

Symposium: China and the International Legal Order

## **Indigenous Constitutionalism and Global Legitimacy: Excavating the Roots of Chinese Constitutionalism**

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China has been at times understood to lack the requisites for rule of law that particular conceptions of international order require. This has been accentuated in recent periods by practices of the PRC in the international arena. Underlying the view is a sense that China lacks a grounding in its culture, history and ethos of the values that inform constitutionalism and the rule of law. This sentiment arguably contributes to the perceived lack of legitimacy of China in the world. In response, some Chinese scholars have suggested a fundamentally different conception of constitutionalism in contrast to the West, which further has widened the gap.

The purpose of this exploratory Article is to begin excavating dimensions of the Chinese past that have not received sufficient attention relevant to this inquiry. It claims, contrary to popular beliefs, that elements of constitutionalism have been prevalent in a variety of forms throughout Chinese history. While there are many different conceptions of constitutionalism, one interpretation has to do with constraints on governmental power. Constitutionalism distinguishes from other conventional forms of constraints in part because the authority of the government derives from, and is limited by, a fundamental set of rules and norms. Thus, the sovereign can and should be limited in its powers, and that its legitimacy depends on observing these limitations.

As a counterweight to the literature on state capacity, this Article organizes and lays out an initial framework of five possible dimensions from Chinese history: constitutionalism as (1) an ideal and blueprint, (2) textual and interpretative source of authority, (3) ritualistic norms and social practices, (4) counterbalancing role of scholar officials and other institutions, and (5) cosmic justifications of the responsibility to rule. These constitutionalist norms enabled elites to profess allegiance to shared norms while supporting competing

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interpretations to challenge the claims and use of state power.

Without discounting the challenges and criticisms that China faces globally, this Article shows there are resources in the Chinese past, whether or not presently used, that could enable it to be a constructive member of, and with greater legitimacy in, the 21<sup>st</sup> century international order. Any consideration of China's future development likely requires drawing upon its own ideational, normative, and institutional legacies, without being wholly constrained by it. These categories may provide a basis for thinking about China's own constitutional order as it interacts with the international legal order.

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#### GLOBAL AND COMPARATIVE CONTEXT

Constitutions and the rule of law are frequently seen as hallmarks of modernized states in the international legal system. This is no less true for China, which in late Qing and early Republican periods initiated serious debates and discussions on what the modern Chinese constitutional order should mean in light of monarchy's expiration and greater, albeit often unwelcomed, interactions with the world.<sup>1</sup> The perceived success of Japan at the time vis-à-vis Russia lent credence to its constitutional system. Indeed, the modern concept of constitutional government itself was introduced in the 1890s by those wishing to reform or overturn imperial institutions in response to the dynamics of Japan and the West.<sup>2</sup> Such ideas also became mobilizing focal points among many elites and reformers within the state apparatus, not only at the center but also in provincial outreaches such as Sichuan.<sup>3</sup> Critically, many

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1. See, e.g., Xiaohong Xiao-Planes, *Of Constitutions and Constitutionalism: Trying to Build a New Political Order in China, 1908–1949*, in BUILDING CONSTITUTIONALISM IN CHINA, 37, 56 (Stéphanie Balme & Michael Dowdle al. eds., 2009).

2. See *id.* at 37.

3. See PETER ZARROW, AFTER EMPIRE: THE CONCEPTUAL TRANSFORMATION OF THE

within China believed that a legitimate constitutional order was *necessary* for China to be respected among civilized nations as equals, an assumption which has continued from Mao Zedong and onwards.<sup>4</sup> Thus, an important connection can be seen between the type of domestic legal order and how the country is perceived in the international system.

Skip forward to 2018 when the decision was taken to amend PRC's constitution to remove term limits. While many discussions have taken place on the merits of this change, an aspect somewhat overlooked is its impact on how other states and nations may have changed their views toward China's constitutionalism and legitimacy more globally.<sup>5</sup> What does the removal of a fundamental constraint on executive power mean for how other states view China in the international legal system? While this is a largely empirical question, there is a possibility that such a move may have undermined not only China's perceived constitutional order but also its soft power more generally. The Habermasian notion of legitimacy as the worthiness to be recognized is relevant for analyzing this dynamic between constitutionalism and external perceptions.<sup>6</sup> Predictable institutions of succession and power transfer serve not only as important means of stability but also external *signals* of legitimacy. Thus, while major states of the international system may not expect every system to be democratic, there may be some basic normative assumptions of what makes a state legitimate and worthy of respect.

The debate on Chinese conceptions of constitutionalism has implications on the international stage in another sense. Some recent scholars such as Matthieu Burnay have made explicit study of the link between domestic conceptions of and orientation towards international law.<sup>7</sup> Others such as Lucas Brang have detailed the use of Chinese 'political constitutionalism' to "challenge the post-Cold War agenda of global constitutionalism."<sup>8</sup> Underlying this attempt to present a Chinese model as competitor of "Western" constitutionalism is a desire to identify distinctive path suitable for China's own context. At the heart of the argument is an assumption of fundamental incompatibility between Chinese and western models. This is further set within

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CHINESE STATE, 1885-1924 (2012).

4. See Xiao-Planes, *supra* note 1, at 56.

5. See, e.g., *The World Reacts to China's Constitutional Amendment*, US-CHINA PERCEPTION MONITOR, Mar. 19, 2018; see also Taisu Zhang, *Succession Politics and the Cost of Eliminating Presidential Term Limits in China*, LAWFARE, Mar. 9, 2018.

6. See JURGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (Thomas McCarthy trans., Beacon Press 1979) (1976) ("Legitimacy means a political order's worthiness to be recognized." (emphasis omitted)).

7. MATTHIEU BURNAY, CHINESE PERSPECTIVES ON THE INTERNATIONAL RULE OF LAW: LAW AND POLITICS IN THE ONE-PARTY STATE 231, 233 (2018) (on the one hand, drawing parallel between its "instrumental and ambivalent approach towards the rule of law" at home and "partial commitment to a 'thin' version of the international rule of law" and, on the other, exploring a 'thick' conception of the international rule of law in the case of China's focus on non-intervention, which may appeal to developing countries).

8. Lucas Brang, *The Dilemmas of Self-Assertion: Chinese Political Constitutionalism in a Globalized World*, MOD. CHINA 28 (forthcoming 2020).

a context that Brang and others describes as a crisis of the post-Cold War liberal order in which the geopolitical configuration anchoring a normative model of global order is at question.<sup>9</sup> Others have similarly observed how global forces have frustrated local institutional innovation and participation.<sup>10</sup> Basic assumptions of possible convergence in comparative and global constitutionalism are being challenged. The Chinese inquiry is a critical part of this broader exchange. What is the implication of the Chinese experience if we were to take a longer horizon? Does it imply a constitutional model fundamentally incompatible with the West or is it possible to have distinctive contribution without necessarily being disjointed from the international order?

As will be discussed below, many from both China and the West have tried to argue that China's history suggests a tradition oriented toward autocratic rule with limited, if any, checks on sovereign power. Some have used this as a foil to argue for the exceptionalism of the American or Western constitutional order while others have used it to argue China has done more than well without such constraints. Francis Fukuyama in his work asserts that China never developed a true rule of law system because it lacked an independent institution in its history, such as the Catholic Church in the West, to challenge state power.<sup>11</sup> While there may be some truth to this, as we will see, it is not the full picture either.

This Article aims to shed light on an area that has been overlooked by exploring theoretical dimensions and roots of the constitutional order in Chinese history. Of course, this constitutionalism in its deeper past did not entail judicial review or even pervasive mechanisms towards protecting individual rights but we fail a degree of intellectual rigor by overlooking that even within the West such institutions often developed later and were not practiced evenly. For the purposes of this Article, I define constitutionalism as forms of structural checks on sovereign power. Constitutionalism distinguishes from other conventional forms of constraints in part because the authority of the government derives from, and is limited by, a fundamental set of rules and norms. Thus, the sovereign can and should be limited in its powers, and that its legitimacy depends on observing these limitations. Viewed from this perspective, there are various elements of constitutionalism throughout Chinese history that may shed light on the important questions confronting China's past and future.

In this Article, I categorize these dimensions into five types: as (1) an ideal and blueprint, (2) textual and interpretative source, (3) ritualistic norms and social practices, (4) counterbalancing role of minister and institutions, and

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9. See *id.*; see also Mattias Kumm et al., *The end of 'the West' and the future of global constitutionalism*, 6 GLOBAL CONST. I (2017).

10. See, e.g., Wen-Cheng Chang, *Back into the Political? Rethinking Judicial, Legal, and Transnational Constitutionalism*, 17 INT'L J. OF CONST. L., 453, 455 (2019).

11. FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER* 262-275 (2011).

(5) cosmic justifications of the responsibility to rule. Inevitably, these forms overlap and intersect with one another but they each provide a unique lens in understanding how Chinese thinkers, scholars, and officials approached constraints on power, both in terms of ideas and practice, with the former being more common for obvious reasons. The *constitutional* dimension is also seen in the relative permanence of the constraints on successors of a particular dynasty, including during major crises. As we will see, sovereigns often had strong motivations to be bound by these constraints, ranging from a filial obligation towards the founding emperor's precedents, a need for clear rules among ruling elites in power vacuums or social changes, and the double-edged nature of Confucian texts which both enabled and delegitimated the ruler. Of course, sovereigns often had motivations to not be bound by these constraints.

One may wonder even if these forms existed, so what? Many may argue modern China is in many ways different or even disconnected from its past. The current constitutional order, if one desires to label it as such, is underpinned by a deep Leninist party-state infrastructure. However, just as influential is the conception of the centralized bureaucracy model of Qin dynasty and onwards. Moreover, the *use* of the past to make analogies and to justify positions has been a prevailing theme in Chinese history itself. Thus, how the past is *understood* matters for our contemporary world, even though that understanding has varied and been debated. There are many who argue that China is not suited for certain futures based on its history or tradition. For some, any movement towards constitutionalism necessarily entails embracing a Western foundation not suited for China, without always admitting for complexities within China's cultural makeup.<sup>12</sup> These debates also affect how we think about external legitimacy and internal sustainability of regimes. In other words, were Chinese regimes able to last merely because of strong, centralized rule or did constitutional constraints also contribute to longevity and perceived legitimacy? Consideration of China's future development thus requires drawing upon its own ideational, normative, and institutional legacies without being wholly constrained by it. Even if certain modern legal transplants are to be useful, they are more likely to succeed by connecting with roots found within China itself. These categories may further provide a basis for thinking about China's constitutional order as it interacts with the international legal order in the 21<sup>st</sup> century.

#### CHALLENGING THE COMMON PERCEPTION

It has been argued by many Chinese and western thinkers that there were no constitutional practices in the pre-modern era or China's past has been solely shaped by an autocratic tradition.<sup>13</sup> In history, Western thinkers from

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12. See comparison of different groups in Samuli Seppänen, *After Difference: A Meta-Comparative Study of Chinese Encounters with Foreign Comparative Law*, 68 AM. J. COMP. L., 186 (2020).

13. Andrew Harding & Ngoc Son BUI, *Recent Work in Asian Constitutional Studies: A*

Montesquieu to Hegel to Weber have made a variety of these arguments.<sup>14</sup> As a result, William Alford notes, China is misconstrued “as little more than an instrument of authoritarian control throughout pre-twentieth-century Chinese history.”<sup>15</sup> Claims are also made by some Chinese scholars that constitutionalism in its various Western manifestations is foreign or contrary to Chinese culture.<sup>16</sup> Earlier generations of Western China scholars such as John Dardess and Étienne Balazs emphasized that since Confucian tradition emphasized virtuous rule and obedience to higher authorities, there was minimal recognition for the need to regulate the sovereign institutionally.<sup>17</sup> Much of the recent literature on legal orientalism further show how these narratives have played out in the relations between China and the West over centuries.<sup>18</sup> And beyond the academic sphere, political and popular discourses within and outside China have arguably perpetuated and magnified these narratives. These phenomena merit their own attention beyond the scope of this paper.

Existing narratives fail to capture the full complexity, limiting the sense of what is possible if one is to draw on the richness and diversity of history. Contrary to common imagination, imperial China developed sophisticated constraints, institutional as well as norms, ideals and practices that enabled and limited actions of the sovereign. The long-held Chinese term “fatong (法统),” brings together notions of law, legitimacy and succession, which became the institutions that defined the *constitutional* bounds and rules of imperial China.<sup>19</sup> Substantial literature has focused on the legitimating aspects of state power and state-building without recognizing the constraining dimensions. This

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*Review Article*, 11 *ASIAN J. COMP. L.* 163, 167 (2016) (“The epistemological assumption tends to be that the idea of a constitution is a distinctively western and modern innovation, and that there were no constitutional practices in pre-modern Asia. This has resonated with the discourse of “legal Orientalism”, the Western (normally biased) imagination of oriental law (mainly Chinese law), which has its root in more general discourses of orientalism.”).

14. See, e.g., Charles Montesquieu, *SELECTED POLITICAL WRITINGS* 174 (Melvin Richter ed., 1990) (arguing that the foundation of Chinese law was fear, the main recourse of a despotic state); see also Georg Hegel, *THE PHILOSOPHY OF HISTORY* 116 (J. Sibree trans., 1956) (asserting that Chinese law in essence supported despotism (1770–1831)); see also Max Weber, *THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM* (Hans H. Gerth trans., 1951) (claiming that China lacked an independent and rational legal system).

15. William Alford, *Law, Law, What Law? Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law*, 23 *MOD. CHINA*, 398, 402 (1997); see also William P. Alford, *On the Limits of “Grand Theory” in Comparative Law*, 61 *WASH. L. REV.* 945 (1986).

16. See, e.g., Seppänen *supra* note 14, at 204 (analyzing, among others, the works of Jiang Shigong, as one prominent Chinese legal scholar who believes “China is engaged in an irreconcilable value conflict with the West and must develop its own legal thought in order to realize its civilizational core values.”).

17. See, e.g., JOHN W. DARDESS, *CONFUCIANISM AND AUTOCRACY: PROFESSIONAL ELITES AND THE FOUNDING OF THE MING DYNASTY* (1983) (exploring how Confucian elites cooperated with the Ming rulers); see also ETIENNE BALAZS, *CHINESE CIVILIZATION AND BUREAUCRACY: VARIATIONS ON A THEME* (H. M. Wright trans., Arthur F. Wright, eds., 1964) (arguing Confucianism and scholar-officials were suited to the hierarchical state based on norms obedience, patriotism, and subordination to higher authorities).

18. See generally TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* (2013).

19. See Xiao-Planes *supra* note 1, at 38.

Article argues that the debate should not be *whether* there was constitutionalism in Chinese history but rather *what kinds* existed. It shows that China exhibited many constitutionalist ideas and institutions that pre-committed and constrained the sovereign and its agents. While these phenomena may not perfectly transpose to modern terminology, this Article attempts a comprehensive sketch of the initial categories we might use as a conceptual framework to make sense of how the past relate to the present.

This Article also touches on a broader critique of how the past is used to justify what is possible or legitimate in our contemporary world. Some may argue those things that are indigenous are more acceptable for a society than foreign sources. But what is *defined* as indigenous to that culture is often one dimensional, even misleading. Scholars, politicians and the broader public often make sweeping claims about a certain particular culture or tradition. For example, some claim that the West has had a largely individual-oriented order (with John Stuart Mill as a representative) when that merely represents *one* interpretation that other Western thinkers have amply responded to through their competing communitarian or civic republican understandings (from Aristotle down to Michael Sandel). Similarly, others have emphasized how China has exemplified a top-down, meritocratic past that makes it uniquely exceptional.<sup>20</sup> These claims can be problematic not only because of possible false dichotomies, but they might not be engaging appropriate points of comparison for critiquing the different processes and stages of development of another.<sup>21</sup> Applying sweeping labels to a culture often misses the dynamics and diversity *within* those traditions. They are simplified and pinned down to particular conceptions without revealing the inner tensions and interactions. Peter Ditmanson notes that Chinese history adequately depicts contesting visions of state legitimacy and authority that “actually offer a much more complex picture of how [...] commitments could be marshalled politically, and the wide range of normative argumentation they could and did support.”<sup>22</sup> Furthermore, as scholars such as Leigh Jenco and Zhang Taisu have argued, we do a great disservice by attempting comparative analysis built on existing imbalance of normative assumptions or ideologies.<sup>23</sup>

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20. See, e.g., DANIEL A. BELL, *THE CHINA MODEL: POLITICAL MERITOCRACY AND THE LIMITS OF DEMOCRACY* (2016).

21. Peter Ditmanson, *Moral Authority and Rulership in Ming Literati Thought*, 16 EUR. J. POL. THEORY 430, 431 (2017) (noting the “danger of interpreting the political and social dimensions of the modern nation-state back onto the very different dynamics of late imperial China.”).

22. *Id.*

23. Taisu Zhang, *Comparing Chinese and European Legal Thought*, 56 AM. J. LEGAL HIST., 195, 196 (2016) (noting past approaches perpetuate “preexisting imbalances in our understanding of global legal history, in which studies of “Western” history continue to analytically color the study of other legal traditions, rendering us unable to engage them on their own terms, or even through their own legal language”); see also Leigh Jenco, *A political theory for them—but not for us?: Western theorists interpret the Chinese tradition*, 69 REV. OF POL., 273 (2007).

## CONCEPTION AND FRAMEWORK OF CONSTITUTIONALISM

The definition chosen for this paper is perhaps one of the most basic conceptions of the term, which is the limitation and constraint on sovereign power. This idea became especially prominent through the works of Charles Howard McIlwain, Giovanni Sartori, and others.<sup>24</sup> Within this literature of constitutionalism, there is a general divide between structural types of constraints (such as checks and balances) and rights-based constraints (grounded in the dignity of the individual). One might argue that an adequate modern definition of constitutionalism requires both forms to be sufficient. Without wishing to disregard the importance of the rights dimension and recognizing that there are critiques of the Chinese tradition on this front, this piece focuses on the structural aspect, in part given its greater degree of prevalence in Chinese history.

This definition does not necessarily limit constitutionalism to only legal forms, since some of the mechanisms discussed are political, institutional or even social in nature. However, legal enforcements do become an important dimension, although judicial review is not taken as a starting point. This is *not* to say practices such as judicial review should not necessarily be considered for a modern constitutional system. However, there are reasons for a broader conception. For one, institutions such as judicial review are a somewhat relatively modern construct in human history – it did not exist even within Western legal systems in dominant ways until a couple of hundred years ago.<sup>25</sup> Moreover, the study of constitutionalism itself was arguably more concerned with constitution-making rather than judicial review until after the Second World War.<sup>26</sup> Second, even in many Western and Asian constitutional systems, such as New Zealand, Sweden, Netherlands or Japan, it remains a non-dominant form of check on state power. And finally, it is important to point out that approaching the study of constitutionalism through a strictly modern lens would limit the vista of what we might discover in this historical investigation, such as its non-legal manifestations, expressive functions, etc. In this definition, I have tried to provide a minimal framework to start from.

It is also important to acknowledge differences between the ideas and

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24. See, e.g., CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 24 (1940) (“[C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.”); see also G. Sartori, ‘*Constitutionalism: A Preliminary Discussion*’, 56 AM. POL. SC. R. 853, 855 (1962).

25. See, e.g., Wen-Chen Chang & David S. Law, *Constitutional dissonance in China*, in *COMPARATIVE CONSTITUTIONAL THEORY*, 476, 500 (Gary Jacobsohn & Miguel Schor eds., 2018) (“Neither reliance on the political branches for constitutional enforcement nor the absence of a strict separation of powers was historically viewed as fatal to the very concept of constitutionalism. In the United Kingdom, for example, the highest judicial power lay for centuries in the hands of the legislature: prior to the establishment of the Supreme Court in 2009, a specialized committee of the House of Lords—the upper house of Parliament—had exercised the highest judicial power.”); see also *Marbury v. Madison*, 5 U.S. 137 (1803).

26. *Id.* at 491.

practices of constitutionalism in this piece. The constitutional roots discussed here are deep-rooted cultural approaches and patterns which themselves are subject to the commitment of particular actors. It is one thing to have deeply held principles and norms about the way political power is wielded, but it is another to evaluate the specific applications in enforcing those norms when they are violated. Yet, this does not necessarily undermine the power and attraction of those ideas throughout Chinese history. This piece is primarily focused on the ideational and cultural dimension, leaving the application and uses by actors within and outside the state for a later work.

One of the primary thinkers in the field of indigenous Chinese constitutionalism has been Peking University academic and former law school dean Zhu Suli. In his work on the ancient constitution of China, Su Li defined constitutionalism by those things that “constitute” the state.<sup>27</sup> As a result, his framework and evidence has been those aspects that contributed to Chinese *state-building*, such as the written language, mandarin system, functional role of the emperor, etc. While this is no doubt an important contribution to the field as one dimension of constitutionalism, it nevertheless overlooks the other equally critical side of constitutionalism, that is the aspects that *constrain* the sovereign in response to arbitrary or excessive power. This Article sheds light on this important corresponding dimension.<sup>28</sup>

Furthermore, in our examination, it is essential to disentangle the concepts of liberalism, democracy and constitutionalism. While they are often conflated, each term means something different. This Article is not an investigation into whether there were indigenous for liberalism and democracy. To do so would be a much larger initiative and, likely, a much more speculative project. Others such as Elizabeth Perry have shown how Chinese thinking did exhibit notions of popular sovereignty through influences of Mencius, although its basis lay more with delivering socioeconomic good as opposed to protecting individual liberty.<sup>29</sup> To be analytically precise within the boundaries of this project requires examining constitutionalism without necessarily assuming democratic governance or liberal regime must have always accompanied it. Political scientists have discussed differences between horizontal and vertical accountability and in this sense the orientation of this paper is primarily focused on the former rather than the latter, although the role of local institutions and civil society are also discussed.

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27. SU LI, THE CONSTITUTION OF ANCIENT CHINA 18 (2018) (“The “constitution” I am studying is thus first to be read in the root sense as “constituting.”).

28. There are also other contemporary Chinese constitutional thinkers, a number of whom are discussed in this Article. There are also others such as Jiang Qing, whose normative work of extrapolating Confucian themes for future constitutional governance are intriguing, although largely speculative. See JIANG QING, A CONFUCIAN CONSTITUTIONAL ORDER. HOW CHINA’S ANCIENT PAST CAN SHAPE ITS POLITICAL FUTURE (2013).

29. Elizabeth J. Perry, *Chinese conceptions of “rights”: From Mencius to Mao—and now*, 6 PERSP. ON POL. 37 (2008)

While the focus of this Article is dynastic history and indigenous ideas and practices, it is worth mentioning that in late 19<sup>th</sup> century and early 20<sup>th</sup> century, Chinese thinkers drew on Chinese and foreign inspirations for their particular conceptions of constitutionalism, especially when the term began to be self-consciously used as such.<sup>30</sup> In the Hundred Days' Reform of late Qing, prominent reformers such as Kang Youwei and Liang Qichao advocated for establishment of a parliament and joint governance of the Crown and the people.<sup>31</sup> Liang in his later works, such as *On the Principle of Evolution from the Government of the Crown to Government of the People* (论君政民政相嬗之理) of 1897, combined Western theories with tradition notions of the "Three Ages" to argue for the inevitable development of civil power in place of the monarch.<sup>32</sup> The *Nineteen Important Constitutional Articles* of the late Qing empire, promulgated in 1911, reflected in practice many of these constitutional ideas, such as the emperor's power being constrained and the order of succession being determined by the constitution.<sup>33</sup> Slightly later in the period, prominent actors such as Liang Shuming drew insights from the British parliamentary system to incorporate into his vision of rural bottom-up constitutionalism.<sup>34</sup> Such interactions showed that Chinese practices and foreign influences at this stage were not inevitably antagonistic and began to combine in novel ways as China began to modernize. By the late Qing and Republican period, Chinese and Western self-understandings of constitutionalism began to fuse in unique ways.<sup>35</sup>

Below, at least five possible forms of indigenous Chinese constitutionalism are sketched out. In some ways, the five forms follow each other: ideals are manifested in textual forms, and further put into practice in rituals and institutions, all supported by a broader contestation of cosmic responsibility to rule. But this is not to suggest they always happened sequentially in historical form or are even comparable across periods. Norms are often born in one cultural context, but then venerated and re-appropriated in subsequent periods. Moreover, any type of taxonomy will inevitably lead to

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30. Reformers such as Kang Youwei, Liang Qichao, Zheng Guanying, Wang Tao, and Sun Yat-sen.

31. See, e.g., Kang Youwei (康有为), *Qing Dinglixian Kaiguohui Zhe* (请定立宪开国会折) [*Petition for Constitutionalism and the Convening of Parliament*] and *Qing Junminhezhi Manhanbufen Zhe* (请君民合治满汉不分折) [*Petition for Non-Discrimination and Joint-Governance by Manchu and Han*], in KANGYOUWEI WENXUAN (康有为文选) [COLLECTIONS OF ARTICLES OF KANG YOUWEI] 399–400, 401–04 (Xie Xialing eds., 1997).

32. Jie Cheng, *Why Late Qing Constitutional Reform Failed: An Explanation from the Comparative Institutional Perspective*, 10 *TSINGHUA CHINA L. REV.* 107, 136 (2017).

33. *Id.* at 143.

34. ZHANGRUN XU, *THE CONFUCIAN MISGIVINGS—LIANG SHU-MING'S NARRATIVE ABOUT LAW 101* (2017).

35. Jie, *supra* note at 30, at 140 (“This includes understanding that the constitution is the fundamental law of a state and that the contents of a constitution roughly contain the allocation of state power, the composition of state institutions, the principles governing the exercise of state power, and the basic rights and duties of citizens. The categorization of constitutions in Late Qing went beyond written and unwritten constitutions as there was an emphasis on the distinction between imperial constitutions and constitutions by agreement.”).

selectivity and trade-offs by reducing some of the complexities within and between these forms and examples. Even the use of the label “constitutionalism” for a historical past that did not necessarily articulate in the same way will entail some degree of imperfect analogizing. The nature of this piece is not so much to attempt a detailed historical analysis, which would take several books to do justice, but rather to engage in an initial reflection on how the Chinese past might matter in ways we have not thought of previously. This classification will hopefully provide a clearer understanding of how Chinese thinkers and rulers approached constraints on the sovereign, as well as how they took on *constitutional significance* that may have implications for thinking about the future.

#### PART ONE: IDEAL AND BLUEPRINT

Any constitutional order cannot be wholly separated from the visions and ideals of itself and the state.<sup>36</sup> Some have argued that “constitutionalism is ultimately about envisioning the state.”<sup>37</sup> Often that vision manifests in certain aspirations, identities or founding principles, which we see across societies in history. The American constitution is one example of this, with its text encapsulating its lasting spirit of liberty (negative rights) and union among states (federalism). Ever since, American jurists, statesman and scholars have been debating the intent and meanings of that constitution as applied to the central issues of their times. This is no less the case in the Chinese context.<sup>38</sup>

The first form of Chinese constitutionalism explored is its power as an ideal and blueprint for which subsequent sovereigns of a period felt compelled to follow. These ideals and blueprints could be found in the classics such as *Zhou Li* (周礼) or the *Rites of Zhou*, a definitive Confucian classic which upheld the Zhou dynasty as a model for subsequent rulers, or in the example and written works of the founding emperor of a dynasty. The *past itself* became a powerful form of constraint. As Chaihark Hahm notes, “The task for later states and rulers was therefore to emulate, if not recreate, the ideal government, or rituals, of these former kings. The past exercised normative power on the present, which could be invoked to criticize and correct the failings of current governments.”<sup>39</sup> Because there were numerous and often quite specific precedents set out for how the ideal state ought to be governed, rulers could not merely rule according to their whims. Moreover, their advisors, ministers and various constituents were able to draw on those precedents to check the ruler.

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36. See, e.g., N. W. BARBER, *THE PRINCIPLES OF CONSTITUTIONALISM* 11 (2018) (observing that “the principles of constitutionalism relate to the state—and to other bodies so far as they resemble the state...They present a state of affairs, a partial and idealized model of the state, that those addressed by the principles of constitutionalism are enjoined to create.”).

37. Balme & Dowdle, *supra* note 26, at 15.

38. *Id.* at 12 (arguing “there is evidence to suggest that Chinese constitutional thinking is perhaps even more sensitive to the symbiotic relationship between constitutionalism and one’s conceptual vision of the state than that which is commonly articulated in the West.”).

39. See Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler’s Legitimacy in a Confucian Polity*, 57 *AM. J. COMP. L.* 135, 158 (2009).

Ideals of the past as a form of constitutional constraint has a particularly powerful effect given the elevation of the virtue of *filial piety* in the Confucian tradition. Applied in this context, it meant all subsequent rulers of a particular dynasty felt obligated, not only by laws and norms, but also a sense of filial obligation to live up to the standards of his forebearers and founding emperor.<sup>40</sup> The ancestral and founding documents, examples of former rulers, and accumulated conceptions of the order developed “binding” effects on these successors in important ways. Arbitrary exercise of power became more difficult when changes to foundational laws was “prima facie suspect for it was regarded as a potentially unfilial act.”<sup>41</sup> The enactments of the founder of a dynasty thus set important constitutional precedents.<sup>42</sup> Even departures of later generations within a dynasty were framed as inevitable reconciliation between new realities and respect for ancestral standards.<sup>43</sup>

An interesting example of this is in Ming dynasty. The founding emperor, Hongwu (洪武), published a series of strict regulations for his successors, which together in 1395 became the *Huang Ming Zu Xun* (皇明祖训), the *Ancestral Instructions of the August Ming*. Rules ranged from court protocol and personal morality to particular areas such as military and governance. One might well argue the process consolidated the centralization of imperial power. Nevertheless, later on, Ming officials criticized and challenged *subsequent* emperors by drawing on the *Ancestral Instructions of the August Ming*. While some met with minimal success, other attempts would have lasting impact on the development of politics in later periods of Ming dynasty. Although the emperor may not have been bound by the laws that he himself promulgated, he could in theory be censured for his personal behavior based on ancestral examples.<sup>44</sup> Furthermore, the emperors of Song, Ming and Qing often on their own felt compelled not to act against what were called “established precedents.”<sup>45</sup> This was known as *zuzong dafa* (祖宗大法) or the fundamental laws of the ancestor, which could not be changed by an emperor at a whim. Another example is Song dynasty’s practice of not imposing the death penalty on the literati, as offending persons were exiled instead.

Specific issues would take on significance at a constitutional level. For

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40. *Id.* at 155 (“As descendants of the dynastic founder, later kings had a filial duty to honor their ancestors and to maintain and enlarge upon the dynastic patrimony... On the more political and institutional side, it included the duty to abide by the laws and regulations laid down by them.”).

41. *Id.*

42. Wm. Theodore de Bary has also observed “[t]he dynastic constitution . . . was vested in the exemplary enactments of the founder of the dynasty, seen as legal precedents for his successors, who were bound by filial obligation to perpetuate the regime and its founding institutions, to which they had become heirs.” Wm. Theodore de Bary, *The “Constitutional Tradition” in China*, 9 J. CHINESE L. 7, 12 (1995).

43. See Hahn *supra* note 38, at 156.

44. See Pierre-Étienne Will, *Epilogue: Virtual Constitutionalism in the Late Ming Dynasty*, BUILDING CONSTITUTIONALISM IN CHINA, 265 (Stéphanie Balme & Michael Dowdle eds., 2009).

45. *Id.*

example, the degree to which the imperial court abided by the appropriate rules of descent-line system had significant ramifications.<sup>46</sup> The mode of imperial succession was of central importance. In the 16<sup>th</sup> century, the young Wanli (萬曆) emperor attempted to change the rules of succession set by the dynastic founder (hoping to designate as heir apparent a son who was not entitled according to the rules) and was opposed by the specialists of *Ancestral Instructions of the August Ming*, eventually yielding.<sup>47</sup> Philip De Heer in his examination of the Zhengtong (正統), Jingtai (景泰), and Tianshun (天順) reigns observed similar deliberation and debates over succession and constitutional-like issues.<sup>48</sup> From these episodes crucially emerged the role of court officials in assuming greater legitimacy as the “rightful guardians” of founder’s legacy in subsequent periods, which was a contrast to when successors such as Yongle (永樂) emperor tried to claim for himself the mantle of representing the founding emperor’s will.<sup>49</sup> Thus, we see not only the power of past ideals and examples but also specific manifestations to act as a check against the ruler, even though they were not always successful in practice.

To close, we might also draw on the Southern Song commentaries on the *Zhou Li* as another example of these ideas. As noted, the *Zhou Li* itself lays out a structure of the ideal Zhou government which Confucius endorsed as the highest vision for rulers. In many ways, it is the most *constitution-like* text in the Confucian classics. The document begins with a general preamble (stating that the people are the purpose of government) and setting up a six-part government structure, clarifying the roles of each. In response to the perceived failures of Wang Anshi in his state-driven reforms in Northern Song, more than eighty commentaries on the *Zhou Li* (which had become a standard text for civil service exams) were produced to discuss their interpretation of good government and ideal state. Song scholars such as Ye Shi and Zheng Boqian adopted *Zhou Li* as their constitutional source and developed theories of constrained government, a strong indigenous expression of constitutionalism in the view of Jaeyoon Song who has meticulously analyzed the texts.<sup>50</sup> A reoccurring theme in these works was the deterrence of abuse of governmental authority by showing a clear delineation between the powers of the Emperor vis-à-vis the Grand Steward and ministers, both of which were suspect to abuse of power.<sup>51</sup> In these commentaries and interpretations of the past, we see

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46. See Hahm *supra* note 38, at 186.

47. See Will *supra* 43, at 269.

48. PHILIP DE HEER, THE CARE-TAKER EMPEROR: ASPECTS OF THE IMPERIAL INSTITUTION IN FIFTEENTH-CENTURY CHINA AS REFLECTED IN THE POLITICAL HISTORY OF THE REIGN OF CHU CH’I-YÜ (1986).

49. Ditmanson, *supra* note 23, at 441.

50. See Jaeyoon Song, *The Zhou li and Constitutionalism: A Southern Song Political Theory* 36 J. OF CHINESE PHIL. 424 (2009)

51. *Id.* at 436-7 (concluding that in Southern Song theories, “neither the King nor the Grand Steward can monopolize powers...kingship and ministership symbolize two different aspects of public authority in complementary and countervailing relations. By articulating the legitimate foundation of government, they sought to place constitutional limits to both ministerial tyranny and monarchical autocracy.”).

aspirations of checks and balances or even separation of powers.<sup>52</sup> Some of these ideas would play out in practice, especially in institutional forms discussed later in this Article.

#### PART TWO: TEXTUAL AND INTERPRETATIVE SOURCE

Flowing naturally from constitutionalism as an ideal or blueprint, the manifestation in textual form further deepens these constraints. Along with *Rites of Zhou* as discussed earlier, the other Confucian classical texts of the *Four Books and Five Classics* (四书五经) also served as foundational sources to adjudicate important legal problems and crises, sometimes even at the level of the state. At times, these texts were even relied upon during periods of leadership vacuums or transitions. Indeed, one might argue there are some distant analogies to the use of constitutional interpretation we see in Western societies, albeit with clear differences as these texts were always not understood as legal texts *per se*.

Laws themselves tended to be written and consolidated after periods of social change and disruptions.<sup>53</sup> Ernest Caldwell has shown how the role of written texts were forged as shared rules among competing ruling aristocracies.<sup>54</sup> Thus this approach, while later limiting arbitrary actions of the elite was also done for its own preservation.<sup>55</sup> But in doing so, these texts set clear the normative and legal boundaries that would apply to the ruling class *and* the public. Mark Lewis in his work traces this to the rise of Confucian or *ru* scholars themselves, who were able to successfully mold the political discourse of the times into one based on textual and ritual learning.<sup>56</sup> It is precisely this emphasis on the text that allowed Confucian scholars to withstand the dynastic changes.<sup>57</sup> Over time, these Confucian specialists took on increasingly important roles in the court, especially in drawing on texts to resolve challenging legal or constitutional-type questions.<sup>58</sup> Rituals, another source of constraint on power discussed later, were also encoded in texts, lending a sense of permanence in addition to serving as “a reference point for

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52. *Id.* at 431 (showing that “the presence of the King constrain[ing] the powers of the Grand Steward. At the same time, the administrative powers of the Grand Steward should be secured against arbitrary intervention from the King.”); *see also id.* at 433 (discussing ways “in which the King, the Grand Steward, and the Royal Secretary could form checks and balances to prevent misuse of power by any of the three.”).

53. Ernest Caldwell, *Social Change and Written Law in Early Chinese Legal Thought*, 32 L. & HIST. REV. 1 (2014).

54. *Id.* at 17 (observing that “former systems of social control were no longer deemed efficacious; therefore, the possibility of written law as a means of combating sociopolitical disorder came to the forefront.”).

55. Earlier in Chinese history, dukes of various kingdoms were often at risk of being killed by ministerial families. For example, the kingdom of Jin was eventually partitioned into three (Han 韓, Wei 魏, and Zhao 趙) each governed by a former Jin ministerial family.

56. MARK E. LEWIS, *WRITING AND AUTHORITY IN EARLY CHINA* (1999).

57. *Id.* at 337-62.

58. *See* Benjamin Wallacker, *The Spring and Autumn Annals as a Source of Law in Han China*, 2 J. CHIN. STUD. 59 (1985).

any would-be disputants”.<sup>59</sup> As Janet Ainsworth noted, once incorporated, these “sacred texts” required interpretation and reinterpretation with lasting implications for questions of authority and legitimacy, as we see in constitutional contexts in other cultures.<sup>60</sup>

The essential Chinese canons such as *Spring and Autumn Annals* and the *Book of Poetry* are considered great works of literature and philosophy, but actually also served as central moral, legal and constitutional sources that at times even overrode statutes and laws in adjudicating various public questions.<sup>61</sup> Norman Ho takes the Han dynasty as a case study and observed how in certain instances the *Spring and Autumn Annals* had greater weight than the expressed orders of the emperor.<sup>62</sup> In certain situations of adjudication, dissenting officials felt sufficient impetus to challenge those decisions and at times changed the view of the sovereign.<sup>63</sup> Many officials and scholars thought these texts contained political and moral principles, as well as blueprints for governance that would make law more objective. Drawing on the classics, they would even engage in linguistic analysis to extrapolate implications for their particular situations.<sup>64</sup> Thus, exegetical and philological work itself served as important forms of deliberating the appropriate standards on application of state power. Many debates on the letter versus the spirit of a text took place in certain periods of ancient China.<sup>65</sup>

What made these texts powerful was the normative pull on the rulers and the ruled, which Alan Wood points out was particularly the case in Song dynasty.<sup>66</sup> While the founding Hongwu emperor of Ming displayed various autocratic streaks, he also at times accepted restraints in texts such as the *Great Learning*.<sup>67</sup> The *Book of Documents* (书经) detailed several examples where wise ministers would counteract against the behavior of kings *for the sake* of molding their character for good government. For example, a chief minister of Shang dynasty kept the new young sovereign Tai Jia (太甲) in partial confinement for disobeying instructions. While the contents of law were still

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59. Hahn, *supra* note 38, at 151.

60. See Janet E. Ainsworth, *Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China*, 43 HASTING L.J. 273 (1992).

61. See Norman P. Ho, *Literature as Law? The Confucian Classics as Ultimate Sources of Law in Traditional China*, 31 LAW & LIT. 173 (2019) (noting also that the texts played an important role when the application of the law was unclear).

62. See *id.* (referring to the cases of Prince of Liang and Wang Wang).

63. In the view of Ho, this was because the Confucian classics ranked higher in “primacy” with the “subordinated” statutory law (and the expressed wishes of the emperor), which had the effect of invalidating applicable laws in the adjudication process.

64. See *id.* at 179.

65. Hahn, *supra* note 38, at 159-60. (“Some may argue that the prescriptions in the ancient text should be followed without alteration. Others may argue that the ancient rituals need to be modified and adapted to fit the current conditions of the society. Still others might argue that the details of the rituals are unimportant, as long as the “spirit” of the ancient rituals were preserved.”)

66. See ALAN T. WOOD, *LIMITS TO AUTOCRACY: FROM SUNG NEO-CONFUCIANISM TO A DOCTRINE OF POLITICAL RIGHTS* (1995).

67. See Ditmanson, *supra* note 23, at 434.

determined by the ruling elite, the codification of texts limited the scope of aristocratic capriciousness and arbitrary adjudication. Caldwell notes the very process developing a written, public standard, for the sake of governance, in effect forced the elites to justify and defend the validity of their judgments and decisions.<sup>68</sup>

In addition to these ancient texts, throughout Chinese history, various dynasties laid out sophisticated laws on the structure of government that limited what was permitted and prohibited, including the Tang and Qing codes.<sup>69</sup> Some of these texts were closer to functions of administrative law, which attempted to keep central bureaucrats and local officials accountable to their particular functions. Edward Farmer deemed the Great Ming Code and immense number of legal documents produced as sufficient to have constituted a “Ming Constitution”, as it covered the primary state concerns including governmental institutions and important social customs which limited arbitrary power.<sup>70</sup> These legacies would have an impact on subsequent periods and also other countries such as Korea, Japan and Vietnam.

Perhaps the most vivid example of Chinese texts addressing constitutional-level problems was that of leadership succession and vacuum. Among other episodes in Chinese history, in late Ming, we saw an unusual episode of leadership vacuum when the Zhengtong (正統) emperor was temporarily abducted by northern tribes.<sup>71</sup> The scholar-officials who advised and ran the government actively consulted and debated the Confucian texts and ancestral precedents to first allow for the emperor’s brother Jingtai (景泰) emperor to step in the role and then later, upon return of the emperor, to remove the brother (and his lineage) for the emperor to take back his role. While the scholar-officials deviated from the founding Ming precepts in the *Ancestral Instructions* by letting the brother take over, sufficient opposition expressed misgiving such that Zhengtong emperor was put back on the throne after his return, despite resistance from Jingtai. Benjamin Wallacker similarly examined these dynamics by exploring the procedures by which unsuitable emperors were dethroned during the Han period of Chinese history, for which there were fairly specific rules and whose precedents took on importance for later dynasties.<sup>72</sup>

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68. Caldwell, *supra* note 54, at 17-18 (observing that “efficacy of law to control both the populace and aristocracy was possible because writing was visible and accessible to the general populace. It enabled the actions of those above to be assessed based on a known, public standard.”).

69. See, e.g., Liang Zhiping, *Explicating “Law”: A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55, 86-87 (1989); THOMAS METZGER, INTERNAL ORGANIZATION OF CHING BUREAUCRACY: LEGAL NORMATIVE, AND COMMUNICATIONASPECTS 235 (1973); WILLIAM JONES, THE GREAT QING CODE (1994).

70. See EDWARD FARMER, ZHU YUANZHANG AND EARLY MING LEGISLATION 10 (1995).

71. See Ditmanson, *supra* note 23, at 440.

72. See Benjamin Wallacker, *Dethronement and Due Process in China*, 21 J. ASIAN HIST. 48 (1987).

The literati who filled the imperial institutions had a particular importance in applying these texts. Ditmanson argues what gave them this power was their ability to make claims on “moral status of the imperial throne and consistently assert[ing] their prerogative as the guardians of its integrity.”<sup>73</sup> The authority of the ruler to determine his own succession process led to frequent debates in the imperial family, which shaped the degree of moral leverage of scholar officials over imperial power. For this reason, emperors throughout history were often deferential to prominent scholars, as was the case of emperor Hongwu with Neo-Confucian Fan Zusan, especially over issues of legitimacy.<sup>74</sup> On the one hand, the literati depended on state powers for their positions (often lacking sufficient independent basis of power), but on the other, they asserted vocally that it was they, not the rulers, who understood the nature of legitimacy and tasked with deducing it. Figures such as Fang Xiaoru asserted that it was within the scholar historians’ imperative to make the correct moral assessment of the ruling family and thus, the status of the dynasty.<sup>75</sup> Ray Huang notes that the effect of these practices was erecting an “intangible wall” (invisible because it was not easily changed or challenged even if it was not law per se).<sup>76</sup> The cost of challenging the emperor can indeed be high, from losing all ranks to being sentenced to death. Yet the responsibility to exercise these powers existed and if successfully done could bring one much lifelong prestige, including in posterity.<sup>77</sup> In these ways, the textual precedents served as a critical lever for adjudicating how the power was used, illustrating a dimension of constitutionalism.

### PART THREE: RITUALISTIC NORMS AND SOCIAL PRACTICES

While ancient China did not display strictly legalized form of constitutionalism, as exemplified in modern Western nations using judicial review to overturn decisions of the sovereign, there is a growing body of literature examining the impact of ritualistic practices and norms as preemptive constraint on sovereign power.<sup>78</sup> In the Confucian tradition, rituals (礼) served the central function of disciplining the body and the mind, flowing from the individual to the head of household and the ruler. Rituals thus consisted of patterns that regulated the behavior and speech of the ruler. Chaihark Hahm in his extensive study of East Asian rituals argues that the means of legitimate rulership was by virtue perceived through rituals.<sup>79</sup> Just as an individual

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73. Ditmanson, *supra* note 23, at 431.

74. *See id.* at 434.

75. *See id.* at 435.

76. *See* RAY HUANG, 1587, A YEAR OF NO SIGNIFICANCE: THE MING DYNASTY IN DECLINE 84 (1981).

77. *See* Will, *supra* note 45, at 271.

78. *See, e.g.,* Hahm, *supra* note 38; Sungmoon Kim, *Confucian Constitutionalism: Mencius and Xunzi on Virtue, Ritual, and Royal Transmission*, 73 REV. POL. 371 (2011); Tom Ginsburg, *Constitutionalism: East Asian Antecedents*, 88 CHI.-KENT L. REV. 11 (2012).

79. Hahm, *supra* note 38, at 139-40. (“A ruler who failed to comport with the requirements of proper ritual was not qualified to be a ruler. With such an elevated notion of ritual, it is then hardly surprising that, in a society where Confucian values formed the basis of political morality, ritual could

without ritual became a brute, a ruler without it became a tyrant. The sovereign was thus compelled to act in very specific ways as a result of these rituals. Minute and elaborate details such as methods of ancestral worship could reflect the degree of moral and political authority of the emperor.<sup>80</sup> Sungmoon Kim observes that the degree of adherence to commonly perceived forms either could enable or disable his legitimacy.<sup>81</sup> Moreover, rituals also had practical implications, such as limiting which constituents had meaningful access to the ruler, which could in effect constrain his space to maneuver. Ritual norms and practices existed not only at the center but also in lower levels of the state, such as the community compacts of Wang Yangming, which acted as a bulwark on the center from a bottom-up manner. In contrast to predominant image of rituals creating docility among its governed, rituals provided an ordered check on the ruler.

Confucius is perhaps the most singularly identifiable source for the importance of rituals both in governing the self and the state.<sup>82</sup> Living in the Spring and Autumn period, he certainly did not imagine anything other than a monarchy in a feudal context, however, his notion of the ideal state was closer to the reduced involvement of early Zhou than the statist and legalist approach of Qin, China's first unified dynasty.<sup>83</sup> In place of that vision (and the sole use of penal punishment), Confucius focused on the importance of rituals and conventions in cultivating a moral vision for the individual and state. He believed the ancient rituals of the former Kings of the Three Dynasties, who preceded his time, provided the foundations of political order, particularly because of its power to influence the moral dimension of people. And due to the lasting Confucian legacy, rituals and authority of the ruler became inextricably linked.

We find numerous sources expanding on these ideas. For example, the *Zuo Commentary to Spring and Autumn Annals* sketches out the implications by noting, "It is ritual that governs the states and families, establishes the foundations of the country, secures order among people, and benefits one's future heirs."<sup>84</sup> The link between governing in accordance to rituals was also seen in texts such as in the *Book of Rites* (礼记), "Thus the sages made known these rules, and it became possible for the kingdom, with its states and clans, to reach its correct condition."<sup>85</sup> Zhang Qianfan argues what gave ritual a

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become the basic term of political discourse.").

80. See David McMullen, *Bureaucrats and Cosmology: The Ritual Code of Tang China*, in RITUALS OF ROYALTY: POWER AND CEREMONIAL IN TRADITIONAL SOCIETIES (David Cannadine & Simon Price eds., 1987).

81. See Kim, *supra* note 79, at 373.

82. See, e.g., A.C. GRAHAM, DISPUTERS OF THE TAO: PHILOSOPHICAL ARGUMENT IN ANCIENT CHINA (1989).

83. See Youngmin Kim et al., *The Confucian Tradition and Politics*, in OXFORD RESEARCH ENCYCLOPEDIA, POLITICS (2019).

84. THE CH'UN TS'EW WITH THE TSO CHUEN 158 (James Legge trans. & ed., 1991).

85. LI CHI: BOOK OF RITES 375 (Ch'u Chai & Winberg Chai eds. & James Legge trans.,

particular constitutional quality was the fact that it was often considered the highest norms of the state, which would become entrenched deeply within the state structure.<sup>86</sup>

The same rituals that could confer upon the sovereign the dignity and legitimacy for rule could be used to challenge, criticize and restrain its authority, even at times censuring and disciplining the ruler.<sup>87</sup> David Kertzer notes, “Far from simply propping up the status quo, ritual provides an important weapon in political struggle, a weapon used both by contestants for power within stable political systems and by those who seek to protect or overthrow unstable systems.”<sup>88</sup> Throughout history, these rituals would themselves become a locus of constitutional discourse in which different understandings and interpretations clashed to produce various constitutional arguments, with direct impact on the status of the ruler.<sup>89</sup> Like in other cultures, they allowed different factions to profess allegiance to the same norms while supporting competing interpretations to challenge the claims and use of state power.

The impact of rituals did not take place only at the center but also locally. This is particularly the case for Neo-Confucians who adapted their concepts of rituals for society at lower levels. The Neo-Confucians developed extensive kinship organizations (with shared ancestry) which played “quasi-public” roles in areas that state power did not reach – which was significant since bureaucracy in imperial China did not always match population growth.<sup>90</sup> Their forms of mutual assistance were frequent, including managing agricultural land, mobilizing capital investments, establishing schools and ancestral shrines. In the worldview of Neo-Confucians, best exemplified by Zhu Xi, the theoretical hierarchy was not between the emperor and subjects, but rather between the sage and non-sage. Even the emperor was constrained by the law-like principle contained within the universe and the sage was thus in a better position to understand and apply it.<sup>91</sup>

Another later Neo-Confucian, Wang Yangming, was a prominent example of rebuilding civil order in regions following revolts and uprisings. To do so, he drew on his notion of community compact (*xiangyue* or 鄉約) rather than state institutions. These local institutions and social practices served as a bulwark against arbitrary actions from the center as policies filtered downward.<sup>92</sup> While Neo-Confucians and local literati were often willing to

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86. Zhang, Qianfan, *Chuantong Yu Xiandai: Lun Li De Xianfaxing* (传统与现代: 论‘礼’的宪法学定性) [*Tradition and Modern: On the Constitutional Nature of Li*], 1金陵法律评论 [JOURNAL OF JINLING LAW], 119, 123-36 (2001).

87. See Hahm, *supra* note 38, at 150.

88. DAVID KERTZER, RITUAL, POLITICS AND POWER 104 (1988).

89. See Hahm, *supra* note 38, at 180-1.

90. See Kim, *supra* note 84, at 10.

91. See *id.* at 11.

92. See *id.* at 12-3.

cooperate with the state, they also “attempted to limit central interference and envisioned a more decentralized society.”<sup>93</sup> Many of these ideas would be adapted by 20<sup>th</sup> century reformers such as Liang Shuming in his rural reconstruction efforts, precisely for the purpose of developing the social basis for Chinese constitutionalism.<sup>94</sup>

Throughout East Asia, political actors and scholars drew on the norms and language of ritual to debate political matters and challenge the government’s force. Scholastic exchanges on issues of rituals had a direct impact on the nature of authority for the sovereign. Ritual discourse became a primary means by which constitutional-like discourse on the appropriate boundaries of state and bureaucracy was carried out.<sup>95</sup> Thus, in the words of Walter Bagehot, rituals served not only as the “dignified” dimensions of the constitutionalism but also its “efficient” aspect by constraining excessive power.<sup>96</sup> These Confucian rituals acted as an influential disciplining force on the sovereign by drawing on the authority of traditions.<sup>97</sup>

#### PART FOUR: COUNTERBALANCING ROLE OF SCHOLAR OFFICIALS AND OTHER INSTITUTIONS

An essential constitutional check in the Chinese past was a conception of government whereby ruler and officials were seen as essential and complementary dimensions of governing. Moreover, the role of the minister did not derive its authority completely from the sovereign but rather from the former sources such as classical texts and rituals. Relying on these sources of authority, officials and institutions acted as checks on sovereign power. Officials and felt it was their obligation to critique the emperor and acts of remonstrance would serve as a non-legal enforcement of constitutional norms. There were also important formal institutions such as the Censorate which also acted as checks. While such institutions did not always succeed in overriding the ruler, they set up boundaries that made it harder for the emperor to cross into arbitrary rule and overreach.

The role of scholar-officials and ministers checking the sovereign developed early on in the theories of Mencius and Xunzi. They were mandated with averting serious problems of the state and resolving constitutional crises, even by deposing the ruler if needed.<sup>98</sup> Mencius noted on times proceeding his,

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93. *See id.* at 16.

94. ZHANGRUN XU, THE CONFUCIAN MISGIVINGS—LIANG SHU-MING’S NARRATIVE ABOUT LAW 123 (2017) (nothing a central object of “rural reconstruction was to develop a social consensus reached through new customary practices” where it was hoped that it would “come to constitute the substantial-rooted basis upon which a true form of constitutional government would arise.”).

95. *See* Hahm, *supra* note 38, at 140.

96. *See* WALTER BAGEHOT, THE ENGLISH CONSTITUTION (1867).

97. For general discussions on the relevance of tradition for law, *see, e.g.*, Anthony T. Kronman, Precedent and Tradition, 99 YALE L.J. 1029 (1990); David J. Luban, *Legal Traditionalism*, 43 STAN. L. R. 1035 (1991); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993).

98. *See* Kim, *supra* note 79, at 396.

“If the prince made serious mistakes, they (ministers of royal blood) would remonstrate with him, but if repeated remonstrations fell on deaf ears, they would depose him.”<sup>99</sup> Xunzi, on the other hand, focused on the importance of institutions, rather than the personal characteristics of the king in preserving responsible governance of the realm. Similarly, in the Daoist tradition, the ideal scenario was one wherein the king was in a position of *wuwei* or non-action since he could rely on operations of effective institutions.<sup>100</sup> Inherent in his model is a framework of the ruler integrated as part of a larger system.

There were many other historical Chinese thinkers who addressed horizontal accountability between rulers and ministers. To take one example, Zheng Boqian of Southern Song dynasty saw the tension between ministership and kingship as a necessary condition for political durability. While the king represented notions of discretion, wisdom, responsiveness and rule of man, ministers such as the Grand Steward stood for bureaucratic standardization, meritocracy, and limits to autocracy. As Jaeyoon Song observes, such tension was seen as essential in preventing one from dominating the other.<sup>101</sup> These ideas emanated from the *Zhou Li*, discussed in Form I, serving as blueprint that later thinkers and commentators such as Zheng would develop in greater detail. Similar opposing dynamics between ruler and ministers are seen in Han Feizi.<sup>102</sup>

These ideas would play out in practice in various forms in Chinese history, although in much greater complexity than can be given in this piece. Many institutional structures and restraints acted as a bulwark against sovereign rule, not least the meritocratic selection of civil servants and sophisticated bureaucratic procedures. Chinese scholars have also examined a number of these power checking mechanisms and themes including principles of “mutual surveillance and mutual correction” (互督互纠), “synergy of remonstrance and censorship” (台谏合一), and “using the lower officials to censor the higher” (以卑临尊) at different points in history.<sup>103</sup> While some of these terms may be less familiar to a Western audience, these concepts have been studied by Chinese scholars, although not necessarily within a constitutional framework.<sup>104</sup>

Many Western scholars have also identified instances of these institutional and legal checks. A.F.P. Hulsewe surveyed the role of

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99. MENCIUS (D. C. Lau, trans., 1971) (cited in passage 5B:9).

100. *See id.* at 395.

101. *See* Song, *supra* note 52, at 435.

102. *See* Han Feizi on relationship of ministers to sovereign, especially sections 12, 13 and 18.

103. *See* Libao Ni, Zhongguo Xiandai Jianchadu Yu Quanli Zhiheng Jizhi (中国古代监察度与权力制衡机制) [*The Censorship System and Power Checking Mechanism in Ancient China*], 24 新疆大学学报 [XINJIANG U. J.] 64 (1996).

104. Jiping Sun & Feng Yong, Zhongguo Chuantong Guanliao Zhengzhizhong De Quanli Zhiyue Jizhi 中国传统官僚政治中的权力制约机制 (THE POWER CHECKING MECHANISM ANCIENT CHINESE BUREAUCRATIC POLITICS) 2010.

Commandant of Justice in Han dynasty who has the duty of both prohibiting and punishing crimes by the imperial kin, many of whose ambitions threatened the state.<sup>105</sup> This sometimes included even subjecting the imperial family itself to legal procedures. As noted in Form II, in certain occasions, the decisions of the highest legal official could overrule the emperor's intent in legal matters. In countering Emperor Wen (漢文) who wished to more harshly punish a commoner who inadvertently endangered the emperor, Commandant of Justice Zhang Shizhi or Ban Gu challenged the action by asserting, "The law is what the Son of Heaven shares with the people. If it were made heavier in this case, the people would no longer trust it."<sup>106</sup>

The Censorate is also worth further exploring for the quasi-constitutional work that it provided within the state. The censors had at least three functions traditionally: (1) to ensure the legal and formal conformity of government decisions, (2) to oversee the behavior of officials across the empire, and (3) remonstrate the emperor for his inappropriate conduct and policies. What allowed the Censorate to discharge its function was a degree of protection from outside pressures owing to established customs and its reputation for independence.<sup>107</sup> The relationship between the bureaucracy and the throne was an important factor in shaping the degree of control by the Censorate. At their most contentious points, *constitutional*-type arguments were put forth challenging the behavior of the emperor.<sup>108</sup> In the case of emperor Wanli (万历) of Ming dynasty, his decision to not return memorials for approval or comment (a necessary feature for government to run) was seen as a kind of constitutional breach because it prohibited the bureaucracy from being informed in order to do their work, an essential constitutional function. In response, the censors allowed memorials harshly criticizing the emperor to be published without his approval.<sup>109</sup>

Academic institutions, such as the Hanlin (翰林) which was part of the court and Donglin (东林) which was in opposition to the court, delineated a quasi-independent sphere of influence from state power. According to Peng Chengyi, at its height, it possessed significant claims over different areas, such as supervision power (监国权), scholar examination power (考试权), ritual and sacrificial power (礼仪祭祀权), personnel appointment power (任命权), arbitration power (仲裁权), and custom-mores maintenance power (维持风教权), which all served as institutional mechanisms for checking arbitrary power.<sup>110</sup> In general, while these institutions were not as independent as

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105. See A.F.P. Hulsewe, *The Functions of the Commandant of Justice During the Han Period*, in *CHINESE IDEAS ABOUT NATURE AND SOCIETY: STUDIES IN HONOUR OF DERK BODDE* 249-62 (Charles Le Blanc & Susan Blader eds., 1987).

106. KU PAN, *THE HISTORY OF THE FORMER HAN DYNASTY* (1938) (referred to section 50:2310). The first part is a well-known phrase in Chinese: "法者，天子所與天下公共也".

107. See Will, *supra* note 45, at 267.

108. See *id.* at 267-8.

109. See *id.* at 269-70.

110. Peng Chengyi, *Traditional Confucian Constitutionalism: Current Explorations and*

possible Western counterparts such as the Catholic Church, they were willing to adopt highly critical views of the sovereign.<sup>111</sup> Many of these ideas were then adopted by later Chinese figures, such as Sun Yat-sen, who added two further branches of government to the traditional Western model: the examination system (selection of civil servants) and the censorate (supervising behavior of public officials), which we see as a living example in Taiwan.

As noted in Form III, it is also worth mentioning briefly here the importance of local institutions as another check on the power of the center. Su Li in his response to critics admitted that “it would be wholly true to say that the executive [function] was normally subordinate to the judiciary at the local level in ancient China.”<sup>112</sup> In other words, the judicial dimension could take precedent over the executive aspect, especially at lower levels of governance. Also earlier in Chinese history, such as during reign of Jingdi (景帝) of Han, there were institutional protections of lower-level local officials for making a wrong decision while at the same time prohibiting arbitrary judgments.<sup>113</sup> And while the center appeared all-powerful, the reality was that even in Qing dynasty, the Chinese state needed the cooperation of local elites to perform deliver quasi-governmental functions, which was especially true in its later periods. The reason was in good part due to the lack of capacity. As one example, by late Qing, the ratio of local population to local officials grew to one magistrate for every 200,000–300,000 people.<sup>114</sup> While the power of the ruler in theory could be seen as absolute, in practice the shortages within the bureaucracy and vibrant diversity within locales in different regions acted as another de facto form of check on imperatives from the center.<sup>115</sup>

#### PART FIVE: COSMIC JUSTIFICATIONS OF RESPONSIBILITY TO RULE

Throughout Chinese history, emperors were seen as the primary mediator between Heaven and Earth. They were endowed with a right to govern through the crucial concept of the Mandate of Heaven (天命), which becomes a reoccurring discourse on legitimacy to rule throughout dynastic periods. The Mandate of Heaven implied that there was a *higher authority*, which was moral or cosmic, that checked the emperor himself. New dynasties justified their overthrow of the previous regime on the basis that the latter had lost the Mandate. Crucially, the Mandate of Heaven was not only a right to govern but a *responsibility*.<sup>116</sup> It mandated that the emperor had to govern in accordance

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*Prospects*, 8 *FRON. OF PHIL. IN CHINA* 76, 93 (2013).

111. See Kim, *supra* note 84, at 10.

112. See Su Li, *supra* note 29, at 226.

113. See Karen Turner, *Rule of Law Ideals in Early China?*, 6 *J. CHINESE L.* 1, 33 (1992).

114. See Masahiko Aoki, *Historical Sources of Institutional Trajectories in Economic Development: China, Japan and Korea Compared*, 11 *Soc.-Econ. R.*, 233 (2013).

115. Kim, *supra* note 84, at 4 (observing “the Chinese state bureaucracy was consistently understaffed” and thus to the extent that “the Chinese ruler controls the Chinese elite and society through inefficient patrimonial bureaucracy, the ruler and the elite possess limited power to transform the society.”).

116. For a more detailed explanation of this idea, see Luke Glanville, *Retaining the Mandate of*

with certain immutable moral and universal principles which, according to Mencius, eventually manifested in the hearts of everyday people. When the ruler violated these fundamental principles to the extreme, he eventually lost the authority to rule. These higher principles became another form of discursive constitutional check on the abuse of power.

The concept of Mandate of Heaven originated most likely during the founding of Zhou dynasty which had argued the preceding Shang dynasty had lost the sacred mandate from Heaven (due to a lack of virtue among its rulers) and thus passed it onto Zhou. The term was mentioned extensively in ancient texts, including Book of Poetry and, by one account, over 70 times in the Book of Documents.<sup>117</sup> These ideas were then further developed by Confucius, Mencius and their followers to become the basis and language for state legitimacy. Importantly, the mandate itself was closely tied to the *behavior* of the ruler, with the implication that immoral, inappropriate or tyrannical activities may undermine the legitimacy of the sovereign.<sup>118</sup> Duke Zhou, perceived as one of the model leaders in ancient China, was recorded to have made the following comments: “Heaven had ripped off the mandate from the Shang state and passed it to us, ... but I cannot count on the Mandate resting with us and will respect the Heavenly Mandate and our people forever. It is all contingent upon human conduct whether or not mistakes and evils will occur.”<sup>119</sup> Thus, in doing so, the concept provides a normative framework to challenge the legitimacy of the rule by providing a language to question the acts of the sovereign.

Therefore, what bound the sovereign and the people was the mandate itself, which was a duty that had to be met in order for the rule to be sustained.<sup>120</sup> Here we also see some preliminary expressions of popular sovereignty in Confucius’ successors who would build on this notion. Mencius put it this way: “The people are the most crucial and important, the next is the state, and the least is the king.”<sup>121</sup> Xunzi similarly argued that while the king was like a boat and the people were the water that not only carried the boat but could overturn it too. For Mencius, the world or *tianxia* (天下) theoretically did not belong to the ruler and thus it was not his discretion to hand the authority to another. The ultimate arbiter was in Heaven which manifested in the willingness and acceptance of the people.<sup>122</sup> As is well known, Mencius went

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*Heaven: Sovereign Accountability in Ancient China* 39 MILLENNIUM J. OF INT. STUD. 323, 323–24 (2010).

117. See MENGZHEN FU, *THE WORKS OF FU MENGZHEN* (1952).

118. See Hahm, *supra* note 38, at 155.

119. BOOK OF DOCUMENTS (SHANGSHU) (Zhonghua Shuju 1980) (referenced in the “Junshi” chapter).

120. See, e.g., Karl Büniger, *Concluding remarks on two aspects of the Chinese unitary state as compared with the European state system*, in FOUNDATIONS AND LIMITS OF STATE POWER IN CHINA 313-23 (S. R. Schram eds., 1987).

121. MENCIUS (MENGZI) (Zhonghua Shuju 1980) (referenced in the “Jinxinxia” chapter).

122. “Tian does not speak but reveals itself by its acts and deeds.” (Mencius and Wan Zhang in

so far as to suggest that killing of tyrants was justified given their undermining of the “moral order between man and heaven”.<sup>123</sup> Xunzi in a similar manner justified killing of sovereigns Jie and Zhou as they were no longer real kings. We also find many instances of those who challenge the ruler on the basis of these concepts. For example, the Han reformer, Jia Yi (201-169 B.C.), argued that the ruler who punished to serve his personal grudges would become subject of vengeance: “If the punishment is appropriate for the crime, you can punish many people without being at fault. If the punishment is not right and you kill one person [wrongly], your crime will be reported to highest Heaven.”<sup>124</sup> Others, as recorded in the Chinese classic *Huainanzi*, thought inappropriate activities would lead to natural disasters, such as drought.<sup>125</sup>

These sentiments were also found in non-Confucian Chinese traditions. In the concept of *Dao* or commonly translated the Way, found in Daoist and other schools, we find ideals that also transcended the sovereign. The term cosmic rather than transcendental may be more appropriate because the Dao was not seen as a law-giving entity but more an unalterable set of universal principles and patterns that could not be influenced or manipulated. Scholars such as R.P. Peerenboom have also identified the Huang-Lao school of thought, manifested in Mawangdui legal texts on silk, as a coherent normative natural order for constraining government decisions, including that of making war.<sup>126</sup> In any case, the Dao was thus seen as a guidepost that could secure adherence from its followers a commitment to a moral order that mirrored the cosmic world.

The ideas of cosmic legitimation had various manifestations throughout Chinese history. To take one example, Jiang Yonglin argues the Great Ming Code, the foundational legal texts of the Ming dynasty, embodied the cosmic order and human sentiment based on Heavenly principles.<sup>127</sup> These codes played crucial roles in delineating appropriate rituals between the ruling and ruled and rectifying the behaviors of the governing elite. As earlier scholars such as Romeyn Taylor observed, the laws of this era were perceived as conveying the will of the emperor only so far it “faithfully expressed the heavenly patterns”.<sup>128</sup> Jiang also notes that imperial law, contrary to popular conception, did not serve merely as a strict punitive instrument to control society but was also a “powerful device for maintaining social boundaries, even

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Mencius 5A:5) D. C. Lau, trans., Mencius (New York: Penguin, 1971).

123. Kim, 375.

124. Turner, *supra* note 113, at 29.

125. *Id.* (“Oppressive laws and ordinances stimulate plagues of insects and furthermore if the innocents are put to death, the countryside will dry up in drought.”).

126. See R. P. PEERENBOOM, LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO (1993).

127. YONGLIN JIANG, THE MANDATE OF HEAVEN AND THE GREAT MING CODE 4 (2010).

128. Romeyn Taylor, *Da Ming Huidian Bianzuan Zhong de Yuzhouguan yu Lishiguan*, “*Worldview and History in the compilation of Collected Statutes of the Great Ming*”, in DIERJIE MING QING SHI GUOJI XUESHU TAOLUNHUI LUNWENJI [COLLECTED ARTICLES OF THE SECOND INTERNATIONAL CONFERENCE ON MING AND QING HISTORIES], 47 (Jiang Yonglin trans. 1993).

for restraining the arbitrary forces of the emperor and his civil and military representatives.”<sup>129</sup> Given its immutability, the cosmic order, as understood by these historic actors, definitively superseded the authority of the sovereign and created a strong imperative for the latter to act within restraints. When the ruler exceeded these bounds, opposition were able to draw on this higher moral, or if codified as was the case in Ming and other periods, *constitutional* authority to challenge its power. While in practice such efforts did not succeed, it need not undermine the fact that such theoretical foundations as a source of indigenous constitutionalism existed.

#### CONCLUSION AND IMPLICATIONS

Since this is an exploratory Article, one can only highlight some illustrations of the different forms, as further examples and details will be returned to in a longer iteration of this research. Contrary to the views of those who hold China lacks an indigenous constitutionalist tradition, this Article is an attempt to challenge those assumptions. Moreover, we may observe that these distinctive elements are not necessarily *fundamentally* at odds with Western paradigms in the international system. It may also stimulate contemporary Chinese thinking more broadly on what “constitutionalism” of different forms mean rather than assuming that it is a settled question. As one possibility, strong centralization with structural checks are dimensions not in opposition, but rather play a complementary role. As for Western constitutional discourse, this investigation may shed light on non-*legal* forms of enforcing constitutional norms. While Form II (textual and interpretative source) or IV (institutional mechanisms of checks) may be more familiar to Western constitutional scholars, Forms I, III, and V can offer further valuable perspectives to the broader global exchange.

The past has been used to justify not only the present but also what is *possible* in the future. This Article shows that there has been much “constitutional potential” based on China’s own history than is often thought. This investigation may help begin to uncover how China can draw on its historical resources to develop its own distinctive constitutional path, but one that is not necessarily fundamentally at odds with conceptions defined by other actors in the international system. Rather, comparative exercises of this nature should encourage us to embark on a more open-ended, constructive deliberation of how different experiences, portrayed in all its complexities, can learn from one another.<sup>130</sup> In illuminating the Chinese past, these forms of indigenous constitutionalism may also provide a reading of possible long-term trajectories, while also locating language and frameworks more easily accessible within the Chinese tradition itself. In the broader landscape, China’s place within the international legal order will continue to exhibit moves

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129. Jiang, *supra* note 130, at 13.

130. See, e.g., Thomas Coendet, *Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law*, 67 AM. J. COMP. L. 775 (2019).

towards and against cosmopolitan constitutionalism.<sup>131</sup> By drawing on its authentic and distinctive indigenous experiences, which are much more interesting and robust than recognized to this day, China itself can perhaps better meet the world and modern realities without sacrificing its own cultural roots.

There are a number of questions for scholars to examine from this initial inquiry. For those interested in contemporary developments, one might explore how economic or social performance of a regime can be accurately used as a measure for concepts such as the Mandate of Heaven<sup>132</sup> or how the various forms of constitutionalism discussed intersect or contrast with contemporary understandings in Chinese discourse.<sup>133</sup> From a sociological perspective, drawing on the inspiration of Liang Shuming in building a rural foundation for Chinese constitutionalism, it may be worthwhile to explore how these constitutional forms originated in the first place and what provided the socioeconomic underpinnings for these structures.<sup>134</sup> Once we establish various constitutionalist forms did exist in Chinese history, how can we better explain the changes and shifts of certain forms becoming more dominant relative to others? Another area might be the interplay between the ideas and practices – what determined when certain constitutional ideas would have more traction and likelihood of being enforced than others? A separate investigation could shed light on the present situation of China might be how these constitutionalist ideas and practices affect or not affect the interactions of China by other states throughout history. Did formal and informal constraints of state power shape perceptions of legitimacy with China's neighbors or in other spheres of the world? Finally, for those hoping to adapt ideas of the past for the contemporary world, wrestling with the process of creative transformation of a tradition is a challenging but intriguing first step.<sup>135</sup> While these are no doubt big questions that reach beyond the scope of this Article, they nevertheless show the significant potential for this line of research, with increasing consequences for the uncertain world we find ourselves.

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131. Haig Patapan, *Towards a Cosmopolitan Constitutionalism: On Universalism and Particularism in Chinese Constitutionalism*, 3 CHINESE J. COMP. L. 78, 96 (2015).

132. Dingxin Zhao, *The Mandate of Heaven and Performance Legitimation in Historical and Contemporary China*, 53 AM. BEHAV. SCI. 416 (2009).

133. For comparisons with contemporary application in other Asian contexts, see Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC. INQUIRY 763 (2002).

134. Zhang *supra* note 23, at 205 (“It is therefore imperative to carefully consider why-and how-institutions exist in the first place, before employing them as analytical starting points in a study of economic divergence.”).

135. Albert Chen, *Is Confucianism Compatible with Liberal Constitutional Democracy*, 34 J. OF CHINESE PHIL. 195, 209 (2007).