993, Korea brought into power its first civilian President in thirty years, and in 1998, Koreans experienced the first peaceful transfer of power to an opposition candidate. This period also saw the unprecedented prosecution and conviction of two former Presidents who had come to power through a military coup d'etat. The special law enacted to allow this historic process listed "subverting the constitutional order" as one of the offenses committed by the ex-generals.[2] It appears that, along with democracy, constitutionalism is becoming one of the shared political ideals of Korean people.

For lawyers, one of the most interesting, and frankly unexpected, developments during this period has been the role played by the Korean Constitutional Court that was established under the constitution of 1987.[3] More a product of a political compromise than the result of any principled or reasoned deliberation, the Court not only has

1) For an overview of the political events leading up to constitutional revision, see James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, 1 Harv. Hum. Rts. Y.B. 135 (1988).

2) Special Act Concerning the May 18th Democratization Movement [5 · 18 Minjuhwa Undong e kwanhan Tŭkpyŏlpŏp], Law No. 5029, Dec. 21, 1995. This law itself became a center of controversy as many critics viewed it as a mere legal "cover" for carrying out political retribution. Legally, it also came under attack because it appeared to allow prosecution for offenses on which the statute of limitations had already run, and to violate the principle of double jeopardy. *See generally* David M. Waters, Note, *Korean Constitutionalism and the 'Special Act' to Prosecute Former Presidents Chun Doo-hwan and Roh Tae-woo*, 10 Colum. J. Asian L. 461 (1996).

3) The Constitutional Court itself began operation on September 1, 1988 after the National Assembly passed the Constitutional Court Act earlier that year. *See generally* James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of Vortex*, 40 Am. J. Comp. L. 73 (1992); Dai-Kwon Choi, *The Structure and Function of the Constitutional Court: The Korean Case*, *in* The Powers and Functions of Executive Government: Studies from The Asia Pacific Region 104 (G. Hassall & C. Saunders eds., 1994); Dae-Kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 Pac. Rim L. & Pol'y J. 395 (1995). Kun Yang, *The Constitutional Court and Democratization*, *in* Recent Transformations In Korean Law and Society 33 (Dae-Kyu Yoon ed., 2000).

exceeded all expectations in carving out a secure role for itself in the legal and political life of the nation, but also has contributed significantly to the process of democratization and establishment of constitutionalism in Korea. Through many controversial decisions,[4] in a relatively short period of time, this Court has substantially cut back the power of the state to encroach upon the citizens' basic rights. Through such decisions, it has also been instrumental in changing the people's attitude toward law and the Constitution.[5] It is transforming the Korean legal culture, as it were.

As a result, there is a growing perception that the Constitution is a living norm that can actually be invoked to protect one's rights, a norm that is enforced through the Court's decisions. Frankly, this phenomenon is something new and unfamiliar to most Koreans. It may be fair to say that for decades since regaining their independence from the Japanese, Koreans have lived with a constitution that was more of an ornament than a document with binding force. A brief look at the record of the various constitutional organs that were entrusted with the role of enforcing the constitution is enough to confirm this. During the forty years up until the establishment of the present Constitutional Court, only a handful of legislation has been referred to such organs for adjudication, and even fewer have been held unconstitutional.[6] By contrast, as of February 2001, the Court has held a law or government action unconstitutional in two-hundred three cases.[7] In addition, the Court has found in fifty-one cases that a particular legislation or government action was incompatible with the Constitution.[8]

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4) For discussions of major decisions of the Court, see Yoon, *supra* note 3; Yang, *supra* note 3. *See also* Gavin Healy, Note, *Judicial Activism in the New Constitutional Court of Korea*, 14 Colum. J. Asian L. 213 (2000).

5) *But see* Chan Jin Kim, *Korean Attitudes Towards Law*, 10 Pac. Rim L. & Pol'y J. 1 (2000) (arguing that Korean attitudes toward law have not kept pace with economic development and are impeding transition to democracy).

6) For an account of the history of judicial review in Korea, see Dae-Kyu Yoon, Law and Political Authority in South Korea 150-70 (1990).

7) Statistics regarding the cases adjudicated by the Constitutional Court are available at the Court's website http://www.ccourt.go.kr.

8) The Korean Constitutional Court has developed the practice of rendering decisions other than the black-and-white "constitutional" or "unconstitutional." One of these "altered judgments" (*pyŏnhyŏng kyŏlchŏng*) is to hold a law "incompatible with the Constitution" (*hŏnpŏp pulhapch'i*) which essentially is to recognize the unconstitutionality of the law in question but let it stand until a given deadline for the legislature to enact a new legislation compatible with the Constitution. In case the legislature fails to take the necessary measures to correct the constitutional infirmity, the law will automatically lapse. Modeled after the practice of the German Federal Constitutional Court, this form of decision (*unvereinbar* in German) is based on the rationale that sometimes invalidating a law will bring about a vacuum

There many be several explanations for this change in the way the constitution is perceived and utilized by the people. From an institutional point of view, one could attribute it to the establishment of the system of "constitutional petitions" which allows ordinary citizens to request the Constitutional Court for a remedy to a violation of their constitutional rights.[9] More generally, one could point to the scope of jurisdiction given to the Court as well as the appointment process of the Court's Justices which allowed the opposition party to voice its demands.[10] For more political and sociological reasons, one could of course look to the fact that the current constitution was the outcome of the Korean people's growing desire for democratic politics.[11] Especially, given the fact that Koreans were trying to move away from a regime in which so much power was concentrated on the government, particularly the President, it is perhaps only to be expected that people would make use of the constitution which they revised in order to limit the power of the government.[12] Whatever the direct cause for this nascent constitutionalism in Korea, it is generally understood as a novel development in the political history of Korea.[13]

In this article, I would like to query the meaning of the statement that constitutionalism is a new phenomenon in Korea. I begin in Part II by suggesting that that statement is problematic if we take a longer view of Korean political history. By redefining constitutionalism from a comparative perspective, I seek to establish in Part

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and unnecessary confusion in the legal order, and that the principle of separation of powers requires the Court to respect the National Assembly's power and freedom to legislate.

9) Constitution, Art. 111(1). In accordance with this provision, the Constitutional Court Act prescribes two types of constitutional petitions: one allows redress for unconstitutional state action or inaction which is not amenable to ordinary court proceedings (art. 68(1)), and the other permits citizens to request the Court to review the constitutionality of a law when an ordinary court has refused to refer the issue of the law's validity to the Court (art. 68(2). Though basically modeled on the German system of *Verfassungsbeschwerde,* the Korean system of constitutional petitions departs from that of Germany in providing for this second type of petition.

10) According to the Constitution, a third of the Justices must be appointed from candidates nominated by the National Assembly. Constitution, Art. 111(3). At the time of the Court's inauguration, the opposition party held the majority in the National Assembly, and as a result it was able to influence the composition of the Court by nominating people who in their view would actively promote democracy and human rights.

11) West & Baker, *supra* note 1, at 140-51.

12) For a view that regards the current Constitution as still concentrating too much power on the President, see Jong-Sup Chong, *Political Power and Constitutionalism, in* Recent Transformations, *supra* note 3, at 11, 16-20.

13) Kun Yang, *supra* note 3, at 45 (" This is quite a new phenomenon.")

III the plausibility of understanding the political history of Korea as an instance of constitutionalism. Proceeding on such a revised definition of constitutionalism, I investigate in Part IV the sources of constitutional norms in pre-modern Korea. I also argue that some conventional ideas concerning Korean legal history must be revised. In Part V, I attempt an interpretation of the terms and principles of the constitutional discourse of pre-modern Korea.[14] I shall close with some thoughts on the relevance of such constitutional history for the flourishing of constitutionalism in modern Korea.

The underlying premise of this article is that constitutionalism in any country must be supported by its cultural and political traditions. One anxiety that runs throughout this article is that in Korea, constitutional discourse is currently proceeding in a state of isolation from its cultural and political traditions. By providing a constitutional perspective on Korean political history, it is hoped that a small contribution might be made to remedy this situation.

II. How Long Has Korea Had Constitutionalism?

As mentioned, with the enactment of the 1987 constitution, Korea is generally regarded as finally learning to practice constitutional politics. There is, however, an alternative way of looking at the burgeoning constitutionalism in Korea. It could be seen as the culmination of at least four or five decades of experimenting with constitutionalism. If we take a look at the popular Korean textbooks on constitutional law, most scholars begin the history of constitutionalism in Korea from the period following liberation, which saw the promulgation of the first constitution of the Republic of Korea in 1948.[15] Similarly, in 1998, Seoul National University held a conference to commemorate the fiftieth anniversary of Korean constitutionalism. According to this view, Koreans have been attempting to establish constitutionalism in Korea for at least a half-century. The recent "novel development" might be better seen as the fruition of a painful, decades-long process of trying to implement constitutionalism.

14) A fuller discussion of the claims I make in Parts IV and V require illustrations through copious historical examples. In the interest of economy of space, however, I have had to keep such historical cites to a minimum.

15) E.g., Huh Young, Korean Constitutional Law [Hanguk Hŏnpŏpnŏn] 101-30 (2000). Kwon Young- Sung, Constitutional Law: A Textbook [Hŏnpŏphak Wŏllon] 91-102 (2000).

Perhaps a more "nationalistic" historical narrative would posit the Provisional Constitution of the Korean Government in Exile, which was established in 1919 right after the March First Independence Movement, as the starting point of Korea's constitutional history. This constitution, subsequently revised numerous times until the end of the Japanese occupation, proclaimed the first republican form of government of Korea and is sometimes seen as the first "modern" constitution of Korea. Apparently, the drafters of the current Constitution took this position also, for in the Preamble, the Constitution lays claim to political legitimacy by declaring itself to be the successor of the Provisional Government's constitution.[16] If one wished to push back even further the origin of Korean constitutionalism, one might even look to the famous Kabo Reforms of 1894, with its fourteen-point *Hongbŏm* [Great Plan] which, among others things, proclaimed Korea's "independence" from China. This was followed in 1899 by the promulgation of *Tae Hanguk Kukje* [National Institutions of the Great Korea] according to which King Kojong was declared an "emperor," as the head of a state with equal status in the community of nations according to public international law of the time.[17]

It is not my intention in this article to identify the "correct" starting point of constitutionalism in Korea. Instead, I am more interested in the concept of constitutionalism itself and how that term should be understood in the Korean context. I should note, of course, that even among Western scholars of constitutional law and political theorists, constitutionalism is not a well-defined term. As Louis Henkin says, "constitutionalism is nowhere defined."[18] Therefore, I do not pretend to have discovered a universal and uncontroversial definition of the term. My intent in the following pages is much more modest: I wish to offer some thoughts on how we might go about thinking about constitutionalism in relation to the entire span of Korean political history. My hope is to spur more reflection and discussion on the issue of how to conceptualize constitutionalism from a comparative perspective.

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16) Contitution pmbl.

17) In his textbook, Professor Young-Sung Kwon includes this 1899 code as the "pre-history" of Korean constitutionalism. Kwon, *supra* note 15, at 91. For English translation of the *Hongbŏm*, see 2 Sourcebook of Korean Civilization 384-85 (Peter H. Lee ed., 1996); For the Provisional Government's constitution, see *id.* at 435-36. The Korean text of these early constitutions are available at the Constitutional Court's website http://www.ccourt.go.kr.

18) Louis Henkin, A *New Birth of Constitutionalism, in* Constitutionalism, Identity, Difference, and Legitimacy 39, 40 (Michel Rosenfeld ed., 1994).

To return for a moment to the three possible starting points for the history of Korean constitutionalism mentioned above, it is obvious that the each of them are supported by different historical narratives according to which a radical change took place at the respective dates. That is, to claim that constitutional history began in 1919 rather than in 1894 or 1948 requires some showing that that year marked a more significant break with the past than the other years. Similarly with the other positions. Participants of this imaginary historiographical debate[19] would therefore argue about and disagree on which set of events was more significant in terms of Korea's political and legal development.

For all their different interpretations and disagreements regarding the past, however, the three positions all share one crucial assumption, namely, that constitutionalism was something unknown to Koreans prior to some identifiable point in time-however difficult it may be identify that point. The very fact that one could debate about which year deserves to be marked the inaugural year of Korean constitutionalism indicates that there was a time when constitutionalism did not exist in Korea. Yet, as soon as we start to unpack this assumption, a troubling situation emerges, which is in turn related to problematic assumptions underlying our conception of constitutionalism.

At the core of constitutionalism as a legal and political concept lies the idea of opposing arbitrary or absolute power. Despite the theoretical disagreements among theorists and historians of constitutionalism, they all agree that at bottom constitutionalism is an expression of the desire to limit or at least regulate political power. In short, to define it negatively, constitutionalism is the opposite of despotism or tyranny.[20] Now, if we combine this admittedly crude, negative definition of constitutionalism with the assumption that Korea did not have constitutionalism until late nineteenth century, at the earliest, we are forced to conclude that Korean politics was defined by despotism or tyranny up to that point. That is, until constitutionalism was introduced (from the West), Koreans must have had nothing to restrain absolute power and nothing to protect people from the arbitrary exercise of such power.

19) I do not mean to represent this as an actual debate among historians of Korea. To the best of my knowledge, this has not been the subject of any serious scholarly debate among Korean academics.

20) *E.g.,* Charles Mcilwain, Constitutionalism: Ancient and Modern 21 (1947) ("it [constitutionalism] is the antithesis of arbitrary rule; its opposite is despotic government").

Yet, it is highly doubtful whether that is a defensible conclusion. Indeed, one need not be a hot-headed Korean nationalist to see that there is something wrong with portraying the entire couple of millennia of Korean political history as one of domination and oppression under absolute power. To be sure, Korea had her share of despotic rulers, but the idea that Korea for centuries knew *only* such rulers runs counter to one of the few themes of Korean history on which most people agree. It is generally accepted that, aside for a couple of exceptions, rulers of traditional Korea were quite weak in their relation to their subjects. In comparison with the emperors of China or the shogun of Japan, the position of Korean kings generally was not the object of abject exaltation, and rarely commanded absolute power.[21] One of the salient features of the political history of Chosŏn dynasty (1392-1910) is the prominence of the scholar-officials' position relative to the throne.[22] Moreover, it is highly unlikely that Korea would have led a continued existence for so long if its politics were pervasively arbitrary and authoritarian.[23]

What, then, does this imply for our understanding of constitutionalism? And, for the assumption that Koreans did not know constitutionalism until 1894, or 1919, or 1948? If Korean political history cannot be characterized as one of unmitigated despotism, then is it legitimate to use the term "constitutionalism" in describing it? If so, did Koreans practice constitutionalism without knowing it?[24] Surely, Koreans of

21) At least on two occasions, Chosŏn bureaucrats deposed their kings and installed substitutes who were more pliant and amenable to their biddings.

22) It is a well-known feature of Chosŏn history that a considerable number of the Confucian scholar-officials (*sadaebu*) regarded the throne as not much more than first among equals. According to one historian, traditional Korea was known in China as the land where the "king is weak and his ministers strong." Sung-Moo Yi, *Discourse on li and Factional Strife During 17th Century* [*17 Segi ŭi Yeron kwa Tangjaeng*], *in* A Comprehensive Review of Late Chosŏn Factionalism [Chosŏn Hugi Tangjaeng ŭi Chonghapchŏk Kŏmt'o] 9, 74-75 (Sung-Moo Yi et al. eds., 1992).

23) In the words of a noted Korean jurist:

> It is difficult . . . for us to find a constitution as we know it today in the political life of our ancestors prior to the opening of the country in 1876. And yet, we would be making a grave mistake if we were to assert simply that our ancestors had no fundamental law. The fact that they had maintained a politically organized life for more than two thousand years belies such an assertion.

Pyong-Choon Hahm, The Korean Political Tradition and Law 85 (2d ed. 1971).

24) The easy answer is that when we argue about when to mark as the inaugural year of constitutionalism, we are talking about the history of "modern" constitutionalism in Korea. That is, even if traditional Korea did not necessarily have a despotic government, it did not operate in terms of a constitution in the sense of a written document that lays down the powers of the government and the rights of the individual. On this view, constitutionalism is an achievement

Chosŏn dynasty did not know of the term "constitution," although the current term *hŏnpŏp* does appear in some of the Chinese classics known to the scholar-officials of the time.[25] Did they then have a different term for their political system and ideal?

III. Redefining Constitutionalism

Now, this of course is an age-old problem in the study of comparative law. That is, when we find a practice, institution, or concept in another legal tradition that is similar to but different from a well-known one in one's own tradition, is it legitimate to use one's familiar label to refer to the one found in the foreign setting? Especially when doing so will not only "enrich" one's own legal lexicon but also make it messier and more confusing? In other words, should we revise our understanding of constitutionalism to include political practices and institutions that do not have their roots in the familiar modern political experience of the West?[26]

Obviously, there are quite legitimate scholarly reasons for *not* doing so. For example, in order to preserve intellectual and theoretical consistency, it might be advisable to limit the use of "constitutionalism" to only Western or West-inspired political and legal arrangements. Also, describing something foreign with a label that refers to something functionally similar in one's own tradition may cause one to "read

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of modernity, and as such, cannot be discussed in the pre-modern context. To be sure, constitutionalism as we know it derives most of its inspiration from the American constitutional "experiment," the spirit of the French Revolution, or the lessons of the Weimar Constitution. In that sense, it is hard to think about constitutionalism without invoking modernity. This, however, is problematic to the extent that how to understand "modernity" itself is the subject of serious debates nowadays. For a critique of the utility of "modernity" in understanding Korean law, see Chul-Woo Lee, *Modernity, Legality, and Power in Korea under Japanese Rule, in* Colonial Modernity in Korea 21 (Gi-Wook Shin & Michael Robinson eds., 1999). Moreover, as will be argued below, the story of constitutionalism even in the West goes back much further than the period of so-called Enlightenment.

25) For example, the term (pronounced *xianfa* in Chinese) appears in such books as *Guoyu*, *Guanzi*, and *Huinanzi*, but its usual referent is either an abstract term like "the fundamentals of a state" or a more narrow idea of "regulation." The use of that term as the translation for the Western concept of constitution is said to have become fixed when the Japanese government sent emissaries to Europe in 1882 to study the constitutions of those countries. Chong-Ko Choi, History of the Reception of Western Law in Korea [Hanguk ŭi Sŏyangpŏp Suyongsa] 294 (1982).

26) In view of the fact that Korean research on constitutional law is predominantly influenced by Western scholarship, I am here assuming that the perspective of the Western scholars will also be that of Koreans. That is, " we" and "our" in this context refer not only Westerners but also most Koreans who are similarly more familiar with the Western concept of constitutionalism than with the native political and legal traditions of Korea.

into" the foreign practice one's own values, assumptions, and beliefs which simply don't apply in the foreign case. In other words, it may contribute to "ethnocentric" distortions in representing the foreign political and legal practices.

Nevertheless, I think we should at least be equally mindful of the political import of such a decision. We should also beware that restricting the use of a term to its original context may sometimes have the effect of implicitly casting negative judgment on the practice, institution, or concept found in other legal and political traditions. This is particularly the case with a term like "constitutionalism" which has now become a highly valued ideal for virtually all states everywhere. It is an "honorific term" nowadays which confers on a nation the status of being a member of the civilized world community.[27)]

By insisting that we apply the term constitutionalism only to institutional arrangements having roots in, say, the Enlightenment context, we may be unintentionally perpetuating another kind of ethnocentrism, namely, an attitude of condescension and disdain toward non-Western countries. It is tantamount to refusing to regard the people of these countries as worthy of equal respect and dignity as Westerners. True, in some cases, their politics are in fact worthy of less respect. Nevertheless, that cannot justify a blanket dismissal of their entire political history.

Of course, another option might be to create a new category that is neither constitutionalism nor despotism, and use it to describe the political history or experience of non-Western countries. The goal would be to reject the binary opposition between constitutionalism and despotism and to use a third term which is at least as "respectable" as constitutionalism. Yet, this option has its own difficulties. Creating an unfamiliar, *sui generis* category will more likely than not contribute to the needless mystification of non-Western politics which will only inhibit mutual understanding. Moreover, it may even provide occasions for new "orientalist" interpretations, which may end up demonizing the unfamiliar.[28)]

I therefore believe that it is best to go ahead and use the concept of

27) This explains why in the imaginary historiographical debate above, the nationalist would wish to push back the starting point of Korean constitutionalism. It is grounded in the desire to represent Korea as a civilized country by bestowing upon it this honorific term. In order to portray Koreans as having entered the civilized world sooner, it becomes necessary to claim that Korean constitutionalism began at an earlier time.

28) As originally used by Edward Said, "orientalism" refers to the process by which Europeans of the early modern period essentially created the idea of the "Oriental" and filled its content with images and values opposite to

constitutionalism to refer to non-despotic political arrangements in non-Western worlds as well. This means broadening the definition of constitutionalism beyond its usual referent of legal limitations on government powers through judicial review and other mechanisms codified in a written constitution. We must modify our understanding of constitutionalism to include political institutions, practices, and discourses that do not necessarily operate in terms of principles like the separation of powers, representative democracy, or even the rule of law.

Granted that this is an unusual way to define constitutionalism. Indeed, it might even appear to take away all the necessary elements that go into making constitutionalism work. Yet, for anyone who might be alarmed or skeptical about understanding constitutionalism this way, I would just point out that in fact historians of Western constitutionalism have also used the term in a similar fashion. That is, it is important to keep in mind that although the "modern" type of constitutionalism cannot do without those principles I just mentioned, historians have identified constitutional politics in pre-modern contexts where these principles were never invoked, such as Renaissance Venice, Ancient Greece and Rome, or even Medieval Catholic church.[29)]

Now, the problem is, even among Western scholars, there is little communication or exchange between the historians on the one hand and the constitutional lawyers on the other, such that we do not yet have a suitable definition of constitutionalism that can accommodate both the modern and pre-modern species of constitutionalism. I therefore would like to propose a definition that would do justice to both, and which would also accentuate the distinctive features of constitutionalism vis-à-vis other related concepts.

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their own (e.g., backward, immoral, and unenlightened). According to Said, the creation of this "Other" of Europeans' self-image in turn provided ideological justification for imperialist policy of subjugating and exploiting the people of the Orient (i.e., the Middle East and India). Edward W. Said, Orientalism (1978).

29) *E.g.*, Scott Gordon, Controlling the State: Constitutionalism from Ancient Athens to Today (1999); R.C. van Caenegem, An Historical Introduction to Western Constitutional Law (1995); Brian Tierney, Religion, Law, and the Growth of Constitutional Thought 1150-1650 (1982). *See also* Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983) (arguing that the Papal Revolution of 1075 effectuated through the reforms of Pope Gregory VII introduced the first constitutional form of government in the West); Quentin Skinner, 2 The Foundations of Modern Political Thought 113-85 (1978) (describing the Conciliarist Movement of the Catholic church which sought to restrain the power of the pope through the council of bishops).

30) On Foucault's notion of "discipline," see generally Michel Foucault, Discipline and Punish: The Birth of the

My proposal is to define constitutionalism simply as the practice of disciplining political power. Here, I'm loosely borrowing the term discipline from the works of Michel Foucault and I use it to refer to a set of institutional and discursive practices designed to control and regulate through a combination of both external incentive structure as well as internal, educative, processes of character formation.[30] The end-state, or goal, or discipline is self-surveillance through internalization of a variety of control mechanisms. When applied to political power, discipline means restraint and control of its exercise. Understood in this way, constitutionalism is still about opposing despotism, but it means opposing it in a disciplined manner.

Obviously, discipline of political power can be achieved in various ways. The more familiar way is to take a sort of mechanistic, or Newtonian, approach of checks and balances, or division of power. This approach in a way assumes a preexisting power that needs to be checked or balanced. Power is viewed as a physical entity which has a weight and a size, and therefore can be divided into smaller parts or balanced with another power of equal weight and size. Some historians describe American constitutionalism as the most representative of this approach.[31] In one of the *Federalist Papers*, James Madison famously wrote: "Ambition must be made to counteract ambition."[32]

Another approach might be to take a more constitutive, or formative, perspective and focus more on the control and restraint that results from molding both the power and the power-holder in a specific way. This approach would emphasize the continuous process of educating the power-holder by putting him or her under a constant state of surveillance and supervision. In my view, the ideal of Confucian political philosophy was to implement this second type of discipline. Contrary to the popular perception of Confucianism which views it as an authoritarian ideology, Confucian political philosophy was deeply concerned about disciplining the ruler.[33] At

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Prison (Alan Sheridan trans., 1979) (1975); Michel Foucault, *Two Lectures, in* Power/Knowledge 78 (Colin Gordon ed., 1980); Michel Foucault, History of Sexuality (Robert Hurley trans., Vintage Books 1980) (1976).

31) There is actually an ongoing historiographical debate about the extent of the influence of Newtonian thinking on the American founding generation and consequently on the American constitutional design itself. *See generally* Michael Kammen, A Machine That Would Go of Itself: The Constitution in American Culture (1994); Michael Foley, Laws, Men and Machines: Modern American Government and the Appeal of Newtonian Mechanics (1990).

32) The Federalist No. 51.

33) By saying that Confucianism was not authoritarian, I am not thereby claiming that it was democratic.

least as practiced by the scholar-officials of Chosŏn dynasty, Confucianism provided the institutional and discursive resources that enabled them to discipline the monarch through constant surveillance and supervision.[34] This means that Koreans of Chosŏn dynasty aspired to practice constitutionalism by taking this constitutive and formative approach. They may not have known or bothered to take the Newtonian approach, but they were aspiring to implement constitutionalism nonetheless.[35]

In order to evaluate the claim that traditional Korean politics can be understood as a form of constitutionalism, we need to know, among other things, what operated as the constitutional norms of that period.[36] In other words, what were the sources of Korea's pre-modern constitutional law? It might be thought that asking this very question is to prejudice the analysis, for this presumes that Korea had something called "constitutional law." If we were to adhere to a narrow, positivist definition of "law," as

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Confucian philosophy did not envision the people as their own masters, except in a very extenuated and rhetorical sense. That, however, should not lead one to think that it legitimated the use of absolute power or fostered "authoritarian personalities." One of the common mistakes is to equate "anti-democratic" with authoritarian and despotic, and to assume that anything which predates the appearance of democracy was *ipso facto* supportive of authoritarian politics. Yet, as was alluded to above, historically constitutionalism was not necessarily predicated on the existence of democratic politics. Today, we are prone to regard the two as, if not identical, at least complementary, as is indicated by the expression "constitutional democracy." In fact, democracy and constitutionalism can be, and often are, in tension with each other. For, constitutionalism is about disciplining and restricting the sovereign power, even if people are the sovereign, whereas democracy is about giving people what they want.

34) I am painfully aware of the danger in trying to generalize about Confucianism, for claiming that such and such was "the Confucian position" necessarily risks ignoring the remarkable diversity of positions within the Confucian tradition. An analogy would be trying to summarize Christianity in one sentence disregarding the vast difference of outlook, tenor, and issues that characterized different people at different stages of its history (think of Aquinas, Luther, Kierkegaard, and Latin American liberation theology). Nevertheless, if it can plausibly be argued that these different Christians shared at least some common symbols, vocabulary, or rhetorical strategies, I think it is also plausible to assume the same with regard to Confucian thinkers. In this article, I intend only to describe certain terms which I believe were widely shared and used in political disputations among Chosŏn dynasty Koreans.

35) In this regard, we should also be cautious about the simplistic dichotomy between "constitutional monarchy" and "absolute monarchy" and the use of the latter term to describe Chosŏn dynasty. In common parlance, the former term refers only to those forms for government where the power of the throne is limited by or shared with some elected officials. As a corollary, all monarchy that lack this "democratic" element are assumed to have authorized the use of absolute power. According to my interpretation of the Chosŏn dynasty Confucian politics, this is overly simplistic. In other words, although Chosŏn had no democratic government, there are many problems in calling it an "absolute monarchy."

36) Detailed examination of this issue is taken up in Part IV.

a type of norm that can be enforced through independent courts, we naturally will not find any such thing in Chosŏn dynasty Korea. Yet, according to my definition of constitutionalism as the practice of disciplining political power, constitutional norms need not be enforced solely through the courts. To assume this would be to confuse constitutionalism with judicial review.

Granted, today some form of judicial review is considered an indispensable element of constitutionalism.[37] Yet, I submit that to equate the two is both inaccurate and anachronistic. One must remember that judicial review was "created" through an imaginative legal maneuvering at the start of the nineteenth century by an American jurist named John Marshall.[38] He "read into" the American Constitution a power that was not even specified in the text.[39] By contrast, as is well known, American constitutional discourse itself was an outgrowth of centuries-old British constitutionalism.[40] To this day, the United Kingdom has maintained a constitutional polity without having adopted the principle of judicial review.[41] Thus, judicial review is a relatively late-comer in the story of constitutionalism.[42] In fact, even in the U.S.

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37) *See generally* Mauro Cappelletti, Judicial Review in the Contemporary World (1971).

38) Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

39) Writing almost a century after the *Marbury* decision, Harvard law professor James Thayer noted that judicial review was still an anomaly among world constitutions. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 130 (1893). To this day, American constitutional scholarship is plagued by whether judicial review was "really required" by the Constitution, and whether it can be justified on democratic grounds. The classic text on this issue is Alexander Bickel, The Least Dangerous Branch (2d ed. 1986).

40) Even in their fight for independence, American colonists used the terms of the British constitutional discourse to support their cause against the British. *See* Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. Pa. L. Rev. 1157 (1976).

41) This is not to deny that there has been a steady growth in Britain of judicial review, in the sense of court's review of administrative action, i.e., checks on the executive by the courts. *See* Geoffrey Marshall, *Lions Around the Throne: The Expansion of Judicial Review in Britain, in* Constitutional Policy and Change in Europe 178 (Joachim Jens Hesse & Nevil Johnson eds., 1995). Moreover, courts have recently been given further power to pass judgment on acts of the legislature as the Human Rights Act of 1998, which incorporates the European Convention on Human Rights into domestic law, finally entered into force October 2, 2000. Yet, this Act still does not establish full judicial review, as the courts are only empowered to make a "declaration of incompatibility" with the ECHR, rather than being able to strike down the offending legislation. Human Rights Act, 1998, 4(2) (Eng.).

42) Of course, it is sometimes argued that the American "invention" of judicial review was also a development of certain elements in British constitutionalism. Some trace its genealogy to the famous *Doctor Bonham's* Case in which Edward Coke opined that whatever is contrary to common law is null and void. It is noteworthy, though, that in Britain the doctrine of Parliamentary sovereignty has eclipsed any notion that the courts can override the will of the legislature.

where judicial review is seen as the core of constitutionalism, there are constitutional norms which are not enforced through the courts. An example can be found in the congressional impeachment proceedings against the President and other civil officers prescribed in the American Constitution.[43] This is a system devised for enforcing constitutional norms in which the courts do not take part. The Constitution itself specifically entrusted that job to the House and the Senate, i.e., the legislative branch.[44]

The case of British constitutionalism is actually quite instructive in conceptualizing the political discourse of traditional Korea in constitutionalist terms. Even though Britain does not have a single written document, called the Constitution, that has the status of a higher law, and although its courts cannot strike down legislation for reasons of unconstitutionality, no one can reasonably deny there is something called the British constitution or that the U.K. is a constitutionalist state.[45] Similarly, I believe the lack of a single document constitution or judicial review need not preclude an understanding of Chosŏn political system as a constitutional regime.

It is often pointed out in many characterizations of the legal history of Korea and other East Asian countries that independent courts failed to develop which could annul or inhibit arbitrary acts by the government. The usual inference made from this fact is that those governments did not have the institutional arrangement necessary to practice constitutionalism.[46] Yet, the British constitutional tradition calls into question the

43) U.S. Const. Art. II, 4.

44) U.S. Const. Art. I, 2, cl. 5 ("The House of Representatives shall have the sole Power of Impeachment."); U.S. Const. Art. I, 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). For an argument that there is nothing logically inconsistent with entrusting the legislature with the responsibility of enforcing constitutional norms, see Thomas C. Grey, *Constitutionalism: An Analytic Framework, in* Nomos XX: Constitutionalism 189 (J. Roland Pennock & John W. Chapman eds., 1979) (describing judicial review as but one instance of "special enforcement" of constitutional norms).

45) The classic statement of British constitutionalism is of course A. V. Dicey, The Law of the Constitution (1885). A work by a non-lawyer which is in some ways more informative is Walter Bagehot, The English Constitution (1867). For more recent works, see generally Geoffrey Marshall, Constitutional Theory (1971); T.R.S. Allan, Law, Liberty and Justice (1993); Eric Barendt, An Introduction to Constitutional Law (1998).

46) *See, e.g.*, Dai-Kwon Choi, *Development of Law and Legal Institutions in* Korea, in Traditional Korean Legal Attitudes 54, 65, 70-72 (B. D. Chun et al. eds., 1981) (noting the lack of differentiation in government functions and the absence of public law principles like judicial review). Professor Choi does state that "Confucian moral principals [sic] were the functional equivalents of public law," thereby suggesting that Chosŏn monarch was subject to some form of restraint. *Id*. at 72. For China, see Wm. Theodore de Bary, Asian Values and Human Rights 94-97 (1998) (noting the

assumption that constitutionalism requires the courts' possession of the power of judicial review. Put differently, constitutional norms need not always take the form of law, in the strict narrow sense of the word. Indeed, in most countries, constitutional norms comprises, in addition to judicially enforceable rules, a range of norms including political rules, precepts, conventions, and even tacit understandings about what is deemed proper in matters of government. And, it is in this broader sense that I am using the term "constitutional law."[47]

To identify the sources of constitutional law of traditional Korea, we must then look for not only strictly legal norms that may have been promulgated by the government, but also the seemingly vaguer and more ineffectual norms which informed the political discourse of the period. In this regard, again, comparison with the British system highlights, and facilitates our understanding of, another aspect of traditional Korean constitutionalism, namely, the importance of tradition as a source for constitutional norms. The British have developed a distinct terminology for this: "constitutional conventions." These refer to the unwritten rules of the constitution.[48] They are not enforceable at a court of law, but that does not diminish their importance or normative force. In fact, in Britain, the term "unconstitutional" means that something is contrary to constitutional convention, rather than simply illegal.[49] Although the fact that they are "non-legal" have led some commentators to characterize them as simply moral or ethical rules of governance,[50] many constitutional conventions do not derive their force from their moral persuasiveness.[51] Rather, their normative force derives from the fact

absence in Chinese history of separate and independent courts to resolve "constitutional" issues).

47) I believe this is similar to the sense in which Professor Park Byung Ho understands the word "legal" when he discusses the "legal restrictions" (*pŏpchŏk cheyak*) on the royal power during Chosŏn dynasty. Byung Ho Park , The Law and Legal Thought of Modernity [Kŭnse ŭi Pŏp kwa Pŏpsasang] 444-52 (1996) (arguing that even though the king was considered the author of law, he was not at freedom to disregard it).

48) On British constitutional conventions, see generally Geoffrey Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability (1984). *See also* Nevil Johnson, *Law, Convention, and Precedent in the British Constitution, in* The Law, Politics, And the Constitution 131 (David Butler et al. eds., 1999) (noting the trend toward increased reliance on written rules in British constitutionalism).

49) Vernon Bogdanor, *Britain: The Political Constitution, in* Constitutions in Democratic Politics 53, 56 (Vernon Bogdanor ed., 1988) (stating that in the British constitutional tradition, "unconstitutional" cannot mean contrary to law; "instead it means contrary to convention, contrary to some understanding of what it is appropriate to do.").

50) *E.g.*, Marshall, *supra* note 48, at 214.

51) In the words of the noted legal philosopher Jeremy Waldron:

that tradition has made them hallowed and sacrosanct. Violation of a constitutional convention therefore will occasion a major political controversy, in which the political legitimacy of the violator will be seriously impugned and compromised. In any such controversy, the point of reference will always be what had been done in the past, and arguments will turn on how much authority is to be conferred on tradition. Tradition, in another words, is an important source of constitutional norm. In Canada, the Supreme Court actually made it explicit that sources of Canadian constitutional norms consist of not only the constitutional documents (i.e., the Constitution Acts, and the Charter of Rights and Freedom), but also the constitutional traditions of Canada.[52)]

Indeed, constitutional discourse in any country is pervasively a traditionalist discourse. This is so even in America, where constitutionalism is usually seen as part of the project of refuting tradition, for to the framers of American Constitution, "tradition" represented hierarchy and oppression. This common image notwithstanding, it is undeniable that constitutional discourse in the United State is marked by an attitude of extraordinary deference to its tradition. For example, invoking the authority of the founding generation is a common way of arguing constitutional issues. Even when not focusing on the framers' "original intent," the discursive style of American constitutional discourse forces constitutional lawyers, both conservative and liberal, to rely on tradition to justify their arguments.[53)]

That the normative force of many constitutional norms should depend on tradition

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> They are not merely habits or regularities of behaviour. . . . But they are not merely subjective views about morality either. They have a social reality, inasmuch as they capture a way in which people interact, a way in which people make demands on one another, and form attitudes and expectations about a common practice with standards that they are all living up to. . . . Politicians refer to them when they are evaluating one another's behaviour. They are social facts, not mere abstract principles, because they bind people together into a common form of life.

Jeremy Waldron, The Law 63-64 (1990).

52) In the Matter of '6 of The Judicature Act, [1981] S.C.R. 753. Cited in Walter Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 La. L. Rev. 91, 114 (1991).

53) *See* Frank I. Michelman, *Super Liberal Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 Va. L. Rev. 1261, 1312-20 (1991) (differentiating between conservative and liberal uses of tradition in constitutional interpretation). Sanford Levinson distinguishes between the Protestant and the Catholic approaches to constitutional interpretation, wherein the former emphasizes the text and original intent, and the latter stresses the doctrines formulated through the Supreme Court's decisions. Sanford Levinson, Constitutional Faith 27-53 (1988). In my view, the two approaches are but different species of traditionalist discourse, emphasizing different aspects of the constitutional tradition.

is hardly surprising. Whereas the binding force of an ordinary law is ultimately dependent on the threat (real or potential) of coercive force of the state, a constitutional norm cannot rely on the coercive force of the state because, in this case, it is the state itself which is being subjected to the norm. It is the state itself that is being disciplined, and therefore the normal grounds of normative force does not apply here. As the wielder of the coercive force, the state, if it wanted to, could refuse to conform to constitutional norms. The fact that it does not and cannot so flout constitutional norms must be explained in other terms. Some explain it in terms of "persuasion" as another source of the binding force of laws in general.[54] Others seek to explain it by analogizing it to H.L.A. Hart's idea of the "rule of recognition," according to which people are able to identify what are to count as law in their society-a rule whose own source of normative force can only be located in the precarious fact of people's acceptance or readiness to regard themselves as bound by this rule.[55] While these explanations are not wholly incorrect, they do not account for the temporal dimension of constitutional law. I submit that the power of tradition is in fact a dominant force in making people and the state accept the constitutional norms and arrangement that have been handed down by the preceding generation. Moreover, it is my contention that this is dramatically exemplified in the case of the constitutional discourse of traditional Korea.

IV. Sources of Constitutional Norms in Traditional Korea

Before turning to examine how the power of tradition was played out in the constitutional discourse of Chosŏn, it is important to have a clear understanding of what we mean by "constitutional law" in traditional Korea, or any other Confucian society.[56] The standard approach to Korean legal history has noted the existence of a national code, *Kyŏngguk Taejŏn* [Great Canon for Governance of the State], that was

54) P. S. Atiyah, Law and Modern Society 81-91 (2d ed. 1995) (noting that any law, especially constitutional law, must be supported by both compulsion and persuasion, if it is to be effective).

55) Waldron, *supra* note 51, at 64-67. "It is the fragile readiness of those involved in political life to order their conduct by certain implicit standards that forms the basis of whatever claim Britain has to be a constitutional regime." *Id.* at 67.

56) For a more in-depth analysis of the issues discussed in this and the next Parts of this article, readers are referred to Chaihark Hahm, Confucian Constitutionalism 107-240 (2000) (unpublished S.J.D. dissertation, Harvard Law School).

promulgated in the early part of Chosŏn period.[57] Scholars generally tend to regard this code as "the constitution" of the Chosŏn dynasty. Koreans also tend to be proud of the fact that throughout the history of Chosŏn, the government was constantly involved in the project of codifications. The implication is that Koreans were from a very early period deeply concerned about governing in accordance with the law-that Koreans practiced their own kind of "rule of law."

Yet, if we examine the contents of *Kyŏngguk Taejŏn*, we find that the vast majority of the rules contained therein pertained to the administration of the government bureaucracy. The primary audience to whom they were directed was the officials who staffed the various ministries, bureaus, and offices. Very little of it is directly concerned with disciplining the power of the ruler. In modern terminology, most of them were "administrative" law rather than "constitutional" law.[58] Faced with this fact, it is all too easy to make either of two mistakes: On the one hand, this could be used as "evidence" that constitutionalism did not exist in traditional Korea, that Korea had no legal means of restraining the power of the ruler.[59] On the other hand, this fact could be "explained" by invoking the standard description of traditional Korea as an absolute monarchy, in which all power was concentrated at the center and which allowed no medium for restraining that power. In fact, the two moves tend to reinforce one another to form an essentially circular argument-since Chosŏn was an absolute monarchy, it was only natural that its so-called constitution would not provide for any mechanism for disciplining power, and the fact that its constitution did not include such mechanism was "further" evidence that Chosŏn was an absolute monarchy.

The critical element that undergirds this type of historiography is the assumption that the code *Kyŏngguk Taejŏn* was "the constitution" of Chosŏn. To test the soundness of this assumption, we need to have a clear understanding of what

57) Promulgated in 1485, this code was the culmination of a series of codification efforts that begin with the founding of the dynasty in 1392. For a review of the codification process leading up to the enactment of this code, and its subsequent revisions, see Park, *supra* note 47, at 81-87. *See also* William Shaw, *Social and Intellectual Aspects of Traditional Korean Law, 1392-1910, in* Traditional Korean Legal Attitudes, *supra* note 46, at 15, 29-32.

58) Of course, a code containing such rules might be called constitutional law in the sense that it lays out the duties, capacities, and composition of the various government offices. But, that is not the sense that we are interested in when we speak of norms for disciplining the ruler. Moreover, it is hardly clear that the mere existence of such a code of government organization will have a disciplining effect on the ruler.

59) A notable exception is Park, *supra* note 47, at 435-53.

constituted the proper subject matter of codes under Confucian regimes. This may inevitably lead us to thorny debates about how to understand "law" in traditional East Asia. For decades, there have been debates as to whether the word *pŏp* (Chinese: *fa*) accurately translates the Western term "law." A related debate has been how to understand the conceptual relationship between the words *pŏp* (commonly translated "law") and *ye* (Chinese: *li*, commonly translated "ritual"). Rather than continuing these tired and interminable debates (which inevitably involves the philosophical question of what law is in the first place-something that is far from settled even among Western scholars), I believe we should take a less conceptual and more historical approach. That is, our understanding of Chosŏn constitutionalism will be better served by inquiring into the issue of "What were the sources cited by political actors engaged in disputes which we would describe as constitutional?" Here, I am again using the term constitutional to refer to matters relating to the disciplining and regulation of the ruler.

The conventional answer to this question is that, given the primacy of Confucian ideology, people cited from the classics to urge that the king become morally virtuous. According to the conventional image of Confucianism, moral virtue on the part of the ruler was all that was needed to bring peace, harmony, and justice in the state. While there are passages in the Confucian classics which could be read to support this,[60] I believe this is at best a partial and imperfect understanding of the Confucian political discourse as it was actually conducted in history. Indeed, if moral exhortation and admonition were all there was to Chosŏn political discourse, we would not be justified in regarding it as a form of constitutionalism. It is my contention that it was a far more structured discourse with its own discursive principles and institutional backdrop.

To get at the more concrete and institutional aspects of Confucian constitutionalism, then we need to examine the kinds of "codes" that the government compiled for various purposes. For, in actual political debates relating to constitutional issues, scholar-officials did not merely cite passages from the classics. They actually cited provisions from various "codes" compiled by the government. This means we need to

60) For example, in the *Analects*, Confucius says: "To govern means to rectify. If you lead on the people with correctness, who will dare not to be correct?" Confucius, Confucian Analects, The Great Learning & The Doctrine of the Mean 258 (James Legge trans., Dover Reprints 1971) (1893). Also: "When a prince's personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed." *Id.* at 266.

query if the *Kyŏngguk Taejŏn* can really be regarded as Chosŏn's constitution, and whether other codes of similar authority and breadth might not have been compiled by its government.

In order to find out what other codification projects might have been undertaken by Chosŏn, we must first know what was considered proper subject matters for codification. In a study of the early codification projects of Ming dynasty China, historian Edward Farmer has made the following comment, which I believe is equally relevant for Korea:

> Law in Ming China was really a combination of elements that included penal law but shaded off in one direction toward administrative regulations and in the other direction toward ritual. In fact one can draw no firm line between these elements. When we speak of Ming law we should keep the ritual elements in mind and not divorce them from our definition.[61)]

Here, he is using the term "law" to refer to legislation, i.e., codified documents. In other words, the subject matters of early Ming codes included administrative rules, penal law, and ritual regulations. Indeed, in any given code we can probably locate materials of all three types of norms. It would be reasonable to expect that their compilers did not make a sharp distinction among them. The fact that administrative rules, penal law, and ritual regulations could all be legislated means that "law" to the Confucians encompassed these three types of norms. They represent different points on a continuum which make up the Confucian conception of "law."

On the other hand, we can also identify a certain correspondence between these three types, or categories, of law and the types of codes that were compiled by the government. It is a historical fact that ever since the Tang period in China (618-907 A.D.), each dynasty compiled three types of codes: ritual, penal, and administrative. Within a period of five or six years, the *Tang* government enacted in seriatim, *Da Tang Kaiyuan Li* [Ritual Code of the Kaiyuan Reign-period of the Great Tang] (732), *Tang*

61) Edward L. Farmer, Zhu Yuanzhang and Early Ming Legislation 13 (1995). *See also* Edward L. Farmer, *Social Order in Early Ming China, in* Law and State in Traditional East Asia 1, 6 (Brian E. McKnight ed., 1987) (including within the definition of Confucian law such diverse items as "criminal law, rules governing the imperial clan, tables of organization for the bureaucracy, warnings to officials and commoners about improper conduct, rules applying to the management of local affairs, and on the proper way to conduct rituals.")

Lü Shuyi [Tang Penal Code with Commentaries and Subcommentaries] (737), and *Tang Liudian* [Six Canons of Tang] (738).[62] The first code specified the state ritual system to be observed by the government, the second was the penal law of the state, and the third was the administrative code modeled after a classic text, *Zhouli* [Rituals of Zhou].[63] Historically, the completion of these three codification projects represents the establishment and flowering of Tang political institutions.[64] They served as the model for later dynasties of China. For example, the Ming dynasty shortly after its founding commenced upon the codification of the three types of laws. These codification projects culminated in the enactments of *Da Ming Lü* [Penal Code of the Great Ming] (1397), *Da Ming Huidian* [Collected Canons of the Great Ming] (1503), and *Da Ming Jili* [Collected Rituals of the Great Ming] (1530).

We are now able to put the legislations of Chosŏn period in perspective. We know that in compiling the *Kyŏngguk Taejŏn*, Chosŏn consciously took the *Zhouli* as the model. Thus, it is more appropriate to regard the *Kyŏngguk Taejŏn* as the administrative code of Chosŏn, which represents only one part of a tripartite code structure. For its penal code, as is well known, Chosŏn adopted the Ming dynasty's penal code (*Da Ming Lü*) as its own, instead of compiling a separate independent code. Obviously, in order to implement it in an alien environment, it had to be modified and "localized" in various ways to fit the Korean context.[65] However, in principle, the Ming Penal Code was understood to be the general penal law of Chosŏn. In fact, the

62) All were compiled during the reign of emperor Xuanzong (r. 712-756 A.D.). Of these three, the *Tang Liudian* and the *Tang Lü Shuyi* were completed under the leadership of the same chief minister, Li Linfu, while the compilations of *Kaiyuan Li* and the *Tang Liudian* appear to have commenced during the regime of the same chief minister Zhang Yue. 3 Cambridge History of China 390-91, 414-15 (Denis Twitchett ed., 1979).

63) The *Zhouli* was purportedly a description of the government structure of the ancienty Zhou dynasty (1027-771 B.C.). According to Confucius and his followers, Zhou culture and society had attained a level of perfection that had never been surpassed by later generations. Its government institutions as laid out in the *Zhouli* were therefore idealized by most Confucian scholar-officials, including the compilers of *Kyŏngguk Taejŏn*. The *Introduction* to this code specifically refers to the *Zhouli* as its model. 1 KyŏnggukTaejŏn 3 (Pŏpchech'ŏ ed. & trans., 1962).

64) *See* Zhu Weizheng, *Coming Out of the Middle Ages, in* Coming Out of the Middle Ages: Comparative Reflections on China and the West 3, 23 (Ruth Hayhoe trans. & ed., 1990) (referring to the trio of Tang legislations as having laid the framework for later state structure). Unfortunately, Zhu's discussion is impaired by the indiscriminate and inapposite use of terms like "feudal," "autocratic," and "Middle Ages" in reference to China.

65) For a detailed analysis of the adaptation of the Ming Code by Chosŏn, see Byung Ho Park, Legislation and Social Conditions of Early Chosŏn [*Chosŏn Ch'ogi Pŏpchejŏng kwa Sahoesang*], 80 Kuksagwan Nonch'ong 1 (1998).

administrative code, *Kyŏngguk Taejŏn*, contains an explicit provision which incorporates the *Da Ming Lü* as the penal part of Chosŏn legal system.[66] As for its ritual code, Chosŏn did enact a separate code, which it began to compile very soon after its founding. In 1410 a special bureau for specification and determination of rites (*Ŭirye Sangjŏngso*) was established for this purpose, and a ritual code containing the state ritual program called *Kukcho Oryeŭi* [*Five Rites and Ceremonies of Our Dynasty*] was completed in 1474. And for this, too, there is a provision in the *Kyŏngguk Taejŏn* that specifies the use of this code in matters concerning ritual.[67]

As mentioned above, these three types of codes roughly corresponded to the three types of norms that comprised the Confucian conception of law. There was not, however, a perfect match. For example, an administrative code might well contain provisions on ritual matters or on penal matters. Similarly, the penal code also contained regulations of administrative nature. This perhaps was inevitable given the conception of law which was basically a continuum that ran from the administrative, to the penal, to the ritual. Thus, while each code would have a point of emphasis, corresponding to different points on the continuum, each unavoidably contained other types of norms as well.

With this conceptual framework in mind, we can now ask what types of provisions from which codes would have been invoked by Chosŏn scholar-officials in their constitutional disputations. Which type of norm and which type of code had the force of a constitutional norm-a norm that disciplined the ruler? The simple answer is: the ritual norms and the ritual codes. Of the three types of norms, it was only ritual regulations that could be directly applied to the ruler himself. Indeed, the ruler's observance of ritual regulations was of paramount importance in Confucian political theory, much like the duty of a modern-day president to uphold the constitution. In *Liji* [Record of Rituals], one of ancient classics, it is written, "If he act [sic] otherwise [i.e., contrary to ritual], we have an instance of the son of Heaven perverting the laws, and throwing the regulations into confusion."[68] Ritual was a norm that even the king was expected to obey.

It should be clear that penal law could not be directly applied to the king for the

66) 2 Kyŏngguk Taejŏn, *supra* note 63, at 149.

67) 1 Kyŏngguk Taejŏn, *supra* note 63, at 250.

68) 1 Li Chi: Book of Rites 375 (James Legge trans., University Books reprint 1967) (1885).

purpose of restraining his power. Almost by definition, penal law was directed at the commoners, and sometimes at the scholar-official, but never at the monarch.[69] As for the administrative code, its main audience was the bureaucrats. Indeed, the administrative code was in its origin a collation of previous edicts issued to the bureaucrats by the king, a collection of those edicts which were considered to have enduring validity.[70] It would have been therefore difficult to invoke the administrative code for purposes of disciplining the king, unless it was a ritual provision contained therein.

Of course, both penal and administrative norms could be involved in constitutional issues. Scholar-officials wishing to discipline the monarch might argue that these norms must be interpreted or applied in a certain way. By insisting on a specific manner of interpretation and application, scholar-officials might have been able to put a check on the discretionary power of the king, thereby achieving a certain constitutional effect. As we shall see in Part IV, they might have argued that these codes must be understood in a way that is consistent with the relevant precedents.[71] Even so, those norms themselves were not directed at the monarch himself. The only part of Confucian law that applied directly to the ruler and his family were the ritual norms and ritual codes.

What then were these norms called "ritual" or, in Korean, *ye*? While we cannot explore all of the philosophical and cosmological aspects of this uniquely Confucian concept, it should suffice for our purposes to understand the "disciplinary" aspects of it. The first thing to understand about the idea of *ye* is that, according to Confucian political thought, observance of *ye* conferred legitimacy on the ruler. The Confucian classics were replete with remarks to the effect that no state that disregarded *ye* would endure long, or that the ruler himself must conform to the dictates of *ye* in order to govern properly.[72] Therefore, every political leader had an incentive to at least appear

69) This does not mean that the penal code in its entirety was inapplicable to the ruler. To the extent that it contained ritual regulations, it could also be considered directly applicable to the ruler.

70) Bong Duck Chun, *Legal Principles and Values of the Late Yi Dynasty*, *in* Traditional Korean Legal Attitudes, *supra* note 46, at 1, 7-8.

71) On the principle of respecting precedents, see *infra* Part IV.

72) *E.g.*, "Thus the sages made known these rules [ritual], and it became possible for the kingdom, with its states and clans, to reach its correct condition." 1 Li Chi, *supra* note 68, at 367. The *Zuo Commentary* to the *Spring and Autumn Annals* provides: "It is ritual that governs the states and families, establishes the foundation of the country, secures order among people, and benefits one's future heirs" (My translation based on James Legge's in The Ch'un

to be abiding by the precepts of ritual. That is why every regime deemed it necessary to engage in a codification project to specify the correct ritual regulations.[73]

The second thing to keep in mind in understanding *ye* is that its contents are not confined merely to the procedural rules of ceremony. To observe ritual norms is not merely to follow some fixed set of rules that explain how to perform sacrificial rites, although it is that too. To follow ritual means to subject oneself to the "restraining mold of minutely prescribed ceremonial behavior."[74] Ritual is a "formative" norm in the sense that, it works by regulating the person's bodily movement and psychological temperament.[75] The idea is to make one's life a series of ritualized actions, so that one will know how to comport oneself in any given situation, and is able to do what is expected of one without even thinking about it. In Foucaultian terms, it means to go through continuous training, observation and surveillance so that one ends up internalizing the "normalizing gaze."[76] For the Confucian, this also meant the process of learning to become truly human, for according to Confucian philosophy, one's true humanity could only be attained through such a process of "ritualization."[77]

This should not, however, lead us to think that *ye* is basically about cultivation of moral virtue. This can be seen in the sanctions prescribed for its violation. Violation of *ye* resulted in much more than mere moral condemnation or social censure. For example, the *Liji* warns: "Where any ceremony [ritual] had been altered, or any instrument of music changed, it was held to be an instance of disobedience, and the disobedient ruler was banished."[78] It was understood that "violations of ritual entail

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Ts'ew With The Tso Chuen (5 The Chinese Classics) 33 (James Legge trans., SMC Publishing Inc. reprint 1991). Another passage states: "Ritual is the stem of a state; reverence is the vehicle of ritual. With no reverence, ritual will not observed; with no observance of ritual, status distinctions will be confused. How can such a state last many generations? (My translation based on *id.* at 158).

73) For example, in his coronation edict, the founder of Chosŏn, T'aejo (Yi Sŏnggye), declared that his government should rectify ritual practices and ordered the Ministry of Rites to research the classics and past practices and to establish the proper ritual institutions. 1 Sourcebook of Korean Civilization 481-82 (Peter H. Lee ed., 1993).

74) Noah E. Fehl, Li: Rites and Propriety in Literature and Life 183 (1971).

75) "When one disciplines himself to conform externally to the letter of the *li* [ritual] he will by its conditioning come to an inner sense of courtesy and propriety." *Id.*

76) Foucault, Discipline and Punish, *supra* note 30, at 177-84.

77) Tu Wei-ming, *Li as Process of Humanization,* 22 Phil. E. & W. 187 (1972). "In the Confucian context it is inconceivable that one can become truly human without going through the process of "ritualization"." *Id.* at 198.

78) 1 Li Chi, *supra* note 68, at 217.

submission to punishment."[79] In another classical text, *Xunzi*, ritual is described as a legislative innovation by the ancient mythical sage kings to deal with the social fact of scarcity of material goods in relation to human desires.[80] Ritual was an institutional form of norm that required formal legislation, rather than a moral norm whose enforcement depended on informal and social sanctions. Therefore, it should be recognized that ritual was as much a legal category as the other two types of norms.[81]

Next, it should be remembered that *ye* was not just a "personal" norm that regulated the conduct of the king; it pertained to the operation of the entire government.[82] In addition to defining the personal ritual responsibilities of the king and the royal family (e.g., weddings and coming-of-age ceremonies), Chosŏn's ritual code, *Kukcho Oryeŭi*, also prescribed ritual norms applicable to the more public aspects of the government. For example, it contained norms that regulated the conduct the state's foreign relations with the neighboring states, as well as the conduct of its military forces.[83] This is also apparent in the nomenclature for government bureaus. The Ministry of Rites (*Yejo*) was the government department that was in charge of foreign affairs and legislation. It was the *Yejo* that was responsible for all the codification projects noted above. Yet, *Yejo* was not the only government office in charge of ritual matters. The importance of ritual for Chosŏn government went well beyond that. In a sense, the whole business of government was to ensure the proper observance of ritual norms.[84]

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79) *See generally* Fan Zhongxin Et Al., Sentiments, Principle, Law and the Chinese People [*Qing, Li, Fa* yu Zhongguoren] (1992).

80) 3 John Knoblock, Xunzi: A Translation and Study of the Complete Works 55 (1994).

81) *See* Seung-Hwan Lee, A Reconsideration of Confucian Thought as a Social Philosophy [Yuga Sasang ŭi Sahoe Ch'ŏlhakchŏk Chaejomyŏng] 169-77 (1998).

82) *E.g.*, "Therefore to govern a state without the rules of propriety [ritual] would be to plough a field without a share." 1 Li Chi, *supra* note 68, at 390.

83) The ritual code of Chosŏn, like that of other Confucian regimes in China, was structured around the traditional system of Five Rituals (*Orye*; Chinese: *Wuli*) of the state. They were: (i) Rituals for Auspicious Occasions (*Killye*; Ch.: *Jili*) dealing with various sacrificial ceremonies offered to numerous "deities" of the state; (ii) Rituals of Ill Omen (*Hyungnye*; Ch.: *Xiongli*) concerned with illness and other sad occasions at court; (iii) Guest Rituals (*Pillye*; Ch.: *Binli*) regulating the ceremonies dealing with state visits by foreign emissaries; (iv) Military Rituals (*Kullye*; Ch.: *Junli*) regulating the conduct of military exercises and expeditions; and (v) Rituals for Felicitous Occasions (*Karye*; Ch.: *Jiali*) dealing with ceremonies such as wedding and coming of age within the ruling house.

84) The statement of historian Charles Hucker in relation to the Ming government is equally applicable to Chosŏn:

Lastly, in terms of our understanding of the constitutional function of ritual, it is extremely important to note the Confucian scholar-officials' relationship toward ritual. Historically, the word "Confucian" (*yu*; Chinese: *ru*) signified a person with expertise in ritual matters. Indeed, it is only a slight exaggeration to say that the whole Confucian tradition is a product of the intellectual and political triumph of a certain group of specialists on ritual who were able to transform their expertise into the dominant political discourse, the terms of which defined the regime's legitimacy as well as the values people should aspire to. Of course, even among Confucians, some were more adept at ritual matters than others. Yet, almost by definition, a Confucian scholar-official was assumed to be knowledgeable about ritual and the classics.

Given the fact that a regime's legitimacy depended on observance of ritual and the fact that Confucian scholar-officials were universally regarded as specialists on ritual, it was natural for them to consider themselves as the custodians of political legitimacy. Since it was they who defined what was political proper for the king to do, the king could not but be constrained by the Confucian scholar-officials. They were, in a sense, "disciplinarians" of the ruler.[85] For example, codification projects were occasions to use their expertise to influence the exercise of political power according to their ideal. Of course, these were also occasions on which competing understandings of ritual vied for political power through royal recognition in the form of official legislation. When the process of codification was finished, Confucians continued to set the terms of political discourse through their interpretations of these codes, as well as their arguments based on classical texts. Although the ritual codes were intended to be

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"Performance of proper rituals was one of the most notable obligations of the government," such that "proper government in the Ming view was largely a matter of performing proper rituals." Charles O. Hucker, The Traditional Chinese State in Ming Times (1368-1644) at 97-98 (1961).

85) Institutionally, they disciplined the king through such mechanisms as the censorate and the royal lectures. Unlike its Chinese counterparts, the Chosŏn censorate was more interested in disciplining and remonstrating against the king than in impeaching misconduct on the part of the officials. Some historians regard the censorate as a separate branch of the Chosŏn government which checked the powers of the throne and the "executive." JaHyun K. Haboush, *The Confucianization of Korean Society*, *in* The East Asian Region: Confucian Heritage and Its Modern Adaptation 84, 96 (Gilbert Rozman ed., 1991). The royal lectures, which by definition was an educative and therefore disciplinary institution, also developed a highly constitutional function. Beyond the usual role of exposition of classical texts, it took on the role of a forum for policy deliberation. *See generally* Yon-Ung Kwon, *The Royal Lecture of Early Yi Korea (1)*, 50 J. Soc. Sci. & Hum. 55 (1979); Yon-Ung Kwon, *The Royal Lecture of Early Yi Korea (2)*, 51 J. Soc. Sci. & Hum. 55 (1980).

permanent laws, they were also subject to frequent revision. And any debate concerning a perceived need for revising or amending the established ritual codes was thus necessarily a highly political activity with constitutionalist significance.[86] Discourse on *ye* was constitutional discourse.[87]

This allows us to understand the particular intensity and vehemence with which debates on ritual matters were conducted in the Chosŏn government. The famous Ritual Controversies of 1659 and 1670 were but the more conspicuous of such debates.[88] Correct observance of ritual rules being an issue of constitutional importance, it naturally evoked impassioned arguments in every scholar-official who had an opinion about ritual. Again, it is important to remember that these were not simply moral arguments urging the king to be virtuous. In putting forth their arguments, they would cite from the ritual provisions contained in the various codes. Therefore in order to appreciate the texture of Chosŏn constitutional discourse, we need to understand the various principles according to which disputants justified the correctness of their positions. It is to these discursive principles of Chosŏn constitutionalism that we now turn.

V. Discursive Principles of Chosŏn Constitutionalism

It might be objected that characterizing Confucian political philosophy as a constitutional theory is an exaggeration and/or misrepresentation. For, according to the conventional view, the Confucian position promoted a personalistic approach to politics, thereby neglecting the more stable and lasting institutional aspects of politics. In other words, Confucianism failed to distinguish between politics and morality.

86) Patricia B. Ebrey, Confucianism and Family Rituals in Imperial China 34-37 (1991); Wechsler, Offerings of Jade and Silk: Ritual and Symbol in The Legitimation of The T'ang Dynasty 9 (1985) ("Confucians served as experts in the field of ritual, discoursing on its proper forms and manipulating it for political ends, both on behalf of and against monarchical power.").

87) For a similar interpretation of the ritual discourse in China during Ming dynasty, see Ron Guey Chu, *Rites and Rights in Ming China, in* Confucianism and Human Rights 169 (Wm. Theodore de Bary & Tu Weiming eds., 1998).

88) *See generally* JaHyun K. Haboush, *Constructing the Center: The Ritual Controversy and the Search for a New Identity in Seventeenth-Century Korea, in* Culture and the State in Late Chosŏn Korea 46 (JaHyun K. Haboush & Martina Deuchler eds., 1999). For an exposition of these ritual controversies from a constitutional perspective, see Hahm, *supra* note 56, at 221-38.

Being generally disdainful of law, Confucianism was, the story goes, naturally inimical to the "rule of law" and preferred to practice the "rule of man." [89]

However, in light of the foregoing interpretation of Confucian law, and of ritual in particular, I believe these conventional wisdom must be radically revised. To further support my claim that Confucian political ideals as they were theorized and practiced by Koreans of Chosŏn dynasty warrant their designation as a form of constitutionalism, I shall in this Part examine the principles-constitutional discursive principles- that were invoked by Confucian politicians for the purpose of disciplining their ruler. In the eyes of someone conditioned to look for judicially enforceable norms, these may appear to be "mere" conventions or rhetorical devices, but as was seen above constitutional norms often rest on grounds no firmer than the fact that they are accepted as normative by the force of tradition.

Particularly, when examining the politics of traditional Korea, it is exceedingly important to recognize the "traditionalist" element of its constitutional culture. In order to appreciate how constitutional issues were argued by Chosŏn scholar-officials whose political language was informed by Confucianism, we need to understand that in the moral and political discourse of Confucianism, tradition occupied a place of fundamental importance. More importantly, we must understand that the authority of tradition could be, and in fact was, invoked in various ways for the purpose of disciplining political power. In other words, the vocabulary and arguments deployed in political disputations derived their normative and justificatory force from tradition.

Indeed, in some ways, the whole Confucian outlook is one that is steeped in a deep respect for tradition. For example, Confucius himself once described himself as a preserver and transmitter of tradition.[90] He idealized the cultural traditions of the Zhou dynasty and lamented the decay and corruption of those traditions.[91] For that, he is sometimes portrayed as a hopeless reactionary or at best a conservative. Yet, the reason

89) The origins of these stereotypes are very old. In the West, one might even trace them as far back as to Montesquieu, who described the Chinese government as one committed to a rule by morality. Montesquieu, The Spirit of the Laws 317-21 (Anne M. Cohler et al. trans. & eds., 1989) (1748). East Asians too adopted this view in their self-descriptions. *See, e.g.*, Liang Chi-Chao, History of Chinese Political Thought During the Early Tsin Period (L. T. Chen trans., 1930) (contrasting Confucian "rule of man" with Legalist "rule of law").

90) Confucius, *supra* note 60, at 195.

91) *Id*. at 160 (proclaiming himself a follower of Zhou culture); Id. at 162-63 (lamenting the transgression of Zhou ritual regulations by usurpers).

that he wished to transmit the Zhou cultural traditions was because, for him, they embodied the constitutional framework[92] required for civilized human existence. Therefore, for later Confucians, it was natural to emulate their Master in wishing to preserve (and sometimes even revive) ancient traditions.

One powerful principle that informed their political discourse, and which represented this strong disposition toward tradition is the concept of the "way of the former kings" (*sŏnwang ji do*; Chinese: *xianwang zhi dao*). "Former kings" here refer to the ancient mythical sage kings of China such as Yao and Shun, who were said to have laid down the basic framework of human civilization. Indeed, whatever they did (in matters of personal morality, friendship, family, politics, economics, criminal justice, etc.) were regarded as the perfection of human possibilities. As mythical figures, they obviously predate Confucius, and Confucius himself talked about emulating them. They were perennial models for later generations.[93]

The significance of the term "way of the former kings" for understanding Confucian constitutionalism lies in the fact that scholar-officials of Chosŏn were able to use this to discipline their king. They constantly urged the monarch to discipline himself by taking the ancient sage kings as his model. They capitalized on the ancient past as the criterion by which to judge and criticize the present.[94] If there was a disruption of peace and order in the realm, it was attributed to the current king's deviation from the way of the former kings. And it wasn't just because the former kings were perfections of personal moral virtue. Matters of policy, such as tax, agriculture, and commerce, were also to be judged according to the model set by the former kings, which were often referred in the discourse as "ancient institutions" (*koje;*

92) The Confucian term for this is *ye-ak-hyŏng-jŏng* (Chinese: *li-yue-xing-zheng*), which literally means "rituals-music-punishments-regulations" and is often used as a shorthand for a state's entire social and political arrangements. *See, e.g.*, 2 Li Chi, *supra* note 68, at 93 ("The end to which ceremonies, music, punishments, and laws conduct is one; they are the instruments by which the minds of the people are assimilated, and good order in government is made to appear."); *id.* at 97 ("When ceremonies, music, laws, and punishments had everywhere full course, without irregularity or collision, the method of kingly rule was complete.")

93) *E.g.*, 1 Li Chi, *supra* note 68, at 367 ("Confucius said, 'It was by those rules [ritual] that the ancient kings sought to represent the ways of Heaven, and to regulate the feelings of men."); Mencius 4A:1 ("There has never been anyone who has abided by the way of the former kings and fallen into error.").

94) What Professor William Alford has aptly described as the "power of the past" pervading all intellectual discourse of traditional China was also in operation in Korea. William P. Alford, To Steal Book is an Elegant Offence: Intellectual Property Law in Chinese Civilization 20-28 (1995).

Chinese: guzhi) or "ancient rituals" (*korye*; Chinese: *guli*). Invoking such terms therefore had great rhetorical power because they represented the normative force of tradition which the current king was required to follow. They were the reference point to which later kings were expected to look for guidance and enlightenment. In other words, the government and laws of the former kings were to serve as a model for the present-day ruler.[95]

In order for the current king to follow the way of the former kings, he had to have access to records of the former kings. Since those records were to be found in the Confucian classics, this meant that the current ruler had to be educated in the classics. The government of Chosŏn therefore had specialized offices dedicated to the education of the ruler, starting from his days as the crown prince. These were specifically provided for in the administrative code.[96] While it is difficult to generalize or summarize the classics without great distortions, it is safe to say that an important aspect of them were the idealized representations of the ancient past in which sage kings maintained peace and harmony through constant self-discipline.[97] And, although it may be difficult to regard them as constitutional documents in themselves,[98] the Confucian classics such as the Five Classics and the Four Books did function as

95) Park, *supra* note 47, at 401-04.

96) One of these was the *Kyŏngyŏn*, or Royal Lecture, mentioned above. Whereas this office was in charge of lectures to the king, another office *Seja Sigangwŏn*, or princely lecture, was in charge of the crown prince's edification and enlightenment.

97) Obviously, not all classics purported to be records of the former kings' exemplary deeds. Some contained highly metaphysical discourses on human nature, while others were very mundane instructions on how to perform specific ritual ceremonies. Nevertheless, their authority as classics and as sources of constitutional norms were inextricably related to the claim that they all derived from antiquity and thus connected to the sage kings. By the time of Chosŏn dynasty, the scholar-officials were all familiar with the Five Classics (*Book of Poetry, Book of Documents, Book of Changes, Record of Rituals, Spring and Autumn Annals*) and Four Books (*The Great Learning, Analects, Mencius, Doctrine of the Mean*).

98) *But see* E.A. Kracke, Jr., Civil Service in Early Sung China 960-1067 (1953). Describing the political outlook of the Song dynasty's ruling elite, Kracke wrote:

> The Confucian classics became a fundamental part of the state constitution, with a force which neither the Emperor or his subjects could venture to deny. . . . This function of the classics was not formally stated in the legal codes; it was accepted as an assumption so basic that it required no statement.

Id. at 21. *See also* Herrlee G. Creel, The Origins of Statecraft in China 94-95 (1970) (describing some parts of the classics such as the *Book of Documents* as "a kind of constitution" that "defin[ed] both the duties of rulers and the grounds upon which . . . they might rightfully be deposed."). While it is certainly true that the classics were

sources for political norms whose meaning was to be re-presented and made relevant to the contemporary context. In other words, in order to ascertain the way of the former kings, one had to investigate and interpret the classics.

This points to another important aspect of Confucian constitutionalism, namely, the thoroughly "interpretive" nature of its constitutional discourse.[99] For, the classics had to be interpreted in order to be made relevant to one's own particular situation. Indeed, every Chosŏn scholar was aware of the enormous gap-temporal, spacial, social, cultural, and technological-that lay between themselves and the former kings. They recognized that in most cases the historical context had changed to such an extent that the laws of the ancient sage kings could not be applied without modification or adaptation. Depending on one's estimation of this gap, a range of views were possible. At one end of the spectrum, one could think that just a minimal amount of adaptation was required to follow the laws of the former kings. At the other extreme, one could think that no amount of calibration would be sufficient to make them relevant to the present context. Of course, short of rejecting the entire Confucian outlook (and adopting a Legalist perspective), ignoring the dictate to follow tradition and creating outright new institutions or policies would not have been an option for Chosŏn scholar-officials. Nevertheless, disagreements on how to assess the gap (i.e., how to interpret the classics) were certainly a common feature of Chosŏn political history. They often fueled sharp contention among different political factions and sometimes even

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authoritative, to say that they themselves were the constitutions of a Confucian state is unhelpful. As mentioned above, they included many matters of non-political nature, which had nothing to do with disciplining the ruler. To regard them as the constitution would be like claiming that, since Americans were predominantly Christians at the time of the Revolution, the Bible should be viewed as their constitution.

99) For readers familiar with American constitutional theory, my use of the term "interpretive" might be confusing. As used by some American scholars, "interpretivist" refers to the position that denies the need to look anywhere other than the "four corners of the text," whereas "non-interpretivist" refers to the view that argues for the need to accommodate for the changed circumstances that distinguishes us from the original drafters of the Constitution. *E.g.*, Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L.Rev. 703 (1975); John Hart Ely, Democracy and Distrust 1-2 (1980). Fortunately, in recent literature, scholars have largely abandoned this distinction, preferring instead to speak of "textualist vs. non-textualist" or "originalist vs. non-origialist" approaches. *See, e.g.*, Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984) (acknowledging the confusion caused by his earlier categorization). There seems to be a general recognition that law is an unavoidably interpretive exercise. On the significance of the "interpretive turn" in legal scholarship, see generally *Interpretation Symposium*, 58 S. Cal. L. Rev. 1 (1985).

amounted to a major crisis in the constitutional order.[100]

Another principle that was based on the authority of tradition, and repeatedly invoked within the constitutional discourse of Chosŏn was the concept of "ancestral precedents" or the "established laws of royal ancestors" (*chojong ji sŏnghŏn*; Chinese: *zuzong zhi chengxian*).[101] The idea was that whatever had been established by preceding kings had to be respected. Needless to say, the justificatory power of this idea stems from the core Confucian value of filial piety (*hyo*; Chinese: *xiao*). As a filial son, the ruler had the duty to honor and preserve his dynastic patrimony, and this meant that he could not make changes lightly to the laws, institutions, and policies of his forefathers. Any departure from ancestral precedents was severely criticized by remonstrating officials as a violation of the king's filial duty. In countless memorials to the king, Confucian scholar-officials urged him not to make new laws but to preserve and enforce the laws of his ancestors.

This principle was formally enunciated very early on in the history of Chosŏn dynasty. Ever since the third king, T'aejong (r. 1400-1414), ordered that provisions of a later code that altered the laws of the dynastic founder be struck out, ancestral precedents were treated with the utmost reverence.[102] When change in the law was unavoidable, it was ordered that the new law be appended as a footnote to the original law which remained on the text even if it was no longer in force.[103] In the Introduction

100) Certain aspects of the famous Ritual Controversy of the seventeenth century can be understood in this light. One faction (*Sŏin*) favored the position that the ritual prescriptions found the ancient classics, according to which the ordinary scholar-officials and royalty were to observe different rules, were not directly applicable to Chosŏn. The opposing faction (*Namin*) tried to argue that ignoring the class distinction prescribed in the ancient classics (i.e., "ancient institutions") was a grave mistake and that making the royal family observe ritual rules originally prescribed for the scholar-officials was tantamount to contempt of the throne. For more on this, see Hahm, *supra* note 56, at 227-34.

101) Park, *supra* note 47, at 51-52, 85-86, 404-06, 411-12 (1996); Chun, *supra* note 70, at 9.

102) Professor Byung Ho Park states that the establishment of this principle so early in the dynasty discouraged the practice of looking to foreign (i.e., Chinese) laws for either reforming or refining Korean laws. Park, *supra* note 47, at 51-52, 85-86. From this, it might be tempting to infer that this principle of respecting ancestral precedents was somehow a Korean invention which contributed to Korean "nationalism." Such inference, however, would be unwarranted in light of Chinese imperial history. It is well-known that the founder of the Ming dynasty, ordered his descendants and officials to honor his own laws and prescribed the death penalty to anyone who dared to suggest an alteration. *See* De Bary, *supra* note 46, at 94-97. De Bary writes that through "threats and imprecations Ming Taizu confirmed in blood the tradition of ancestral law as a "constitutional order"." *Id.* at 97.

103) In a way, this is similar to the amendment process of the American Constitution, in which older provisions

to the *Kyŏngguk Taejŏn*, future monarchs are admonished to abide by the established laws contained in that code and never to alter or forget the code.[104]

Beyond the Confucian virtue of filial piety, however, there were more practical considerations behind this principle. Confucian scholar-officials were concerned about the effect that frequent changes in the law might have on the people's trust in the government.[105] Also, they were deeply worried about setting a precedent by making an exception to the ancestral laws. Consequently, they repeatedly memorialized the king that departing from the ancestral laws in a given case will become a precedent, which less scrupulous future kings and officials could cite as authority for disregarding the entire "established laws of royal ancestors."

Obviously, the principle of unalterability and permanence of ancestral laws could not be observed to the letter. That is, even in a tradition-bound constitutional culture, changes in the law were inevitable and indeed necessary. One scholar of Korean legal history suggests that the principle of respecting the "established laws of royal ancestors" were actually more often honored in its breach.[106] As evidence, the fact is cited that throughout the dynasty, the government of Chosŏn was constantly engaged in the process of revising and updating their laws. Nevertheless, invocation of precedents were a permanent feature of the constitutional discourse of traditional Korea. In a way, it was due to this principle that Chosŏn had to constantly struggle with codification projects.

In this connection, we must revise another conventional view that is common among Western scholars of East Asian legal history, namely, the view that there was no doctrine of binding precedent like that of *stare decisis* in the Anglo-American tradition.[107] As we have seen so far, Korean law, or at least constitutional law, was

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that have been altered or even repealed by later amendments continue to stay on the text as part of the document. The most obvious example would be the amendment that enforced Prohibition (of alcoholic consumption) and the later amendment that repealed it. U.S. Const. amend. XVIII, *repealed by* U.S. Const. amend. XXI.

104) The writer of the introduction goes on to boast that observance of the ancestral laws will bring about enlightened government whose brilliance will even surpass that of Zhou, the dynasty which always served as the ideal for all Confucians.

105) Park, *supra* note 47, at 412-15

106) Shaw, *supra* note 57, at 29. *See also* Park, *supra* note 47, at 52, 86, 415.

107) The Western views described here deal with Chinese legal history, rather than Korea. I believe, however, they would be applied *mutatis mutandis* to the case of Korea if anyone were to theorize about its legal history.

pervaded by a sense of being bound by precedents. The two principles of "way of the former kings" and "ancestral precedents" are nothing if not a call to respect and follow precedents. What then is the source of the conventional view? I believe this is due to an assumption about what constitutes "law" in traditional East Asia, an assumption which effectively excludes from the scope of scholarly discussion anything that could be called traditional constitutional law. In other words, due to the assumption that there was no constitutional law, the discussion only focuses on either criminal proceedings or civil disputes among ordinary people. And in both cases, Confucianism is put forth as an explanation for the lack of *stare decisis.*

For example, one scholar attributes this to the Confucian preference for ritual over "law" (*pŏp*). Because *ye* was inherently a flexible norm, as opposed to the rigidity of *pŏp*, and because all disputes were to be resolved in accordance with *ye* rather than *pŏp*, Confucianism could not tolerate a doctrine that insisted on being bound by precedents. In other words, since *ye* required sensitivity to the specifics of each individual case, it had no need for a doctrine like *stare decisis.*[108] Although this view is right in emphasizing the importance of *ye* in Confucian legal and political thought, it fails to consider the fact that many dictates of *ye* were also incorporated into penal codes and hence became rigid rules themselves.[109] Moreover, as seen above, the governments of Confucian regimes compiled ritual codes in order to justify their mandate to rule. With the passage of time, the need also arose for handbooks and casebooks that could guide the administration of justice by the magistrates. Perhaps out of practical necessity, like cases were expected to be decided alike.[110] Of course, this is still different from a legal doctrine which requires the invalidation of a decision which failed to follow relevant precedents. Yet, it does call into question the thesis that Confucianism had no need for a doctrine of binding precedents.

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108) R.P. Peerenboon, Law and Morality in Ancient China 125-32 (1993).

109) Often called the "Confucianization of law," this process refers to the utilization of rigid and coercive measures to enforce the requirements of ritual. Ch'ü T'ung-Tsu, Law and Society in Traditional China 267-79 (1961). For an argument that Chosŏn ruling class's outlook was at once thoroughly Confucian and harshly legalistic, see William Shaw, *The Neo-Confucian Revolution of Values in Early Yi Korea, in* Law and the State in Traditional East Asia 149 (Brian E. McKnight ed., 1987).

110) For studies in English of such handbooks, see Derk Bodde & Clarence Morris, Law in Imperial China (1967) (analysis and translation of *Xingan Huilan* [Conspectus of Criminal Cases] of Qing dynasty); William Shaw, Legal Norms in A Confucian State (1981) (examination of *Simnirok* [Records of *Simni* Hearings] of Chosŏn).

Another eminent scholar of Chinese law refers to the Confucian demand that all cases be decided according to the universally valid moral principles embodied in the classics as the reason why Confucianism was incompatible with *stare decisis*. That is, since those moral principles were accessible to anyone who studied the classics, there was no reason to look to previous cases for guidance.[111] While this view does take notice of the "power of the past" as manifested through the classics,[112] it neglects to consider the same power of the past that becomes visible in political discourse. That is, while it may be that in ordinary civil and criminal cases the judge could not really be faulted for not following precedents, in constitutional matters, failure to follow precedents (of either ancient sage kings or royal ancestors) was deeply problematic for that implied a disrespect for the Confucian tradition or an unfilial attitude toward the dynastic forefathers. As one historian of China has written, precedents "served to hold the Emperor's power within limits and to prohibit any decline into absolutism."[113] I believe there is sufficient grounds to say that the doctrine of binding precedents was a constitutional principle in a Confucian polity.

It was mentioned that the way of the former kings were accessible through interpretations of the classics. In the case of ancestral precedents also, the process of ascertaining the requirements of ancestral laws was similarly an interpretive task. In the first place, they were to be located in the codes that were promulgated by the royal ancestors. In addition, they were also found in individual edicts issued by previous kings, or historical records of the royal ancestors. These texts all needed to be interpreted in order to be understood, and in many cases, there were interpretations of intervening generations which also demanded attention as ancestral precedents. In some cases, there were multiple precedents which would not necessarily be consistent among themselves. Also, for later generations, the gap between themselves and the royal ancestors might have been too great to allow a literal application of the ancestral laws. As in the case of the way of the ancient sage kings, adjustments and adaptations were necessary.

111) Alford, *supra* note 94, at 22.

112) *Id.* (suggesting that the absences of binding precedents may be a reflection of "an even greater embracing of the past").

113) Karl Bünger, *Genesis and Change of Law in China*, 24 L. & State 66, 80 (1981).

More significantly, there could be discrepancies between the dictates of the ancient sage kings found in the classics and the ancestral laws found in the dynastic codes and historical records. Perhaps, in an ideal Confucian world, this would not happen. In the real world of less than sagely rulers, however, the precedents set by the royal ancestor might not always be worthy of compliance or respect. In such instance, someone claiming to be more faithful to the classics, and therefore a "purer" Confucian, could invoke the principle of adhering to the way of the former kings to "override" the authority of the ancestral precedents. On the other hand, anyone wishing to preserve the institutions, policies, or practices handed down from the more recent past could always invoke the Confucian virtue of filial piety to argue for maintenance of the status quo. This does not mean that the principle of respecting ancestral precedents had an inherently "conservative" orientation, or that the principle of following the ancient sage kings necessarily served a "radical" interest. What counts as conservative or radical would depend on which principle better justified the existing state of affairs. That is, depending on the baseline, either principle could be invoked to criticize the status quo and argue for a reform.

To a cynic, the fact that there was no "objective" way to adjudicate between the two principles of traditional authority might imply that these were "mere" rhetorical flourishes that could be utilized to justify any and all arguments. Yet, by the same logic, we would then have to conclude that the modern constitutional principles of, say, majority rule on the one hand and protection of minority on the other are "mere" rhetorical flourishes employed on an ad hoc basis to justify whatever happens to fit one's interest. Likewise with the ideals of equality and liberty, or of individual freedom and the claims of community, which tend to pull in opposite directions, with no "objective" criterion for adjudicating or prioritizing the demands of the two. In the end, the answer to such issues depend on one's constitutional philosophy. A person with a liberal outlook will reach different resolutions than one who subscribes to socialism. In the field of comparative constitutional law, each state is said to reach its distinct resolutions to these and other issues, which in turn reflect their constitutional cultures. The crude, conventional view is that Americans have generally tended to give more priority to freedom and individual liberty compared to other nations. Yet, even in one country, these are ongoing issues and it is more realistic to expect that whatever resolution that obtains at the moment will likely change over time, with the change in the constitutional philosophy of the nation.[114)]

The adjudication between the two constitutional principles of traditional Korea can be expected to be similarly dependent on the prevailing constitutional vision of the moment. No doubt, the constitutional vision of the era was Confucianism. And, unlike modern states, traditional Korea had an official state orthodoxy, in the form of the state-required curriculum for the civil service examination. Ever since the fourteenth century, governments in both China and Korea adopted the Song dynasty master Zhu Xi's commentaries on the classics (particularly the Four Books) as the authoritative and orthodox interpretation of the Confucian learning.[115] This certification of the school of thought represented by Zhu Xi-commonly known as Neo-Confucianism in English-as the official ideology of the state continued at least nominally until the end of the monarchy at the turn of the century.

This meant that for rulers and scholar-officials of Chosŏn dynasty, Zhu Xi's doctrine operated as a third source of traditional authority, in addition to the former kings and ancestral precedents-a third constitutional principle, as it were. Everyone was expected to abide by Zhu Xi's interpretation of the classics and anyone who dared to disagree was criticized as a heretic. In constitutional discourse, the authority of Zhu Xi's thought could always be invoked to discipline the actions of the king. Historians generally agree that the authority of Master Zhu (as he was commonly called by his disciples) was even greater in Korea than in China. Whereas in China later political developments and intellectual trends seriously challenged the authority of Zhu Xi and his school, Koreans of Chosŏn continued to revere Master Zhu, even to the point of criticizing their Chinese contemporaries for failing to defend the orthodox teachings of Zhu Xi. In other words, the Zhu Xi orthodoxy in Korea was quite palpable to a degree never achieved in China.[116] Thus, to a certain extent, the issue of adjudicating between

114) One recent example in American constitutional law is the issue of the proper line between the powers of the federal and state governments. After a period of steady expansion of the federal government, there has been a reversal in the direction of more autonomy for state governments.

115) Zhu Xi (1130-1200) lived during the Song dynasty, and although his views and interpretations of the classics were already quite influential during his lifetime, at the time of his death they were actually banned by the Song government as heterodox. In 1241, however, his teachings were given imperial sanction, and in 1313, his texts were adopted as expressions of official state doctrine by the Yuan (Mongol) dynasty. Hoyt C. Tillman, Confucian Discourse and Chu Hsi's Ascendancy (1992). Korean scholars also had their first encounter with Zhu Xi's teachings during the Yuan period, and many scholar-officials who actively participated in the founding of Chosŏn in 1392 are said to have been motivated by a desire to reorganize the nation in accordance with Zhu Xi's interpretation.

116) *See generally* The Rise of Neo-Confucianism in Korea (Wm. Theodore de Bary & JaHyun K. Haboush eds.,

the principles of respecting the ancient sage kings and adhering to ancestral precedents, and of the potentially conflicting dictates of tradition generally, would have been resolved by relying on Zhu Xi's interpretations.

It must be added that even though Zhu Xi's interpretation was regarded as the definitive statement of the Confucian position on everything from politics, morality, to metaphysics, that hardly meant that everyone had the same views. There were variations among the followers of Master Zhu, which soon developed into distinct schools of thought, and opposing political factions.[117] Moreover, even though hardly anyone dared to openly criticize Zhu Xi's interpretations of the classics, Korean scholar-officials, particularly of the later period, began to form their own independent opinions on the soundness of Master Zhu's commentaries.[118] While nominally professing to follow his interpretations, many achieved a level of scholarship that enabled them to view them critically, in light of their own understanding of the classics.[119]

Thus, in order to understand the constitutional discourse of Chosŏn, we must keep in mind that these three partially overlapping and partially distinct sources of authority were at work all at the same time. One's constitutional vision was necessarily the result of how one negotiated these three sources. Political and constitutional conflicts were the result of different people prioritizing them in different ways. Just as constitutional disputes can arise today through a clash among different people holding different answers to the problem of how to weigh the demands of equality and liberty, Chosŏn constitutional disputes arose from disagreements among people who assigned different weights to the dictates of ancient sage kings, ancestral precedents, and Zhu Xi's orthodoxy.

For example, in the seventeenth century Ritual Controversy alluded to earlier, one group based their arguments on the authority of ancestral precedent, or more precisely ritual provisions found in the *Kyŏngguk Taejŏn*, and the orthodox of Zhu Xi. Their

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1985).

117) For a short genealogy of the political factions of Chosŏn and their different interpretations of the classics, see Mark Setton, Chŏng Yagyong: Korea's Challenge to Orthodox Neo-Confucianism 21-51 (1997).

118) For a study of the very few who in fact went against the orthodoxy of Zhu Xi, see Martina *Deuchler, Despoilers of the Way-Insulters of the Sages: Controversy over the Classics in Seventeenth-Century Korea, in* Culture and the State in Late Chosŏn Korea, *supra* note 88, at 91.

119) *See generally* Setton, *supra* note 117.

opponents tended to emphasize the authority of the former kings, whose teachings were found in the ancient classics. This, however, did not mean that the latter group was free to ignore the authority of Zhu Xi. In fact, they claimed that they were the more faithful followers of Zhu Xi. Similarly, invoking the authority of ancestral precedents should not be seen as rejecting the way of the former kings, for ancestral laws themselves drew their authority from being modeled after the "ancient institutions."[120]

One way of understanding the relationship between the three sources of authority is to regard both ancestral precedents contained in the various codes and Zhu Xi's orthodoxy as different interpretations of the same former kings of antiquity. Zhu Xi was quite conscious about giving a contemporary and more relevant interpretation to the dictates of rituals found in the ancient classics. Faced with the realization that there were numerous gaps between the prescriptions of the former kings and the practices of his own time, he made numerous adjustments and compromises to fit the exigency of his day.[121] As seen above, the ancestral codes were also based on the ritual prescriptions of the former kings, but were also the product of a similar process of adjustments and compromises necessitated by the gap between Zhou dynasty China and Chosŏn Korea. In sum, for Chosŏn Confucians, the way of the former kings was the primary source of authority, but they also had very pressing political and intellectual reasons for respecting Zhu Xi and the ancestral codes.

Sometimes the calculus became even more complicated because another source of authority had to be respected. For the government of Chosŏn, which regarded itself as a "kingdom" in relation to the "empire" that existed in China, the laws and institutions of the current Chinese court had to be accorded certain presumptive authority. Thus, the laws and institutions of the Ming dynasty, which was a rough contemporary of Chosŏn, were often referred to and cited in political debates. In fact, Korean scholar-officials began consulting Ming practice from the beginning of Chosŏn until even after the Ming had fallen in China and been replaced by the Manchu regime of Qing. In some constitutional disputes they were also held up as authority, especially when domestic laws were unclear.

120) *See* Hahm, *supra* note 56, at 236-37.

121) For a description of reinterpretations and modifications of the ancient rituals by Zhu Xi and his predecessors, see generally Patricia B. Ebrey, Confucianism and Family Rituals in Imperial China (1991).

The rationale for according such respect to the Chinese practice was not simply related to considerations of international politics such as the fact that China was the more powerful of the two nations. Confucian theory itself dictated a certain respect for the "institutions of the current king" (*siwang ji je*; Chinese: shiwang *zhi zhi*).[122] Although they might not be as worthy as the ancient sage kings, there was a theoretical presumption (however unjustifiable in reality) that the current occupant of the throne would be the legitimate recipient of the Heaven's Mandate to rule,[123] and this in turn made his institutions presumptively worthy of some consideration. If we count this as another source of authority in Confucian political discourse, it might be regarded as the fourth principle of Chosŏn constitutionalism.

In practice, however, this demand for respecting the Ming practice was always tempered by the awareness that Korea was in important ways very different from China. Some Korean scholar-officials criticized some of the Ming practice for misunderstanding the way of the former kings. Others even claimed that some laws and institutions of the Ming were "corrupt" because they originated not from the ancient sage kings but from degenerate tyrants of later generations.[124] Nevertheless, Chosŏn government continued to accord presumptive weight to the institutions of Ming.

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122) According to Zhu Xi, the reason why Confucius chose to preserve and follow the practices of the Zhou dynasty was because for Confucius they represented the "institutions of the current king" (*shiwang zhi zhi*). Zhu Xi, Sishu Zhangju Jizhu [Collected Commentaries on the Four Books in Chapters and Verses] 36 (Zhonghua Shuju edition 1983) (commentary on Chapter 28 of *Zhongyong* [Doctrine of the Mean]).

123) According to the theory of the Mandate of Heaven, a political ruler had a right to rule only because Heaven had given him a Mandate, the implication being that Heaven could always revoke the Mandate and give it to someone else if the current ruler was not worthy of it. In the Confucian classic, the *Book of Documents*, this theory is invoked numerous times by the Duke of Zhou to justify Zhou's conquest of the Shang dynasty (1766-1122 B.C.). The Shoo King [Shu Jing] 425-32, 453-63, 492-507 (James Legge trans., reprint ed. 1991) (1865). For discussions on the idea of the Mandate of Heaven, see Creel, *supra* note 98, at 81-100 (1970); Benjamin I. Schwartz, The World of Thought in Ancient China at 46-55 (1985). Though sometimes discussed as a Confucian analogue to the Western idea of natural law, and often mentioned for its potential for restraining the power of the ruler, it seems to have been used throughout history more often in a retrospective manner, to legitimize the rule of a new ruler or a newly founded dynasty, rather than as a constitutional argument for disciplining the ruler. For a summary of views that regard the Mandate of Heaven as a functional analogue of natural law, see William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 Tex. L. Rev. 915, 935-37 (1986).

124) For example, during the Ritual Controversy of 1659, one side argued that the Ming regulation relied on by their opponents was unworthy of respect because it originated from the period of the evil usurper Empress Wu (Wu Zetian) (r. 690-705) of Tang dynasty China.

In sum, Chosŏn Confucians seeking to discipline the ruler could avail themselves of a number of discursive principles, which manifested different aspects of the authority of tradition. The fact that there were no guidelines as to how to prioritize them or which should take precedence in case their requirements were mutually inconsistent should not lead us to regard them as mere rhetorical formulae. They defined the terms of the Chosŏn constitutional discourse, and through their interaction they produced a political culture in which the authority of tradition had to be adduced in the form of some concrete provision or precedent.

VI. Conclusion

The main argument of this article has been that constitutionalism is actually not a novel development in the history of Korea. To support that claim, I have described how Koreans of Chosŏn dynasty tried to implement constitutionalism, and what resources and discursive principles were available to them. Yet, despite this historical experience in conducting constitutional politics, Korea during the past century has undergone such a profound change that the modern constitutionalism that is being slowly implemented by the Korean Constitutional Court is quite different from the Chosŏn dynasty's Confucian constitutionalism. In a way, there *was* a radical break from the past, and it is hard to find traces of the Chosŏn constitutionalism in the present.

Without intending to belittle the profundity of the change that took place, however, I submit that it is still important to understand that Koreans have known and aspired to practice constitutionalism for many centuries. This is so because in order to practice the modern type of constitutionalism correctly and effectively, Koreans must be able to draw on their history and culture, for constitutionalism in the end depends on the existence of a certain culture, or shared symbols and strategies for action, which make discipline of power possible.[125] Without a culture and a tradition to support it and to hark back to, Korean constitutionalism will always remain a "derivative" practice, an

125) Lawrence W. Beer, *Introduction to* Constitutional Systems In Late Twentieth Century Asia 1, 16 (Lawrence W. Beer ed., 1992) (constitution of a state must be connected with "the most important, most binding ideas at the heart of that culture"). *See generally* Political Culture and Constitutionalism (Daniel P. Franklin & Michael J. Baun eds., 1995).

epiphenomenon dependent on the constitutional experience of Germans or Americans.[126]

The importance of cultural support for a flourishing constitutionalism points to another aspect of constitutionalism as the practice of disciplining power, namely, that constitutionalism is very much an educative project. It is in fact educative in a double sense. First, it is educative in the sense that constitutionalism requires educating citizens about their constitutional tradition and culture.[127] It requires citizens who are socialized into a constitutional culture. This in turn calls for conscious efforts to highlight and interpret the national culture in constitutional terms. I submit that Korean tradition and culture has many elements which conduces to the disciplining of political power. For example, the Confucian tradition of institutionalized remonstrance is something that is very familiar to every Korean.[128] More generally, as mentioned above, Chosŏn was a period in which the throne was constantly checked and even browbeaten by the ministers. In other words, contrary to the popular view which portrays Korean culture and tradition as having inhibited the growth constitutionalism, I believe there are many historical and symbolic resources that can be mobilized to educate modern Koreans about their constitutionalist tradition.

Secondly, constitutionalism is educative in the sense that the experience of living under a constitutional regime will have a formative effect on the characters of the citizens.[129] As mentioned earlier, the activities of the Korean Constitutional Court is

126) Given that an overwhelming majority of Korea constitutional law scholars are German-trained, the German influence on Korean constitutional law scholarship needs no elaboration. For the relatively smaller, though by no means negligible, influence that American constitutionalism has had on modern Korea, see Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. Ill. U. L.J. 71 (1997).

127) This need for educating citizens is not limited to what I have called the "formative" approach to constitutionalism. Even in the U.S., where the Newtonian approach is said to be prevalent, this need has always been recognized. On the American experience with educating constitutional citizens, see Stephen Macedo, Diversity and Distrust: Civic Education in a Multicultural Democracy (1999).

128) By institutionalized remonstrance, I am referring to the role of the censorate in Chosŏn government alluded to above. *See supra* note 85. It is interesting to note that under the so-called "modern" government structure instituted by the Kabo Reforms, the office of the censorate was abolished. The rationale seems to have been that the office of the censorate was contributing to factional strife within the government. Yet, it is still ironic that at the beginning of modern constitutionalism in Korea, one of the major organs responsible for disciplining power was eliminated.

129) Stephen L. Elkin, *Constitutionalism's Successor, in* A New Constitutionalism 117, 122-24 (Stephen L. Elkin & Karol E. Soltan eds., 1993) (discussing the formative function of institutions).

having a transformative effect on the citizens outlook. Seeing that the discretionary power of the prosecutors is subject to constitutional limitations, or that the government cannot claim a privileged status in its relation to ordinary citizens have contributed to educating the people about their rights and roles as citizens of a constitutional regime. In the U.S., the famous constitutional law scholar Alexander Bickle has noted that the U.S. Supreme Court should play the role of a teacher in an "national seminar" on constitutionalism.[130)]

I believe that, if constitutionalism is to take root and flourish in Korea, this doubly educative aspect of constitutionalism must be taken seriously. If Koreans are able to combine an understanding of constitutionalism as disciplining of power with a proper understanding of the constitutionalist elements in their tradition and culture, they will have at their disposal a particularly rich cultural resource from which to draw.

One such resource is the concept of ritual (*ye*), which was described above as a constitutional norm of Chosŏn dynasty. Although Korea is no longer an officially Confucian state, ritual is still a very important and familiar concept to modern Koreans. It still provides the means by which Koreans interpret and evaluate each other. People learn to relate to one another and define one's place in family and society in terms of *ye*. A person who does not observe *ye* properly becomes a social outcast. Recently, even the Korean Constitutional Court had an occasion to note the important role played by *ye* in Korean society.[131)]

Given this centrality of ritual norms in Korea, it can help promote a constitutional culture among Koreans. This is because *ye* is essentially an educative norm. All Koreans understand that to be proficient in *ye* in interpersonal relationship, one must undergo a constant process of training and cultivation of a sense of what is proper to do in a given situation. *Ye* is about education and self-discipline. Unfortunately, it has become de-politicized today so that its historical role of disciplining political rulers has

130) Bickel, *supra* note 39, at 26. In a similar vein, one historian of the Court has said that one of its important function since the American founding has been that of a "Republican Schoolmaster." Ralph Lerner, *The Supreme Court as Republican Schoolmaster, in* The Thinking Revolutionary 91 (1987).

131) 98 heonma 168, 10-2 Hŏnpŏpjaep'anso Pallyejip 586 (Oct. 15, 1998) (holding unconstitutional a provision in the Law of Family Ritual Standards which criminalized the practice of serving "unreasonable" amount of food and drinks at weddings). The Court criticized the government for attempting to "legislate" morals and manners by imposing legal penalties. The Court also commented that traditional family rituals like weddings and funerals are part of the nation's cultural heritage which the state has a duty to sustain and develop.

been largely forgotten.

I believe constitutionalism in Korea today will be given a firmer cultural grounding when this aspect of *ye* is retrieved and translated into the modern context. The goal would be a cultural awareness that being adept at the requirements of *ye* means not only being courteous to others, but also having the ability to discipline political leaders. Korean constitutionalism will flourish when citizens of Korea are able to make an outcast of a political leader who fails to observe the requirements of *ye*, when a government that fails to be disciplined in the exercise of its power will automatically be regarded as illegitimate. When Korean Constitutional Court is able to speak about *ye* in terms of its original constitutional role, and not just in terms of its ceremonial aspects, I believe constitutionalism in Korea will cease being a derivative practice.