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Book Review

BOOK REVIEW

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LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE: CORPORATE AND CAPITAL MARKET LAW HARMONIZATION POLICY IN EUROPE AND THE U.S.A. R. Buxbaum & K. Hopt. Berlin: de Gruyter, 1988. Pp. 347, includes biography and index. Cloth, —.

When six nation states in Western Europe ("Member States") signed the Treaty of Rome, creating the European Economic Community (now known as European Community or EC), they envisioned the development of a Common Market.[1] In the Common Market, all "obstacles to freedom of movement for person, services and capital" among the Member States were to be abolished.[2] The signatories believed that a properly functioning Common Market would lead to a continuous and balanced economic expansion in the Community, an increase in economic stability within the Community, an accelerated increase in the standard of living for citizens in the Member States, and better relations between these States.[3] In 1987, the Community, now consisting of twelve Member States, agreed to establish a fully integrated "internal market" by 1992.[4]

The Member States, however, have numerous and fundamental differences in their company and capital market laws (more often referred to in this country as corporate and securities laws). These differences run the gamut. Regulations on company finance, internal structure, disclosure obligations, and securities traders fluctuate widely from one nation to the next. Some of the differences are technical, resting on pragmatic disagreements. For example, are two-tier boards of directors, separating supervisory from management directors, preferable to one-tier boards in keeping managers loyal to shareholder interests?[5] Other differences reflect disparate political choices about socio-economic systems and rest on deeply felt emotion and ideology. An example is the divergent laws of the Member States on the subject of whether workers should have representation on corporate boards.[6]

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1. Treaty Establishing the European Economic Community, 25 Mar. 1957, 298 U.N.T.S. 11, art. 2 [hererinafter "EEC Treaty"].

2. EEC Treaty, *id.* at art. 3(c).

3. EEC Treaty, *id.* at art. 2.

4. EEC Treaty, *id.* at art. 8A.

5. Germany requires two-tiered boards; firms in France may choose either; and English firms have one-tiered boards.

6. Germany has the strongest form of worker codetermination, requiring equal representation of labor and capital interest on a supervisory board that oversees the

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The signers of the EEC Treaty recognized that some harmonization of the company and capital market laws of the Member States might be necessary to the eventual success of the Common Market. Article 54(3)(g) of the Treaty provides for the approximation of company and capital laws "to the necessary extent."[7] The thorny questions before the EC Commission then are: first, to what extent ought the European Community harmonize the company and capital market laws of the Member States; second, assuming the EC decides that a particular type of regulation need be uniform in the Community, which version is preferable; and third, what process ought the EC use to coax (or force) Member States into accepting the preferred rule.

Unfortunately, the Commission has not yet risen to the task. Its infrequent and disjointed directives and proposals for company and capital market law harmonization exhibit a total lack of theoretical connection and sophistication.[8] This conceptual void led Professors Richard Buxbaum and Klaus J. Hopt, in their book *Legal Harmonization and the Business Enterprise: Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.*,[9] to grapple directly with the hard questions avoided by the Commission. Sifting through economic and political theory and the history of the federalist experience in America, the authors search for criteria that could aid a rational division of power between the Community and its Member States in company and capital market regulation.

The authors' normative conclusions on the basic questions are limited to a mild suggestion that the Community should take firmer steps to instruct Member States through legislation[10] and court decisions.[11] The book contains no particularized conclusions on how much harmonization is necessary to the creation of a common market nor on what the content of the Community-wide rules ought to be. It matters not. I thoroughly enjoyed the book. The strength of the book lies not in its prescriptions, but in its delightful journey through the arguments and in

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management board. Other Member States have a variety of weaker forms of worker participation and some have no such rules.

7. Article 54(3)(g) is a specific application of the more general Article 3(h), which calls for "the approximation of the laws of Member States to the extent required for the proper functioning of the common market." *See also* Article 100 (approximation is to be pursued only with respect to laws that "directly affect the establishment or functioning of the common market") and Article 100A (omitting such a limitation on the harmonization of laws for the purpose of achieving the "internal market").

8. The Commission has adopted eight formal Directives on company law harmonization and nine directives relating to capital market laws.

9. R. Buxbaum & K. Hopt, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE: CORPORATE AND CAPITAL MARKET LAW HARMONIZATION POLICY IN EUROPE AND THE U.S.A. (1988) [hereinafter LEGAL HARMONIZATION].

10. The Commission could base Community regulations under Article 235.

11. The European Court of Justice, under EEC Article 177, can, if properly asked, interpret Commission directives and clarify whether a Member State's laws are inconsistent.

its sober predictions of future events.[12]

Chapter Two contains a cogent summary of the "American Experience." Detailing our mixed system of federal and state regulation of company and capital market issues, we are encouraged to wonder whether the EC could adopt a similar balance. We rely on state control over our company laws and on federal control over our capital market laws. But our reliance in each case is not exclusive. Federal regulation of company law comes in the form of proxy, tender offer, and fraud provisions of federal securities acts, and in implementing regulations of a federal agency, the Securities and Exchange Commission. State regulation of the capital markets comes in the form of state blue sky laws (and, perhaps, some aspects of state banking laws).

States regulate company law through corporate codes that control the internal affairs of firms. With the exception of some provisions in the New York and California corporate codes,[13] American firms can choose which state's law will apply to them by filing incorporation papers in the locale of their choice. There are no requirements that a firm have its principal office, a significant number of shareholders, or even substantial assets in its state of incorporation.

The authors believe that state codes have become substantially similar; our reliance on state regulation has led to "harmonization from below." States, competing for charters, imitate those states that appear to have the best success in attracting incorporations. Moreover, states were not hesitant to rely on a model act drafted by the Committee on Corporate Laws of the American Bar Association. The claim that state codes are largely similar may strike an American corporate law teacher as overbroad (can we say that California's code is similar to Delaware's code?), but is surely correct in the sense that our state codes look closely related when compared with the various company laws of the individual Member States in the EC.

Will Member States of the EC, if left with the power to regulate company law without substantial Community interference, follow a similar path to substantial uniformity? The authors answer in the negative. First, most Member States require a firm to incorporate not in the nation of their choice but rather in the nation that contains the firm's headquarters (the siege social). This severely restricts (although it does not eliminate)[14] competition among nations for firm incorporations and

12. Indeed, the authors' restraint is welcome in a time when legal writing is dominated by strident advocacy of position. These authors are scholars in the true sense of the term.

13. New York and California have chosen to require "pseudo-foreign" corporations (corporations that carry on most of their business in state but are incorporated out of state), to adhere to a few select provisions in their corporate codes. *See* Cal. Corp. Code § 2115 (West 1986); N.Y. Bus. Corp. Law §§ 1217-1220 (McKinney 1986).

14. Firms can relocate corporate headquarters, but at some cost. Moreover, as long as the Member States do not restrict the flow of capital, investors can still choose among corporations based on the soundness of national regulations.

is unlikely to change. Member States have shown deep displeasure whenever local firms claim a foreign seat. There is wide acceptance in the EC of the view that the seige theory provides more effective control of large firms than the incorporation system used in the United States, which allows states to export the weakest law.[15]

Second, the authors conclude that there is a "stickiness problem because of the need to revamp Member State legislation to a degree not required" at any single point in time in the evolution of the American conventions.[16] For a single convention to develop, some Member States must suffer a radical change in their legislation, a change that will gore those entrenched interests tied to the perpetuation of the old systems. Lawyers and accountants in obsolete systems, for example, will lose the value of their expertise. Moreover, some differences, such as those over the rights of workers to participate in management, have deep political roots.

If harmonization from below seems impractical, can the EC itself legislate harmonization from above? The authors carefully detail the Treaty provisions and Community institutions that give ample room for political directives from the Community, but note, somewhat sadly, that the Community has shown excessive temerity on the matter. The Community has relied on directives rather than regulations to protect the sovereignty of the Member States. Directives apply to the states as states and regulations establish rights and duties among individuals within states. The EC, through a directive, asks that each state pass legislation transforming the directive into local law. The process, however, has bogged down in practice. The EC has found it politically comfortable to issue directives that contain the lowest common denomination of

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15. Europeans do not accept the arguments of Winter and others that claim our competition among states produces the most efficient codes. *See, e.g.*, Winter, *State Law, Shareholder Protection, and the Theory of Corporation*, 6 J. LEGAL STUD. 251 (1977). *See also* Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J. L., ECON. & ORG. 225 (1985).

The authors argue that even in theory, the Winter argument is unhelpful because it assumes a pre-existing formal division of powers in a federal system, a division dependent on political variables. The authors suggest that if the EC relied exclusively on Member State competition to set EC law that social pressure for some kinds of public law protection would develop and would lead the federal authority to act. But if the federal authority was initially denied such authority for political reasons, it would not become more politically acceptable as a result of simple expedience. In other words, a system of competition in laws assumes some basic division of powers between federal and member units based on tacit political variables. The authors conclude that the Winter thesis is empirically suspect.

> The pressure that each state in the American constellation felt to "go Delaware" was a pressure caused not by the economic realities postulated by the public choice theory, buy by a legal, paradoxically perhaps even a federal level legal doctrine. . .That alone renders the evidence of the American harmonization experience useless to prove, though it does not necessarily disprove, the public choice hypothesis. Minor franchise tax revenues may have tempted a West Virginia, but hardly a New York.

LEGAL HARMONIZATION, *supra* note 9, at 274.

16. *Id.* at 277.

the national laws and then permit individual Member States a multiplicity of "options."[17] The options are designed to enable each of the Member States to save most of its pre-existing laws. Moreover, there are long-term lapses between the adoption of a directive and corroborative Member State legislation. The authors conclude that harmonization through Community directives and the like will be continuous but slow and fragmented.

At this point one ought to ask whether the EC has simply overplayed the importance of company and capital market law harmonization. Perhaps the Common Market can function effectively without harmonization in these areas as long as a few critical norms (no restraints on the travel of people, goods, or capital through tariffs or other restrictions; no government subsidies to local firms; no cartels or monopolies; and no market restrictions through government regulation of product features or quantities) are recognized.

The authors briefly discuss and largely dismiss views critical of the EC assumption that harmonization of company law is necessary.[18] I would have enjoyed a fuller treatment of these issues. The authors give us only two paragraphs on whether shareholder/creditor interests are better served by harmonized Member State codes or by the existing system of Member State regulation. In these paragraphs they do not discuss the ability of investors to protect themselves by discounting the price of their investments for inferior national regulation, let alone the difference between the positions of shareholders and creditors as investors.

The market power of investors, at a time when money knows no national boundaries and can travel around the world in a matter of seconds, will have major effects on the regulations adopted by Member States and by the EC as well. We have only to look at Great Britain's deregulation of its London stock exchange for a dramatic illustration of these influences.

Moreover, there is only a single off-handed reference to the Eurobond market, a trading system developed within existing regulations by the international investment community to tap capital resources in Europe. Eurobonds avoid some of the problems associated with multiple currencies among European nations because they are denominated by one currency, usually dollars (sometimes in yens or marks), wherever sold in the EC. The strength of the market comes from the ability of issuers to avoid national controls. Since the market is neither heavily regulated nor heavily taxed, it is very popular with foreign subsidiaries of American firms, for example, who seek to avoid United States securities, tax and foreign investment regulations. In other words, American firms find that they often can raise capital in the Eurobond market at

17. The Fourth Directive allows for 41 options to Member States and 35 options to firms themselves. *Id.* at 235.

18. *Id.* at 198-204.

cheaper interest rates than they would have to pay on Wall Street. European issuers also use the market, which is essentially a negotiated placement system and not a public offering, to avoid the heavy capital market controls among Member States. In short, the Eurobond market is an apt illustration of the ability of investors to avoid heavy national regulations.

The value of the book for American readers lies in the book's power to stimulate self-inspection. When authors ask whether the American system it can provide a model or even lessons for the struggles of the EC in its harmonization efforts, we inevitably question the wisdom of our system, and in a very revealing and novel light. The chapter on the American experience is excellent. It is concise and accurate in its description of the evolution and current state of federalism in this country and I recommend it to anyone looking for single treatment overview of the subject. Moreover, the chapter is provocative in its criticism of the "near-legislative autonomy" of the Supreme Court[19] in pushing an outmoded concept of classical economics.

> [The] Court's present only partly reflective display of a powerful and single-minded laissez-faire philosophy . . . is beginning to drift out of line from the less coherent and politically more adaptive philosophy at work in the legislature and in society at large.[20]

The authors admit that classical economics may occupy the field simply because no clear opposing doctrinal vision is available.[21] Nevertheless, they hope one will develop that is more sensitive to the interplay between legal doctrine and political values.

The chapter on the American experience focuses, as it should, on the current debate over state legislation affecting tender offers, aimed principally at out of state purchasers. Using the Commerce Clause, the Supreme Court invalidated an Illinois statute in 1982[22] and upheld an Indiana statute in 1987,[23] holding the former was inconsistent with the interstate market while the latter was not. The authors join the rest of the academic community in struggling to find a rational basis for distinguishing the two statutes and in anticipating the cases' effect on other areas of corporate law.[24] Meanwhile, states continue to flood their books with a wide variety of protective legislation that essentially takes value away from firm shareholders (and the economy in general) and gives it to firm managers, workers, and local political officials.[25] This type of state regulation, perhaps more than any other recently, demonstrates the dangers inherent in a system of localized regulation.

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19. LEGAL HARMONIZATION, *supra* note 9, at 164.
20. *Id.* at 164.
21. *Id.* at 164.
22. CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637 (1987).
23. Edgar v MITE Corporation, 457 U.S. 624 (1982).
24. One of the authors also has published an article on the matter. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29 (1987).
25. *See, e.g.*, Oesterle, *The Effect of Statutes Limiting Directors' Due Care Liability on Hostile Takeover Defenses*, 24 WAKE FOREST L. REV. 31 (1989).

Unfortunately, the authors wrote the book before much of the modern state anti-takeover legislation had developed. As a consequence perhaps, there is little discussion of anti-takeover sentiment in Europe in the following chapters, although it clearly exists. Moreover, there is little discussion of how Europeans view or ought to view the American experience on the subject.

American tender offer regulation also demonstrates the dangers of regulation from above. The Securities and Exchange Commission ("Commission") simply cannot resist pushing the outer edges of its jurisdictional grant. It has simply recast congressional legislation in a form more suitable to its liking.[26] The agency also increasingly encroaches on State autonomy. The best recent example is new Rule 19c-4. The rule under the guise of the Commission's authority to oversee our national exchanges, prohibits (with some exceptions) the creation of dual class voting stock in our largest firms. The definition of stock voting rights has long been a province of our state legislatures. Indeed, the Indiana statute that the Supreme Court approved as within the province of the states did no more than delimit share voting rights in the context of takeovers.

The Commission recognized that firms were using dual class stock to erect near perfect takeover defenses. At issue then is whether state regulation of takeovers, whatever its form, is appropriate. The Commission, failing in its attempts to convince first the Supreme Court and then Congress to preempt all state regulation of takeovers, is doing piecemeal what it could not do directly—intercede in the state regulation of takeovers. Presumably the Commission could use a similar justification—its supervisory powers over our exchanges for prohibiting all companies on national exchanges from using share purchase rights plans (known as poison pills).

The sad lesson from the American experience is that both sides, the federal government and the states, seem to stretch to misuse whatever authority they have. States, given room to maneuver by the Supreme Court in *CTS Corporation v. Dynamics*, are passing abhorrent legislation at the edges of the *CTS* doctrine and beyond and will continue to do so until the Court speaks again with specificity to the new provisions. The SEC, given room to maneuver by Congress in the form of provisions deferring to its expertise, is pushing past sensible limits in the name of protecting all of us innocents in the market.[27] The total effect of this rapacious behavior is almost absolute deference to our federal courts to set the balance when, by piecemeal decisions, the courts permit or stop the transgressions. Well, as the authors imply in their book, the Europeans have always thought we have become overly dependent on our

26. The Commission has completely changed the statutory structure for registration of securities under the Securities Act of 1933 and for tender offers under the Securities and Exchange Act of 1934.

27. Many of the players do not wish to be so protected.

courts in the way an addict must depend on heroin or a smoker on nicotine. Perhaps they are right.

BOOK REVIEW

*Stephanie J. Mitchell**

HUMAN RIGHTS IN CONTEMPORARY CHINA. R. Randle Edwards, Louis Henkin, & Andrew J. Nathan. New York: Columbia University Press, 1986. Pp. 164. Cloth, $12.50.

This brief book is a study in contrasts: as the fruit of a three-year discussion of the subject among the authors, it is disappointingly brief, with but 164 pages of text. The four essays comprising the book range from the frustratingly vague to the insightful and specific. The chief distinction of *Human Rights in Contemporary China*[1] is the place it assumes in the literature in the field. As a glance at the two-and-one-half page bibliography suggests, there is very little written about the subject of human rights in modern China, whether in English or Chinese. Certainly there is no one book, other than this one, which attempts a survey of the historical development of concepts of human rights in China and a comparison of the present human rights situation there with international norms.

Human Rights begins somewhat inauspiciously with a brief essay by Louis Henkin entitled "The Human Rights Idea in Contemporary China: A Comparative Perspective." It is not clear for what audience this essay was intended, as both "China hands" and human rights specialists are likely to find it wanting. It analyzes Chinese history and politics in sweeping generalizations,[2] likely to frustrate China specialists, and provides scant support for the conclusion that China "is deficient in important ways in respect of human rights" and that "[t]here has been insufficient effort either inside or outside China to persuade the Chinese authorities of the societal usefulness of rights."[3] The West does not fare

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1. Hereinafter *Human Rights*.

2. Such generalizations include references to "traditional" China, veiling distinctions between schools of philosophy and compressing thousands of years of history into a homogeneous blur. This homogeneous entity is depicted as having room for "no confrontation between the individual and society," *id.* at 21, and is summarized in one page. It is followed by a rambling outline of the written provisions of the 1982 Chinese Constitution, which is used as the primary reference for the present state of human rights in both theory and practice. This approach to both past and present leaves far too many questions not only unanswered, but not even raised.

3. *Id.* at 34.

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much better. The essay glosses over discrepancies between aspirations and reality in the West as well,[4] relying more on generalities and a vague liberal philosophy than on clearly articulated standards. While the reader may be assumed to understand the frame of reference used regarding conditions in the United States, such broad statements naturally engender skepticism about the entire analytical framework being applied to China.[5] With little in the way of specific evidence supplied to support conclusions about the Chinese human rights situation, whether historically or in the present, a reader without independent access to such evidence must either doubt the author's conclusions or accept them with little sense of perspective or deepened understanding.

Henkin's essay serves the basic purpose of framing the issues for the remainder of the book. It clarifies that a meaningful discussion of the state of human rights in contemporary China must begin with an understanding not only of the legal systems of China and of the country to which it is to be compared, but also of the cultural norms underlying each of the societies being examined. It raises these issues, but does not answer them.

The shortcomings in Henkin's work would be less obvious were it placed after the concluding essay by Andrew Nathan. Nathan's discussion provides the specifics, both in the text and in the extensive notes to Chinese and English sources, to support some of Henkin's generalities. The difference between the pieces underscores one of the fundamental weaknesses of the book: it is not so much a unified treatise on its subject as a collection of essays which, while not outwardly conflicting, do not blend to create a whole any greater than the sum of the parts.

Some of those parts, nevertheless, are useful, especially for the non-specialist reader. The second of the four essays, Randle Edwards's "Civil and Social Rights: Theory and Practice in Chinese Law Today," provides an outline of the historical developments which have been the backdrop for human rights progress in China, focusing on the changes since the chaos of the decade-long Cultural Revolution. He notes the

4. For example, in a list of rights that "go without saying" in a "good and just society," Henkin lists such rights as the right "to marry a person of one's choice, to have or not to have children, to raise one's children by one's own lights." *Id.* at 15. While these may be commendable goals, the extent to which they "go without saying" in the United States might be questioned in light of the volume of litigation on these and similar subjects over the last two decades.

5. In yet another example of generalization, the devil's advocate might note Henkin's emphasis that, "[i]n one important respect the Chinese system clearly does not satisfy the requirement that the will of the people be the basis of authority. For, it is admitted, the people of China are not free to abandon socialism." *Id.* at 30. This statement seems to presume knowledge about the amorphous "will of the people" which is nowhere supported, other than by inference. How are the constitutional provisions in China to this end to be distinguished from the provisions of U.S. law which, to say the least, have "discouraged" Communism and Communists? It is true that these and many other cavils focus on convenient summaries of conventional wisdom, but reiteration of such platitudes does little to advance a reasoned discussion of human rights issues in China or elsewhere, nor does it provide a useful framework for future analysis.

impact of the dramatic rise in the education of lawyers since then and the growing public awareness of the roles that law can play in society.[6]

The Edwards essay describes five themes touching on civil and social rights in Chinese society and traces their evolution through both provisions of written law and actual practice, based on personal interviews and published reports. His exposition of the role of societal values in Chinese legal development, including the disapproval of litigation, the prevalence of negotiation and mediation, and a judicial system implementing what he terms "a principle of nonfinality,"[7] leads to an appraisal of Chinese culture as one in which the "preferred place [is] accorded to substantive justice over procedural justice."[8] The essay further outlines debates among Chinese legal scholars and political factions about such rights as whether the right to post "big character" posters should remain in the Constitution.[9] These examples illuminate principles behind the decisions and serve as reminders that it is not accurate or useful to assume that there is a monolithic "Chinese," "Communist," "Maoist," or "Socialist" position on human rights. In China, as elsewhere, theory and practice continue to evolve. The Edwards essay briefly scrutinizes the status in China of the rights to life, liberty, equality under the law, freedom of thought, conscience, and religion, privacy and freedom of correspondence, family, honor and reputation, physical security, and so on, with short vignettes on such topics as the lack of Chinese opposition to the death penalty, enforcement of the family planning program, and the use of labor camps for "re-education." He concludes that the human rights situation in China "has basically improved over time"[10] and offers the hope that "individual rights

6. Some of those roles are the result of state efforts to promote orderly economic reforms; others seem to be the result of spontaneous expressions of the "will of the people" to the extent that "will" can be discerned. One of the most interesting phenomena of the late 1980's and early 1990's in China may be the extent to which the Chinese leadership might find that, in promoting the "rule of law," it has opened a Pandora's box of possibilities for the populace. With the advent of an administrative law which will permit citizens to sue the government, it will be intriguing to observe the directions taken in the implementation of the "rule of law" in the near future.

7. *Human Rights*, *supra* note 1, at 47.

8. This conclusion, which may be surprising to those who assume that there is little "justice" in socialist countries, puts into perspective the importance in China of, for example, the confession of the accused. As Professor Edwards points out, it is not simply a propaganda tool, but an integral part of the judicial proceedings. *Id.*

9. "Big character" posters (*da zi bao*) can be traced back to the use of wall posters by peasants to petition officials for redress in imperial times and were used by revolutionaries before the establishment of the People's Republic. The right to post *da zi bao* may be most familiar to Westerners from reports about 1979's "Democracy Wall" in Beijing, when students covered a wall near central Beijing with posters urging greater political and intellectual freedom. *See Peking Posters Point Finger of Protest at the Party*, Fin. Times, June 17, 1988, § 1, at 4. Currently that right is not in the Chinese Constitution. Most recently, however, such posters have been seen mourning the death of former Communist Party General Secretary, Hu Yaobang. *Hu's Death is Stirring Unrest*, N.Y. Times, Apr. 16, 1989, at A38.

10. *Human Rights*, *supra* note 1, at 74.

will grow as the economy develops and the country's leaders become increasingly committed to the rule of law at home and in the international arena."[11]

The juxtaposition of continued economic reforms with hopes for increased enjoyment of human rights presents a challenge for the Chinese leadership and people. While international respect is of some significance to China, bitter resentment of foreign "interference" is, as Edwards notes,[12] equally characteristic. Given the rise in expectations engendered by the economic reforms, and given the apparent rise in crime in China, it is not necessarily clear that continued economic development will lead to increased enjoyment of individual human rights. Perhaps the appropriate *caveat* is to hope that the Chinese economy does, in fact, proceed to develop robustly. Even assuming the attainment of that not inconsiderable balancing act, the Chinese government faces an onerous task in attempting to appease far greater and more varied individual demands for freedoms of all types than have been contemplated to date.

The heart of the book follows the Edwards essay, in the form of two essays by Andrew Nathan. The chapters on "Political Rights in Chinese Constitutions" and "Sources of Chinese Rights Thinking" together comprise nearly two-thirds of the book and are accompanied by some three-fourths of the notes. The two essays provide an excellent synthesis of historical, cultural, and political factors forming the human rights outlook in China today. The overwhelming impression left with the reader, however, is that the final essay should have been the first essay in this collection. Nathan eschews generalities and provides a brief yet sophisticated exegesis of the development of political rights throughout Chinese history. He focuses in greatest detail on the nineteenth and twentieth centuries without neglecting the past or treating it as a five thousand year-old unchanging whole.

His approach is less dogmatic than Professor Henkin's: he notes the importance of scrutinizing both the theory and practice of rights and acknowledges the vast gulf which may exist between any given document and the far more complex reality of the society which creates or lives with the provisions of that document. He nevertheless manages to paint a vivid picture of rights and repression, both legal and extra-legal, using the analytical tool of comparison of eleven Chinese constitutions of the twentieth century. The essay elaborates on a theme which Henkin only alludes to, that of the distinction between the rights accorded to "citizens" and those accorded to "people." Contrary to the intuitive analysis of many Westerners, the "people" is actually the more restrictive of these two categories, carrying with it certain connotations of class background and acceptable behavior.

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11. *Id.* at 75.
12. *Id.* at 52-53.

The Nathan essay also surveys the establishment of the hierarchical system of people's congresses and the relationship between the party and the state, following them from the early days of the People's Republic, as represented in the 1954 Constitution, to the acknowledgement in 1980 by the deputy chief of the Central Party School that "democracy is a mere formality in our country."[13] The essay provides substantial evidence of the extent to which internal debate has characterized these and other legal and political developments in modern China, elaborating on the "big character" poster debate mentioned by Edwards. Ironically, as Nathan notes, the "*da zi bao*" were an instance of greater freedom during the turmoil of the Cultural Revolution, which was withdrawn later. Such an example epitomizes the need, when attempting to analyze human rights in China, to monitor carefully and continuously one's use of the terminology of "freedom" and "rights" and one's understanding of the values attached to those terms in China and elsewhere.

Nathan's essay on political rights concludes with a series of characterizations of the state of human rights in China. He asserts that in China, the state grants, withdraws, or changes rights; that rights derive from citizenship, or from membership in the "people," rather than from the fact of human personhood; that rights are seen as goals to be realized rather than as actually enjoyed; that laws may limit rights; and that there is no effective procedure for independent review of the constitutionality of laws. Each of these conclusions is well supported with evidence drawn from the eleven surveyed constitutions and other sources, the majority of them Chinese. These conclusions are then compared with the United States situation and the differences are elucidated in light of the legal and cultural traditions of the two countries. He effectively describes how the imported concept of a constitution has been defined, refined, and interpreted over time in Chinese terms and has contributed to a characteristically Chinese understanding of political rights.

The final essay begins with the conclusions reached in the preceding essay and traces their background and development through Chinese philosophy and traditions. The depth of perspective this essay offers recommends it to all readers, whether specialists in modern China, in human rights, or simply those having an intellectual interest in the subject. "Sources of Chinese Rights Thinking" lives up to its title by sketching the origins and role of such concepts as individualism and patriotism in the unfolding of thought about human rights in China. As Nathan explains, even imported Western concepts such as individualism were seen through the prism of Chinese patriotism in the mid-1800's. The need to save China from the political and economic disarray of the era was the essential quandary facing Chinese intellectuals of that era and for nearly a century to follow.

In such a context it should not be surprising that concepts of indi-

13. *Id.* at 108.

vidual rights were interpreted so as to "strengthen the state,"[14] drawing on both Western philosophies and the Confucian notion that correct government rests on moral suasion.[15] Nathan clearly explains the development of rights thinking from the late Qing dynasty, through the periods of the republic, the *Kuomintang*, and the People's Republic, up to and including the socialist democratic framework which sees the "procedural freedom of bourgeois democratic systems" as "illusory."[16] Welfare rights are seen as the primary obligation of governments, with political rights playing a far smaller role.[17] In a poignant concluding note, Nathan quotes Sun Yat-Sen's 1924 reference to China as a "sheet of loose sand," where "too much liberty" led to weakness in the face of foreign aggressors.[18] That image is so powerful that Deng Xiaoping used it in 1980[19] and similar thoughts are often heard in China today. Nevertheless, Nathan emphasizes that, in the Chinese tradition, the primary adversarial relationship in politics is not perceived as that of the people and the leadership, but rather that of the people and the bureaucracy.[20]

Nathan's essay concludes with a thoughtful look at the future of human rights development in China. He stresses that "[t]he more we learn about the Chinese tradition, the less we can suppose that the tendencies of premodern Chinese thought were one-sidedly authoritarian"[21] and that "it is no longer possible to accept the myth that the Chinese have no desire for individual rights."[22] Nevertheless, he does not shrink from acknowledging that "the gap between American and Chinese democratic values . . . is wide"[23] or from arguing that Western individuals, governments, or organizations have standing to comment on Chinese rights developments.[24] His argument is cogent and realistic; he neither urges wholesale adoption of Western standards nor presents rosy prognostications. His view of the future of human rights in China postulates that

> the idea of the supremacy of law is being reemphasized and may eventually become an entrenched part of the evolving Chinese concept of rights.

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14. *Id.* at 148.

15. For further discussion of the role of intellectuals in Chinese society, see CHINA'S INTELLECTUALS AND THE STATE: IN SEARCH OF A NEW RELATIONSHIP (M. Goldman, T. Cheek & C. Hamrin eds. 1987), which describes Chinese intellectuals historically as "feel[ing] responsible for the fate of their country," *id.* at 2, having an "obligation . . . to remonstrate with tyrannical, arbitrary rulers," *id.* at 6, and "a group with a special insight into the established moral norms." *Id.* at 7.

16. *Human Rights*, *supra* note 1, at 147.

17. *Id.* at 153.

18. *Id.* at 157.

19. *Id.* at 159.

20. "Instead of a system of permanent conflict among divergent interests as in the West, democracy was seen in China as a system of harmonization of diverse interests on the basis of their dominant common elements." *Id.* at 161.

21. *Id.* at 161.

22. *Id.* at 160.

23. *Id.* at 162.

24. *Id.* at 162-63.

> If this happens, the limits of rights may become more clearly defined. But they will not necessarily be significantly widened.[25]

While this prediction may be less optimistic than those expressed in the preceding essays in this book and elsewhere, it is firmly rooted in an analysis which convincingly weaves together historical, political, and cultural factors.[26]

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25. *Human Rights supra* note 1, at 134.

26. Recent news reports include submission of a petition to the Communist Party leadership requesting amnesty for political prisoners, Washington Post, Feb. 17, 1989, at A35, col. 1; Foreign Broadcast Information Service, China Daily Report, Feb. 16, 1989, at 18; and the apparent rejection of that petition, Washington Post, Feb. 23, 1989, at A22, col. 1. The U.S. government is taking an increased interest in human rights in China as exemplified by President Bush's extension of an invitation to leading dissident Fang Lizhi to a banquet in Beijing (which Prof. Fang was prevented from attending). Washington Post, Feb 23, 1989, at A22, col. 1. The Chinese press continues to publish articles debating the purpose of the rule of law and considering such questions as "how can you change the law in accordance with the law?" Sun Guohua, *On Bringing Reform Into the Orbit of the Rule of Law*, Guangming Ribao, Feb. 7, 1989, at 2, *reprinted in* translation in Foreign Broadcast Information Service, China Daily Report, Feb. 16, ,1989, at 19. Such developments can only be summed up as continuing intellectual ferment; Nathan's analysis of their significance and possible ultimate direction is plausible and well-reasoned.