

Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism

Modern China

2014, Vol. 40(2) 168–195

© The Author(s) 2013

Reprints and permissions:

sagepub.com/journalsPermissions.nav

DOI: 10.1177/0097700413511315

mcx.sagepub.com



Larry Catá Backer¹

Abstract

The state of constitutional theory is in flux. What was once the preserve of those who organized the state became the expression of mass democracy and the popular will, one that has been increasingly constrained by international consensus on the limits of political will within national borders. The stakes are high—constitutional legitimacy is fundamental to internal political stability and to international acceptance. Among the most contested forms of modern constitutional states are party-state systems grounded in Marxist-Leninist theory. This article considers Jiang Shigong's development of a coherent and legitimating constitutionalist theory of China's party-state system. It considers Jiang's argument that constitutionalism must start with values and structure and then considers the mechanics through which it is institutionalized—either in writing or through structuralist approaches. It also examines Jiang's construction of a formal-functional theory of Chinese constitutionalism that acknowledges the democratic basis and the representative character of the Chinese Communist Party within the party-state system. Jiang's theoretical developments point to the deepening of an

¹Pennsylvania State University, University Park, PA, USA

Corresponding Author:

Larry Catá Backer, Pennsylvania State University, 239 Lewis Katz Building, University Park, PA 16802, USA.

Email: lcb911@me.com

understanding of the legitimacy of Chinese constitutionalism. Jiang Shigong is part of a small group of Chinese academics who are working along distinct paths to move beyond the “legitimacy” issue of Chinese constitutionalism and tackle the much harder but more important question of the continued development of Chinese constitutionalism along the lines of its own logic. Critical to that project are notions of civic education and the consequences of the separation of powers at the heart of Chinese constitutionalism—one that distinguishes between the administrative power of the government, including the administration and rule of law, and the political power of the Chinese Communist Party, including the nation’s constitutional norms.

Keywords

party-state system, single-party constitutional state, separation of powers between state and party, constitutionalism, formalism

Constitutions were once self-referencing instruments.¹ There was a fundamentally residual and explanatory element to constitutions—they described what was, and did so uncritically. Constitutions once could be understood as the proxy for the ways societies, organized politically as distinct from others, expressed their preferences for government,² as an apparatus separate from their laws and customs (Backer, 2008a). More importantly, what was once a heterogeneous approach to the foundations of the institutional organization of politics and the legitimate source of that institutionalization has also undergone transformation (McIlwain, 1947). But between the destruction of the ancient regime by the American and French Revolutions, the revolutionary transformations of the state in the twentieth century, and the rise of globalization regimes in the early twenty-first century, constitutions have themselves become enmeshed in two conversations that have both legal and political dimensions. One of these conversations is inherently political and transnational, grounded on emerging rules that both legitimate and frame the limits of acceptable constitutional design that citizens and the community of states are bound to respect (Henkin, 1993). The second is an internal conversation touching on the effectiveness and means of realizing and implementing legitimate constitutional ideals.

Constitutionalism at the political international level certainly is now conflated with a developing ideology of legitimacy (Raz, 1998) that is tied both to a taxonomy of state legitimacy and to the fundamental question of the measure of the legitimacy of the governments instituted to administer its affairs (Backer, 2008b). Thus, constitutionalism is understood as a study of

the characteristics of what separates legitimate from illegitimate governments and political systems. That basic objective is met by focusing on mapping the space that separates legitimate from illegitimate constitutional systems and governments. This constitutionalism conflates government and law, obliterating the ancient division between the administration of the state (*gubernaculum*) and the fundamental substantive rules under which it is governed (*jurisdictio*) (McIlwain, 1947: 86),³ but giving rise to a dynamic interaction understood broadly as rule of law (Fallon, 1997). More importantly, constitutionalism has incarnated the state from out of an aggregation of the people, whose will and authority are the singular marker of the legitimacy of both government and law. And thus when global actors speak of constitutionalism, they speak to legitimacy, grounded in fundamental notions of popular sovereignty expressed through government reflecting popular will and bound to act only according to law (Backer, 2008b). It is in this way that constitutionalism seeks to provide both a methodology and a substantive structure to the fundamental issue of politics, the “legal limits to arbitrary power and a complete political responsibility of government to the governed” (McIlwain, 1947: 146). Legitimate states and governments are constitutional governments and constitutional governments are legitimate and thus free of interference by other states, and free to use their authority, lawfully, against those who would seek to overthrow the government itself.

In a world in which regime changes are predicated on the legitimacy of the state apparatus and the substantive framework within which it operates (Backer, 2009a), constitutional legitimacy becomes an increasingly important element of national and international affairs. While legitimacy can be fairly judged among states sharing certain fundamental assumptions about political organization, the issue becomes more difficult where legitimacy is to be assessed across quite distinct political frameworks (Backer, 2008c). In the early part of the twenty-first century, these difficulties are greatest when approaching issues of the legitimacy of the constitutional framework of the People’s Republic of China (Peerenboom, 2002). The Chinese constitutional system does not imitate those of other developed states, because its political ideology is grounded in Marxism-Leninism, which suggests a different relationship between the state, the people, and the manner of exercising political and economic power, which over the course of nearly a century suggested what Western theorists generally viewed as the anti-constitutionalism of Soviet Stalinism and its variants.⁴ The differences themselves, then, have been taken as signs of illegitimacy, with the expectation that only an imitation of Western political models can produce legitimate constitutional structures.

Beyond the boundaries of legitimacy, of course, lies the infinitely intricate discourse of constitutional implementation. In the United States, for

example, much of what passes for constitutional discourse is grounded on the unassailable assumption (Fallon, 2005) of the legitimacy of the American constitutional framework and the government structured thereunder. This constitutional discourse strengthens the legitimacy of the constitutional enterprise even as it develops theories and methods of applying its ideals in a more orderly and appropriate manner, suitable to the times and the ideals expressed within the constitution instruments. But in states where the fundamental constitutional system remains embroiled in issues of legitimacy, these sorts of conversations are substantially limited. The limit is inherent in the weakness of the framework within which they are attempted. Where every conversation about constitutionalism inevitably turns to the issue of the legitimacy of the system, and every criticism turns to a criticism of the foundation of the political order itself, robust scientific development of a constitutional system becomes difficult if not impossible. China, to some extent, continues to find itself in this position.

Both the rise of transnational standards of constitutionalism and the strong pull of the form of Western democracies and their structural ideologies as the privileged template for legitimate constitutional expression have burdened the scientific development of Chinese constitutionalism as it remains grounded in its emerging Marxist-Leninist framework (Clarke, 1999). Every deficiency in the system and every form of distinction of the Chinese system from Western models are suggested as a basis both for the illegitimacy of the current constitutional structure or as evidence that such a system is incapable of working. But it has spurred a new and dynamic academic discourse about both Chinese constitutional legitimacy and the internal discourse of better implementing this constitutional structure. Constitutional discourse in China recently has been dynamic and profound.⁵ Much of it is unavailable in the West. Some scholars draw on Western sources for a critique of either the legitimacy of the current constitutional structure or its implementation (Yu, 2009), and others seek to theorize a constitutional framework for China that is both legitimate and implemented in accordance with its terms.⁶

Among the significant work being produced is that of the constitutional law scholar Jiang Shigong 强世功, Professor and Deputy Director, Office of Educational Administration at Peking University.⁷ He has suggested that when it comes to constitutional scholarship, there are two major schools of thought in China (Jiang, 2013). The first takes a “judicial constitutionalist” perspective, which is mainly represented by those who advocate Western constitutional perspectives. Judicial constitutionalists are American-style constitutional scholars who believe the Chinese constitution will inevitably evolve toward the American model. They tend to be legal formalists, who focus on democratic procedures, such as general elections and legislative

procedures. Also, they tend to favor Western-style multiparty government systems. I would say currently this school is the mainstream in China, as a result of the professionalization of legal education in China during recent years. Unsurprisingly, many judicial constitutional scholars in China have been educated in the West, mostly in the United States.

The second school represents what I call a “political constitutionalist” perspective, which tries to contextualize constitutionalism within China’s unique sociopolitical milieu. Jiang’s view of Chinese constitutionalism is most closely aligned with this school of thought. He believes that constitutionalism is not merely a legal subject, but more importantly a political one. A question central for political constitutional scholars is grounded indirectly in the issue of the legitimacy of the Chinese constitutionalist system itself: is American-style constitutionalism really inevitable? Jiang resists the idea of the inevitability of merger with American-style constitutionalism, and by implication also resists the idea that the American template is the only legitimate form that constitutional organization can take. This does not mean that the American approach is itself illegitimate; Jiang admits the merits of the American system and its tremendous contribution to the advancement of human civilization. However, progress requires innovations. There isn’t much room for progress if the rise of China simply means that China would merge into Western civilization. There is no reason to believe that history has ended, or that China has nothing to contribute to constitutionalism in its own right. Jiang suggests that perhaps China’s meteoric rise will provide a new model of governance which will contribute not just to China, but the entire human civilization. China might well be already making some positive contributions in this area—with the articulation of the “Peking consensus” being an excellent example (Bennhold, 2011).

The critical distinction for Jiang between Chinese and Western constitutionalism lies in the willingness to fold a party-state system within notions of substantive constitutionalism—not just in terms of legitimacy but also in terms of providing a foundation for building a governmental apparatus that provides for its people in a way functionally equivalent to that in Western democracies (traditionally used as the measuring standard for legitimacy). China, Jiang argues, is developing a constitutionalist system that is unique to its special circumstances, but still functions to achieve the universal constitutionalist goal of managing factions and facilitating a harmonious society. Given the shared goal, the only substantive difference between Chinese and Western constitutional systems is that China is a single-party state. Yet that difference makes all the difference in the world for many constitutionalist scholars. The role of the Chinese Communist Party (CCP), in effect, is the Chinese version of the counter-majoritarian difficulty of Western constitutional legitimacy.⁸

Jiang seeks to overcome this problem by reconceptualizing the CCP and placing it within the constitutional order of China. In this regard, it is important not to confuse the Chinese Communist Party with the conceptualization of political party. It follows that Chinese culture on political sovereignty tend to focus on consensus building, guided by the principle of *tianxia*, or “universality.” In ancient times, the Chinese emperor, or *tianzi*, functioned as a universal. The *tianzi* did not represent any particular faction or ethnicity, and governed the entire civilization through the mandate of heaven. Jiang argues that it is more proper to view the function of the CCP as similar to that of *tianzi* instead of as a political interest group. In turn, the CCP must fulfill its “mandate of heaven” by maintaining itself open to the general public. In this regard, Jiang would say that the CCP and Chinese history are the two cardinal elements forming the Chinese constitutional order. Yet, I might suggest that this focus on history may ignore the Marxist political element of Chinese political organization and thus too narrowly conceive of the party within that construct. Yet it still provides a welcome engagement with the central issue of Chinese constitutionalism in a positive way that is ultimately quite useful.

Jiang provides a robust effort to develop a theory of Chinese constitutionalism that falls easily within the emerging global discourse on legitimate constitutionalism. Its unique feature is its willingness to tackle the issue that causes the greatest difficulty in Western-oriented models—the role of a communist party within a constitutional system. His approach suggests both the possibilities of an important development of constitutionalism theory from China, but also the self-consciousness of Chinese constitutionalism, one that is still more concerned with the defense of its legitimacy than with tackling the more important issues of appropriate implementation in accordance with its ideals, goals, and structures.

This article considers Jiang Shigong’s work in this light. To this end it does not present a comprehensive critique of Jiang’s extensive oeuvre on Chinese constitutionalism. I have already considered his extraordinary work, “Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China,” in a comment (Jiang, 2010; Backer, 2012a). The object is to deepen engagement with one of the most innovative thinkers of constitutionalism in China today and thus to contribute in some small way to the scientific development of Chinese constitutionalism. The next section examines Jiang’s theory between formalism and legitimacy, and the section that follows considers Jiang’s ideas on the democratic basis of a dictatorship of the proletariat. Critical to that project are notions of civic education and the consequences of the separation of powers at the heart of Chinese constitutionalism—one that distinguishes between

the administrative power of the government, including the administration and rule of law, and the political power of the CCP, including the nation's constitutional norms. The article concludes by suggesting that the "revolutionary" period of Chinese constitutionalism is over. The system has been in place almost as long as the American constitutional system on the eve of its severest test by civil war. Jiang Shigong has suggested a structure for understanding Chinese constitutionalist legitimacy; I have suggested another, related version and others have been working in related veins (Backer, 2012b). As valuable as this project is, it is ultimately distracting. The ultimate test of constitutional legitimacy is the strength of the constitutional model, scientifically developed and applied, which acts to bridge the gap between form and reality. It is on a healthy discourse on constitutional practice, the mark of a mature and stable developing constitutionalist system, that Chinese constitutional discourse should focus.

Constitutionalism: Between the Formal and the Legitimate

The foundation of Jiang's constitutionalism combines the logic of the premises fundamental to Marxist-Leninist states with the insights of European structuralism (Jiang, 2006). That unique synthesis is important to help understand both Jiang's innovative contribution to Chinese constitutionalist thought and his ability to find legitimacy in the autonomous path of that constitutionalism.

From Incorporating Ideas from the West to Chinese Constitutionalism

Jiang starts his study of law beyond its horizon by considering the insights of Michel Foucault (2006: 4–5).⁹ Foucault provides a useful foundation for Chinese constitutionalism precisely because he detached rights and the individual from the state, its apparatus, and law. This is a view of the reality of power and politics that is more closely aligned with modern Chinese constitutionalism than with the eighteenth-century models of constitutionalism that are the foundation of constitutionalism in the West. Jiang suggests that while many consider Foucault one of the greatest social theorists of the twentieth century, few pay close attention to his political thought (p. 1). For Jiang, Foucault's interest in the question of "freedom" led him to closely analyze modern disciplinary institutions—hospitals, psychiatric wards, schools, prisons, and the like (pp. 1–2). Jiang reads Foucault as positing that in the modern

age, oppression of individual freedom comes not from state coercion, but from invisible disciplinary institutions that are becoming increasingly sophisticated. The state plays a role in this web of discipline, but is not necessarily either in control or at the top of any power hierarchy of discipline.

For Jiang, this is reminiscent of Tocqueville's "tyranny of the majority," but one in which state coercion is effectively outsourced to society (p. 2). Yet for me, it suggests the contextual nature of oppression—a politico-philosophical concept—is disconnected from the mechanics of law on which behavior appears to be coerced. Indeed, Foucault's bio-politics is notable for its insight that discipline is internalized—and thus in little need of outside agency—law, politics, or the state. Moreover, it is as likely that Foucault's sense of disciplinary structures envisioned the diffuse, permeable, and fractionalized realities of globalization as it touches on the dynamics of the organization and functioning of states (Backer, 2012c). Still, Jiang has a point here—it is to some extent irrelevant to speak exclusively of rule of law grounded in the formal structures of state administration when the realities of popular control are grounded in structures that are premised on the marginal relevance of the law-state.

Jiang recognizes this contradiction. Foucault's conception of power displaces the traditional liberal political philosophy. Rather than the "state" being the "totality of power," power is decentered and is permeated throughout every fabric of modern society. Under his microphysics of power, the essence of "power" is not understood as possession, but deployment. As a consequence, it does not necessarily stand in opposition to freedom (Jiang, 2006: 3).¹⁰ The application of power is intrinsically linked with the deployment of knowledge, hence forming the "knowledge-power" relationship (p. 2). That power-knowledge relationship also suggests the instrumentalist role of the state in the construction of disciplinary structures—and in the case of China, of the importance of the CCP's political work in civic education.

More important to Jiang are Foucault's notions of governmentality, turning disciplinary insights to the operation of institutions tightly bound in multidimensional webs of power grounded in concepts such as "territory," "security," and "population" (p. 4).¹¹ Jiang also draws on Deleuze's notion of *dispositif*—a social apparatus that institutionalizes and connects the disciplinary mechanics of power-knowledge internally to give coherence and focus to institutions (like the state), and externally to regulate social relations (Deleuze, 1992). These disciplinary forces, the lines of force understood as *dispositifs*, can be seen as the power-knowledge relations of constitutions as social apparatus. This is particularly important in understanding the politics-administration construct of the party-state apparatus.

For Jiang, these insights produce an import constitutional premise: governmentality in the modern age is grounded in the relationship between “sovereignty,” “discipline,” and “management” (Jiang, 2006: 4). As modern politics are centered on the idea of “sovereignty,” the disciplinary society ultimately is made to serve sovereignty. As the deployment of techniques of governance (which includes legal techniques) by the sovereign polity is central to modern politics, investigations into personal freedoms should not be made independently of this power configuration. Jiang believes that Foucault’s work on governmentality touches the core problem of constitutionalism: the kind of legal or institutional form available for valid expressions of state sovereignty. Conventional liberal constitutional thought believes that “law” serves to restrain and tame sovereign power, but we can also invert the above logic and say it is in fact that the “law” is tamed by the sovereign power for discipline and control (pp. 6–7). For Jiang, the technique of judicial review in the United States can serve as an example of how sovereign power deploys “law” to serve the political ends of the sovereign state (pp. 7).

Ironically, then, in a post-sovereign world, to build the foundations of his constitutionalism Jiang focuses on the sovereign construct of the institutional disciplinary regimes and their instrumental expression through law that is disciplinary in character rather than simply command-oriented (pp. 8–9).¹² The key to this targeting of sovereignty and the constitutional dispositive is the Marxist-Leninist mass line—the conflation of the institutional context of sovereignty with the incarnation of the popular collective organized under principles of democratic society. Jiang rejects the notion of social contract as antiquated (pp. 10–11),¹³ and instead embraces the idea of the democratic disciplinary potential of the collective—an effort to fuse Rousseau’s popular will with Foucault’s organic disciplinary structures of community (p. 8).¹⁴

With sovereignty as the ordering principle, it follows for Jiang that law can be bent to the purposes of the sovereign organ. Law becomes a disciplinary instrument rather than a formal expression of popular will—the inversion of traditional relations marks the realities of modern social and political ordering. Thus, Jiang holds that from antiquity to the post-conflict reconstruction of Iraq and Afghanistan, “law” has always been used as an instrument of the sovereign. Similarly, although a transition toward constitutionalism is ostensibly “about” the drafting of constitutional provisions, it is actually about the play of political forces beneath the constitution (p. 9).

From this core insight certain propositions follow. First, Jiang maintains that as scholars, we should not use “lawyer’s jurisprudence” to understand constitutions, but rather should look at constitutions through the “jurisprudence of the legislator.” Second, if we go beyond the doctrine of legal formalism, we need to look past written legal ideals and instead focus on the

functional effects of those legal provisions. Likewise, what Jiang argues is needed is not simply a written constitution, but a functional constitutional order (pp. 9–10). Third, it is in this sense that deep constitutionalism—the substantive element of the constitutional order—can be understood. With a reference to the work of Rudolf von Jhering, Jiang suggests that the struggle for power is not only a struggle for citizens, but also part of the citizen’s ethics, that is, a citizen’s responsibility for others (p. 10).¹⁵

Taken together, Jiang has drawn from Western sources all of the key elements of Chinese constitutionalism, elements that justify and make legitimate the structures of the Chinese constitutional order. Yet there is irony in this analysis, one that detracts from its power to understand and to legitimate the Chinese constitutional order. Consider Jiang’s engagement with Kafka’s “Before the Law” (Kafka, 1915). Jiang deploys this story to suggest the archetype for modern individuals, spending their whole life trying to reach an illusory ideal. They are persistently focused on the process to reach that ideal, and yet never question the validity of the “ideal” itself (Jiang, 2006: 10–11). Yet within the global discourse of Chinese constitutionalism, this describes the search for legitimacy as well. Chinese constitutionalism continues to stand at the doorway to constitutional legitimacy. The waiting creates the illusion that the door will be open to it and that once through the doorway, its desires will be satisfied. But this is illusory. There is no doorway and no point in standing. Until the disciplinary power of Chinese constitutionalism in practice is broadened and deepened, discussion will continue to be stuck at this preliminary level and scientific development impeded.

The Legal Community in the Chinese Constitutional State

Constructing a sophisticated framework for understanding both the structures of Chinese constitutionalism and the legitimacy of its approach within the well-accepted bounds of global discourse opens Jiang to the problem of the legal community within the disciplinary and permeable forms of the Chinese system. More specifically, it challenges Jiang to place law within a structure in which the relationship between law, politics, and the state is inverted. In a system in which the sovereign authority—that is, the incarnation of the power of the masses—is divided between administration and politics, law serves an administrative function and is confined by the limits of the jurisdiction of the state apparatus. Under such an arrangement, constitutional norm-making and its development lose their character as “law” and assume the role as the organized expression of the normative basis of political will. Constitutional “law” then is understood as distinct from the law necessary for the administration of the state for the good order of the nation, and the role of the lawyer is

therefore shaped by this dual character of law. That is the subject of Jiang's work *法律人的城邦* (Lawyer's Polis) (Jiang, 2003: 3–39).

For Jiang, the administrative character of law—that is, the law with which lawyers are concerned—is compatible with Marxism because of the inevitable constraints of social relations.¹⁶ Law necessarily manages relations that constrain freedom in the sense of a willing surrender of discretion to communal rules of appropriate interaction with others (pp. 3–4).¹⁷ Jiang shares the Enlightenment view that these relations are not organic and natural but that they can be managed through instruments like law, for specific objectives (pp. 5–6).¹⁸ I am not as sure—my sense is that at the administrative level, the relationship between law as a managerial tool and law as the embodiment of popular consensus may be more complex and over-instrumentalization may prove counterproductive (Backer, 2008a).

One of the most interesting points American scholar Carl Minzner makes in a recent article (Minzner, 2013) is that the current bubble in Chinese legal education is causing officials to rethink legal education as a response to stress in the model developed over the past twenty years. Having produced a generation of lawyers and law students who are now increasingly prominent voices for political reform through law, and hungry for jobs (which requires the development of markets for lawyers to better structure and expand the number of available jobs; Lenhart, 2012), Minzner suggests that Chinese officials are seeking to retrench the legal educational model. Legal education has foundered, Minzner argues, and officials are seeking to return to models from the past. This retrenchment makes sense in that it better conforms legal education to the framework of Chinese constitutional organization. Put differently, to appropriately reform legal education in China to make it conform to the logic of the system in which it operates, it may be necessary to professionalize legal education for lawyers through law schools and to institutionalize political education for cadres through party policy schools.

In the United States, lawyers exercise both administrative and political functions (through constitutional litigation, for example). This reflects the close connection between political and legal cultures in the United States, one that has been formalized through the U.S. Constitution and its system. But China is different, and a recognition of the foundational differences in Chinese constitutionalism suggests the very different effect of changes in legal education in China. In China there is a constitutional distinction between the administration of law through the state apparatus and politics and policy through the party apparatus. Thus, the consequences of current moves to professionalize and narrow the scope of legal education in China are distinct from similar moves in the United States—to professionalize legal education for lawyers' work will narrow their role to the administrative aspects of law;

that narrowing will require institutionalizing political work for cadres through the CCP:

1. Professionalization of both legal and political education should make lawyers more technocratic, that is, more focused on the understanding and application of law. That approach to professionalization harmonizes the training of lawyers and of CCP cadres. The former should focus on law as an expression of the administrative power of the state exercised through its government under the constitution. The latter (even lawyers in their role as CCP members) should focus on a more refined institutionalization of training in political guidance, that is on the political considerations (constitutional policy and premises) that has been assigned to the CCP as the party in power as contemplated under the Chinese constitution's people's democratic dictatorship (1982 Const. art. 1).
2. Political work falls outside the legal work of lawyers, just as law falls beyond political work in China. The legal profession should be organized as "administrative," and professionals in the legal field should serve to ensure the appropriate application of law as administrative regulations are developed through the state apparatus. Political work, however, falls within the jurisdiction of the party. Structural policies within which the state apparatus may make and apply law are not legal but political work. That is, work that falls to the party apparatus as their fundamental duty to the nation. Institutionalization of that role is as necessary for the CCP as the professionalization of legal education is for lawyers.
3. Organize law schools as institutions that train lawyers as professional administrators of law (similar to the training of doctors in medical school), and leave to the CCP the development of institutionalized educational programs for politics and policy, mentoring and training cadres for their responsibilities. Currently, party schools are beginning to function in this way. Just as law schools are being reformed to focus more narrowly on law (within its limits), party schools should also be reformed to better serve as institutions for professional political training.
4. As a result, the professionalization of legal education will narrow the scope of training of lawyers to conform to the scope of law within the Chinese system and will harmonize with the administrative character of law derived from a constitution that frames the regulatory authority of the state. But political guidance, the framing of administrative authority, falls to the CCP, not lawyers. For both lawyers and party

cadres, education is necessary and must be tailored to their function—professionalized legal education for lawyers, and institutionalized political education for CCP members.

Indeed, the failure to adequately define the limits of law and its dual character within the unique framework of Chinese constitutionalism may account in part for the misapplication of Western notions of law and the lawyer's role within that edifice. Jiang correctly criticizes the consequences of the confusion of law in its administrative character—the essence of lawyers' work in China—and law as the normative framework for political organization—the essence of the work of the CCP. The criticism is directed against individuals who ought to know better, yet whose actions may sometimes weaken the soundness of this separation of structures. Jiang notes that politicians often consider lawyers “rival forces that constantly challenge the legitimacy of the political authority”; street political activists see them as accomplices of the oppressors; humanities intellectuals view them as an “apparatus” or “machine” that is devoid of human sentiment and is a symbol of the “decadence” of modernity; economists conversely treat them as a counteracting force against modernity and label them as barriers preventing “rational social exchanges”; and for laypersons who do not belong to the top echelons of the society, they are like deities that are both unreachable and incomprehensible (Jiang, 2003: 5–6).

However, regardless of one's opinion of that community, in a rule-of-law state the daily lives of individuals are necessarily becoming increasingly dependent on lawyers. But again, the role of lawyers here is administrative in character—they serve to require officials to undertake their responsibilities and to administer the state in accordance with the law, rather than under their individual will. This is a great service to society and a basis for socialist modernization. Lawyers themselves must begin to understand the character and limits of their function. The Chinese constitutional system distinguishes between law and politics. Lawyers serve an essential role of providing accountability for the administrative structure of the state. But political work remains with the CCP. For lawyers who wish to do such work, CCP membership is the key. Any other course subverts the system. Thus, Jiang worries that people are increasingly associating that community with a contradictory feeling. Likewise, he worries that the members of the legal community are increasingly organizing themselves into a cohesive entity—into something we call “the legal community” or “lawyer community”—and the members of that community or polis are generalized as “lawyers” (pp. 5–7, 7–12).¹⁹ Yet, within the Chinese constitutional order this organization may well be a good

thing, to the extent that jurisdictional boundaries are respected and the administrative role of lawyers is emphasized and cultivated.

Thus organized, the law and legal profession fit nicely within a rule-of-law constitutional framework with Chinese characteristics. Jiang notes that the legal profession began as fragmented and poorly organized. In antiquity, there was no clear distinction between jurists and other state officials; “law” did not have the aura of “rationality” and “mercy,” instead, the deployment of law relied on spectacular displays of physical violence. Litigators occupied a much lower social position than jurists (judges and law scholars), and various legal professions were not unified under the same value system (pp. 7–9). He explains that the traditional social order relied on a totalizing system of morality or religion, and “law” was an instrument for the deployment of morality or religion. Then came “the death of God” and “the death of *tianzi*”—the disenchantment of the world accompanied by the alienation of individuals. But the advent of modernity did not free us from the bondage of totalizing dogmas and doctrines; instead a new meta-narrative emerged with the professionalization of legal education (pp. 9–12). For Jiang, that suggests that the members of the legal community, united under the principle of value-free formal rationalism (pp. 12–16), strive to defend the rights of individuals (pp. 16–19), develop rules through the litigation system (pp. 19–23), and promote the rule of law through judicial autonomy (not the rule by law or the rule according to law) (pp. 23–27). But this is hard work.²⁰

The Institutionalization of the Chinese Constitution within the State-Party Construct: Is There a Democratic Basis to a Dictatorship of the Proletariat?

On one level, Jiang has suggested that the core function of the constitution is to manage factional disputes. Yet modern constitutions must include a substantive element, especially one that defines the relationship of people to the state apparatus and the political power of the nation (Jiang, 2013). Jiang discounts the role of the constitution for shaping individual rights. He suggests that judicial constitutionalists tend to focus solely on the protection of individual rights and liberties. Many in China believe that if the country adopts a constitution similar to that of the United States, it will automatically lead to the adequate protection of citizens’ rights. To be sure, Jiang supports protection of individual rights and freedoms, but argues that those cannot be developed without first establishing a stable and effective political order. Jiang’s historicism provides the foundation for this insight. He explains that after the

fall of the Qing dynasty, China did experiment with Western-style constitutional democracy, but that did not lead to rule of law and democratic society. The level of rights protection and civil liberty in the United States today is largely the product of its civil rights movement during the twentieth century. He reads the American Federalist Papers as supporting the idea that the United States Constitution was created for the purpose of managing factions and providing a strong central government (Jiang, 2013).

Jiang may read too much into the Federalist Papers on this point. Madison famously opposed, at least initially, the inclusion of a Bill of Rights in the federal constitution, but not for reasons of constitutional purity (Madison, 1788). Among the most telling prudential reasons offered by Madison was that “parchment barriers” like those in a constitution could be repeatedly violated “in every instance where it has been opposed to a popular current.”²¹ For Madison, the value in such expressions was hortatory: “The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion” (Madison, 1788). In a sense, Madison proved to be right, in part. Jiang’s reference to the social movements and the related constitutional litigation of the twentieth century attests to the difficulties of using constitutions to shape substantive rights. Yet second- and third-generation constitutions, especially those modeled on the German postwar constitution, suggest the opposite: that constitutions without substantive provisions protecting individual rights—in relation to the power of the state and the securing of fairness in everyday affairs—can have a tremendous effect on social and political relations and are the essence of modern constitutionalism, irrespective of the structure of the government constituted by that instrument (Kommers and Miller, 2012). And indeed, the Chinese constitution has never shied away from developing important protections for individuals against the state apparatus. That is in keeping with the constitutional framework, especially when one understands these constitutional protections as going toward administrative abuses by the state and safeguarded through the political leadership of the CCP. In effect, the Chinese constitution imposes two sets of obligations—the first imposed on the state apparatus through the constitution, and the second imposed on the CCP as the guardian of the substantive values both memorialized in the constitution and arising from the ideological foundations of the political order.

And indeed, Jiang’s historicism might sometimes be stretched too thinly as an explanatory framework. Thus Jiang’s fidelity to a cultural and historically based constitutionalism with Chinese characteristics could be understood as incompatible with the CCP’s function as a universality that

transcends political factions precisely because Chinese historicism and culture would necessarily have to treat the CCP as both modern and foreign. Communism is not a part of traditional Chinese culture—it originated in Europe and has only been present in China for less than a century. Moreover, at least before *san'ge daibiao*, or the “Three Represents,” it appeared that the CCP as the vanguard of the dictatorship of the proletariat represented the interests of the working class rather than serving as a universal political entity (Jiang, 2013). Deng Xiaoping would suggest that history itself might prove to be a distorting filter through which current facts are understood and applied to current problems.²²

Jiang would agree with the conclusion but would adopt a different method. His solution is to abstract historicism in ways that detach it from its context and convert it from fact to philosophy. He correctly argues that contrary to what many believe, the CCP is not a factional party exclusively for the working class, but a party of the future with general representation.²³ Jiang explains that both Lenin and Mao warned against having the Communist Party becoming a factional party only representing a particular class. In practice, CCP membership is open to all members of society, including business entrepreneurs. Jiang would describe the CCP as a vanguard party—a party that presents a general ideal instead of a particular factional interest. And that general ideal is *xianjinxing*, or “progressiveness,” which is articulated by the *san'ge daibiao*. If the CCP can successfully function as a universal ideal, it can harmonize perfectly with the traditional Chinese governing philosophy that emphasizes collectivism and consensus making.

But Jiang's point highlights the fundamental problem of Chinese constitutionalism, a problem that plagues all legitimate constitutionalist states—the sometimes great gulf between constitutional language and the realities of constitutionalism as applied.²⁴ Jiang agrees that a critical deficiency of the Chinese constitutional system is what some severe critics of Chinese constitutionalism see as the unbridgeable gap between “form” and “reality.” He concedes that both government officials and the general public do not seem to respect the constitution enough (Jiang, 2013). He believes education is the key when it comes to reinforcing constitutional ideals.²⁵ He thinks, though I suspect with more conviction than is shared at the moment in the West (Dillon, 2011), that in this regard, the United States has done a better job than China when it comes to educating the public in constitutional principles. In addition to educating the public, the public authority must also bear the responsibility of adhering to both written and unwritten constitution principles. The public should have knowledge on the workings of the political system, but the state organs should increase their transparency, so that their workings will be visible to the public (Jiang, 2013).

This is a key distinction that merits greater elaboration, both within academic circles and in the political work of the CCP. Jiang clearly would distinguish between party and state with respect to the sort of civic engagement required under a constitutional system. With respect to the administrative apparatus, the global consensus markers of behavior should apply—transparency, engagement, and a willingness to be held to the performance of their obligations. From a historicist perspective this makes eminent sense. The administrative organs of state always have a fiduciary obligation to the people they serve and to the exercise of a fidelity to the principles of state received and developed by the political leadership of the CCP. That requires state organs, as a matter of constitutional principle and in conformity with the CCP's foundational mass line, to be open to view and amenable to criticism from above and below for failures to adhere to their duty. It also permits direct engagement by the people in the administrative work of the state organs—that is, in holding officials accountable for performing their administrative tasks and meeting their objectives, as set out by the government itself under the guidance of the political authority of the CCP. It is in this sense that Jiang correctly discerns the heart of modern Chinese constitutional work, one that starts from systemic legitimacy, grounded in rule of law according to the political principles on which the Chinese state is organized (“under the guidance of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory and the important thought of ‘Three Represents’”) (Xianfa, Preamble, Rev. 2004). But such a discourse is impossible where every criticism is taken as an attack on the legitimacy of Chinese constitutionalism itself.

With respect to the working of the political system, Jiang suggests a substantially different form of obligation to the people. Here the emphasis is on knowledge rather than engagement. The reason is both simple and in harmony with the basic premise of the organization of the Chinese constitutional state. The CCP, as the aggregate expression of the political authority of the people, stands in a different relationship to the masses than do the state organs. The nature of that engagement was expressed in the unfortunately somewhat oracular language of the “Three Represents.” Just as the administrative authority of the people is represented through the state organs, so too the political authority of the people as a whole is expressed through the CCP. The representational character of the CCP within Chinese constitutionalism runs in two directions. In one direction, that representational character obligates the CCP to adhere with absolute fidelity to the normative framework of the organization of political life as expressed in the constitution itself. That serves as a severe constraint on the ability of individuals to assert their will over the people—the CCP serves as the highest political fiduciary of the

principles on which the state was founded. The structures for ensuring this fidelity are an important subject of constitutional debate—but one that has yet to be scientifically developed to its full extent. In another direction, the CCP itself is a doorway for mass participation in political life. Political participation in the state is available to anyone who would seek to join the CCP, and theoretically, that membership should in the long run be available to all citizens. Political participation through the CCP rather than around it is effective when the CCP itself engages forcefully in political education and teaches by doing, the essence of Jiang's point. Indeed, in this way Jiang points to another underdeveloped line of constitutional thought in China that touches on this obligation—the extent to which the CCP is obliged to recruit and expand its ranks to expand political participation. And it is in this regard that Jiang's argument favoring broad civic education becomes both clearer and more powerful.

Jiang's education proposals are far more comprehensive than any suggested in the West. The education process must include both formal and participatory education. Formal education entails teaching the constitution and its principles to pupils through civics classes. Education is crucial for both building up a "citizen ethics" and facilitating the growth of the civilization. "Politics" and "education" have always been closely related; in fact, "civilization" in itself can be understood as a politico-educational tradition. Ultimately, education and civilization are the only substantive values for politics; therefore, the highest expression of politics is not state power, but civilizational leadership (Jiang, 2006: 185–209).

Jiang's citizen ethics produces a more interesting education obligation within Chinese constitutionalism—Jiang's notion of "participatory education" (Jiang, 2013). Jiang argues that we must also realize that civilizational sovereignty cannot be separated from the support of national sovereignty. It is in this sense that national sovereignty and citizen ethics are closely bound together. The significance of national sovereignty in constitutionalism is not based on some kind of "social contract"; rather, it is based on the need to provide a conduit for the deployment of civilizational power. The civilization (or citizen ethics) is articulated through the will of national sovereignty, and it is in this way that the rise and fall of civilizations is connected with the rise and fall of states (Jiang, 2006: 13–14, 185–209). Citizen ethics, then, acquires a dual character—as a duty of citizens to acquire a foundation in the civics of their political order and as a duty of the state to impart that foundation to citizens. But this education has always been central to the idea of the state and to the deepening of its connection with the people, and in China that education is central to the political work of the CCP and an important objective of democratic dictatorship.²⁶ Here, one can understand Jiang's rejection of the

Western notion of social contract in favor of the political objectives of civic education.²⁷ Yet if that is correct, then education remains exclusively party work—to the extent that it is focused on civics,²⁸ and it is administrative in character when it focuses on the utility of the individual for productive economic activity.

As a consequence, Jiang would advocate allowing and encouraging the public to participate in political processes such as elections (Jiang, 2013). For this reason, as well, Jiang is a supporter of the formalization and institutionalization of the *shangfang* system. Jiang argues that *shangfang* (the extrajudicial petitioning system) not only serves to mediate disputes between private individuals and the public authority, but also functions as a participatory education tool, much like the jury system in the United States. But note here a conceptual confusion derived in part from the dual nature of the Chinese constitutional system. Jiang is right to suggest a need for participatory education, but not in the political process. Rather, as his reference to *shangfang* makes clear, participatory education should be focused on the *administrative* process. That sort of participatory education is both useful and important in deepening respect for the constitutional order by fostering engagement by the people in the administrative process, and by that engagement fostering a respect for law and fairness in the administration of the state's duty to the people.

But *political education is party work*. The genius of the Chinese constitutional system is contained in its unique separation of powers principle—the separation of political from administrative obligations. It assigns to the CCP the obligation of guidance and political leadership and it assigns to the state the duty of performance of political objectives within the structural premises of Chinese Marxist-Leninist theory. As such, under Chinese constitutionalism it would seem that political education raises two very specific obligations. One is the duty Jiang focuses on—the obligation of nation building through civics education and the production of a population imbued with civic ethics. But this leads to the more important obligation, one revealed by *san'ge daibiao*—the obligation of the CCP to increase its membership and to deepen the ideological education of its cadres. Jiang's civics education properly understood echoes Deng Xiaoping's notion of the "Party spirit."²⁹ Respect by party cadres for the constitutional system, and the application of the constitutional obligation by party cadres at all levels, should be the cardinal step toward political education under Chinese constitutionalism. In contrast, training for productive activity is administrative work—something fit for the state and its apparatus. This is what Deng Xiaoping meant when he argued,

“if China wanted to shake off poverty and modernize, stability was crucial.” To maintain stability, it is imperative to oppose bourgeois liberalization. Implementing the people’s democratic system is just to protect the majority’s human rights, safeguard national sovereignty and realize rights to development and peace. (Zhu, 2002)

Yet, indeed, even the discussion of *shangfang* suggests the obstacles facing those involved in the important work of shaping Chinese constitutionalism. What would be unthinkable when discussing American or German constitutionalism—questioning the legitimacy of the constitutional system itself in the face of significant gaps between constitutional form and reality³⁰—becomes easy in the Chinese context. The big gap between China’s written constitution and constitutional practice in China has not fueled efforts to press authorities to behave in accordance with law so much as providing a basis for both foreign and domestic criticism on the legitimacy of the Chinese constitutional order itself. This approach distracts from the problem—the efforts to scientifically develop both the structures of the constitutional order and its implementation—one that is common to all constitutional states. Although it may debilitate rule-of-law efforts by reducing popular confidence in the authority of the state and party to act lawfully, it provides a means through which ambitious people may take it upon themselves to act unlawfully to overthrow the structures of state government, something much harder to effect in states in which the legitimacy of the constitutional order is itself unquestioned. Political development becomes much harder where the people are encouraged to doubt the authority of the government and to work to remove the system rather than improve it.

That improvement, of course, is all the harder precisely because Chinese constitutionalism is at a very early stage of development. In comparison with its Western counterparts, Chinese constitutional development is only in its nascent stage and must continue to develop. If one focuses on development rather than replacement of the system, Jiang offers some useful approaches (Jiang, 2013). He argues that when it comes to improving the Chinese constitution system, what China needs now is to make its constitution the supreme source of political power. Both the state apparatus and the CCP must operate within, not above the constitution. Most importantly, as the CCP constitution and the national constitution are all part of the Chinese constitutional order, it is critical that the two constitutional documents not contradict each other. Another major challenge is that China lacks a clear and effective system for constitutional interpretation. Jiang has suggested that China establish a mechanism for constitutional ordering, one that is apart from the judicial function, correctly arguing that such a function is not administrative but

political. He has mentioned that a constitutional committee that functions as the source of political interpretation of the Chinese constitutional order, giving effect to its provisions for the administrative apparatus, might be useful. Such an entity could be organized like the Politburo Standing Committee, should be made up of high party and government officials, and could be designated as the highest authority of constitutional interpretation.

Conclusion

Deng Xiaoping once said,

“The democracy in capitalist societies is bourgeois democracy—in fact, it is the democracy of monopoly capitalists. It is no more than a system of multiparty elections, separation of judicial, executive and legislative powers and a bicameral legislature. Ours is the system of people’s congresses and people’s democracy under the leadership of the Communist Party; we cannot adopt the practice of the West.” (Zhu, 2002)

Chinese constitutional scholars understand this at a certain level, but increasingly they treat failures of constitutional implementation as systemic failures of the Chinese constitutional order itself. The essence of Chinese constitutionalism is its approach to the separation of administrative power (exercised in the form of the traditional law-state) from political authority (collectively exercised by an institutional representation of sovereign political authority). This unique Chinese embrace of democratic principles is one which is exercised through an institutionalized and representative organ of political authority. That organ of political power, the CCP, is one that is (and should be increasingly more) open to all citizens willing to embrace its fundamental normative obligations, and its political line, including the constitution. This organ of political leadership then guides and holds accountable the apparatus of government created to oversee the implementation of the CCP’s political line. What should be lauded as a remarkable effort to deepen an engagement in progressive constitutional development is carefully examined for evidence of constitutional weakness and illegitimacy. The specter of Soviet constitutionalism and its failures in the modern discourse of global constitutionalism continue to haunt Chinese constitutional efforts. Jiang Shigong is part of a small group of Chinese academics who are working along distinct paths to move beyond the “legitimacy” issue of Chinese constitutionalism and tackle the much harder but more important questions of the continued development of Chinese constitutionalism along the lines of its own logic. It is to the forms in which democracy is developed in China, on the important ramifications of

separation of powers along Chinese lines—between politics and administration—and its rejection of Western separation of powers (among executive, legislative, and judicial power of a government in which administration and politics is merged) that both the state and party ought to devote their energies in the decades to come.

Acknowledgments

My thanks to Keren Wang for exemplary and sustained work on this essay, and to Tomo Teraoka and Kathryn Modeer for their valuable contributions.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Notes

1. “If anyone, no matter who, were given the opportunity of choosing from amongst all the nations in the world the set of beliefs which he thought best, he would inevitably, after careful consideration of their relative merits, choose that of his own country” (Herodotus [before 425 BCE], 1954: Book III, 190).
2. This is an ancient notion in the West. See Aristotle, *Politics* (c. 350 BCE) (Benjamin Jowett, trans., <http://classics.mit.edu/Aristotle/politics.html>). This reflects even older wisdom. Herodotus relates the argument among the Persians over the appropriate form of government for their state: democracy, oligarchy, or monarchy. What is profoundly interesting, from a constitutional perspective, was that the ideal of equality before the law (isonomy) was considered merely one acceptable choice among others for the organization of the state and the establishment of the form of its government, none of which was perfect (Herodotus [before 425 BCE], 1954: Book III, 209–12).
3. McIlwain noted that the “two outstanding features that distinguish the medieval constitution from the modern are, then, the separation of government and jurisdiction, and the difference in legal effect between an administrative order and a definition of right” (McIlwain, 1947: 86).
4. For a discussion of the system see, for example, Butler, 1983.
5. See, for example, the proceedings of the 2011 Meeting of the Chinese Constitutional Law Society, Xi’an, China, Oct. 2011.
6. See translations of the work of Tong Zhiwei available at “Zhiwei Tong (童之伟) on Chinese Constitutionalism, Criminal Law and Justice in China,” <http://lback-erblog.blogspot.com/2012/02/zhiwei-tong-on-criminal-law-and-justice.html>.

7. He is well known in China for his work *Fazhi yu zhili: guojia zhuanxingzhong de falü* (Legal System and Governance: Law in the Transforming State) (Beijing: Zhongguo Zhengfa daxue chubanshe, 2003), and *Lifazhe de falixue* (Legislator's Jurisprudence) (Beijing: Sanlian shudian, 2007).
8. On the counter-majoritarian difficulty, see Bickel, 1962.
9. Jiang explicitly expressed that his research on legal and social issues has been heavily influenced by the works of Michel Foucault, especially *Discipline and Punish*. See Jiang Shigong, 2006: Introduction 4–5, referencing Foucault, 1997.
10. Jiang did not read Foucault as positing freedom and power as in opposition to each other: “Foucault did not see ‘power’ and ‘freedom’ as two oppositional forces. Instead, he places ‘freedom’ within various power relations. . . . In the dialectic between freedom and power, Foucault perceives freedom as an individual’s normative value relationship with herself, through which the value of ‘free individual’ emerges and offsets the reins of power” (Jiang, 2006: Introduction 3).
11. Jiang suggests that in antiquity, the deployment of power was centered on the regent, whereas in modernity, the techniques of governance are organized around the “state of reason.” The instruments for governance are not limited to law, but incorporate a wide variety of institutions, techniques, and organized discursive practices. The conception of “sovereignty” also shifted: from the sovereign king ruling over his subjects to the sovereign state managing its population (bio-power) and territory. See Jiang, 2006.
12. Jiang does nod toward the reality of globalization and its overpowering of sovereignty as a privileged concept in the contemporary global regulatory order. He notes that we should not limit our understanding of “sovereignty” within the nation-state framework; after all, the concept of sovereignty was first created to solve international problems. But that itself both limits and decenters the global to the ends to which Jiang would use sovereignty—as the ordering concept for a post-structuralist Marxist-Leninist constitutionalism.
13. Jiang argues that, in Hobbes’s words, “Leviathan” is a being that is created by men, for the purpose of suppressing brutish human tendencies in exchange for individual safety, hence the rationalized “social contract.” According to this view, the modern constitutional order was created to tame those so-called “violent” and “brutish” human tendencies, and human passion has become “interest calculations.” The classic virtues of fidelity, courage, and honor (hence “Master morality”) are dismissed as “irrational” elements, and are replaced with cynical sentiments driven by self-interest and the fear of others. Liberal constitutionalism has transformed those cynical and insidious sentiments (slave morality) as “rights,” thus transforming the classical duty-based politics into the modern rights-based politics.
14. Jiang argues that although sovereign power is everywhere in modern societies, we do not need to feel pessimistic about sovereignty. We should indeed be somewhat skeptical toward the antagonistic Lockean view on sovereign power. The expansion of power down to every fabric of society implies that sovereign power has decentered from the “Prince” to the people. In this sense, sovereign

- rights can be understood as human rights. Ironically and contradictorily, modern constitutionalism has been created to protect individual rights, but it does so by arranging the “public” and the “sovereign” as two antagonistic forces.
15. The reference to von Jhering is interesting. Von Jhering was known as a legal instrumentalist who conceived of law as a science that could be bent to serve the moral and social needs of a target population. Indeed, the introductory paragraphs of von Jhering’s *The Struggle for Law* suggest the sort of dialectic that could translate into Jiang’s normative framework of Chinese constitutionalism: “The life of the law is a struggle—a struggle of nations, of the state power, of classes, of individuals” (von Jhering, 1915: 1).
 16. Marx called on the proletariat of the world to unite and free themselves from their bondage, and many followed Marx’s call and rose up against the old order. But after gaining “freedom” and “liberation,” those revolutionaries soon realized that they were still living under the “bondage” of various social relations—those inescapable constraints may include family, nationality, local community, political party, and the state.
 17. Thus for Jiang, agency does exist. We often willingly subject ourselves to various social constraints (or relationships), freely associate ourselves with groups and individuals. Ironically, in order to be “free,” we willingly subject ourselves to certain “bondage,” evading freedom for freedom.
 18. Jiang argues that the members of this community share many similarities with the scientific community, as they are meticulously trying to develop and advance their instruments and technologies, for the purpose of “maintaining justice” in accordance with their own doctrine.
 19. Jiang notes as well that while lawyer as a profession is quite ancient, the “lawyer’s polis” is a product of modernity.
 20. Jiang queries how long rule-of-law societies can last when moral/religious societies have mostly collapsed and political societies are gradually declining.
 21. “The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy” (Madison, 1788).
 22. “But, to put it briefly, the class struggle in socialist society at present is, and will continue to be, clearly different from that in historical class societies. This, too, is an objective fact we cannot deny if we want to avoid serious mistakes” (Deng, 1979a).
 23. This idea is implicit in Mao Zedong’s thought as well, though perhaps best understood correctly through the lens of scientific development and *san’ge daibiao*. “To overcome the difficulties, defeat the enemy and build a new China, the Communist Party must expand its organization and become a great mass party by opening its doors to the masses of workers, peasants and young activists who are truly devoted to the revolution, who believe in the Party’s principles, support its policies and are willing to observe its discipline and work hard. . . . The only correct policy is: ‘Expand the Party boldly but do not let a single undesirable in’”

(Mao, 1938. It is through the lens of this earlier work that later work might be better understood.)

24. This, of course, was a point that moved Madison initially to oppose the Bill of Rights—the idea that such provisions might be unenforceable and unenforced would bring into question the legitimacy of the constitutional enterprise as a whole. See, Madison, 1788.
25. There is strong historical precedent, usefully developed scientifically in today's factual environment. See, for example, Mao, 1949.
26. It has been expressed this way: “Our Party organizations must be extended all over the country and we must purposefully train tens of thousands of cadres and hundreds of first-rate mass leaders. They must be cadres and leaders versed in Marxism-Leninism, politically far-sighted, competent in work, full of the spirit of self-sacrifice, capable of tackling problems on their own, steadfast in the midst of difficulties and loyal and devoted in serving the nation, the class and the Party” (Mao, [1937] 1999: 651, 657).
27. In Jiang's book review of Huntington's *Who Are We? The Challenges to America's National Identity* (2004), he noted that the Americans' quest for an identity is in fact an effort in search for the “citizen ethics” under the American constitutional framework. For Americans, the question “Who Are We” is a question pursuing the civilizational foundation for American constitutionalism (Jiang, 2006: 185–209).
28. “The people's state protects the people. Only when the people have such a state can they educate and remold themselves by democratic methods on a country-wide scale, with everyone taking part, and shake off the influence of domestic and foreign reactionaries (which is still very strong, will survive for a long time and cannot be quickly destroyed), rid themselves of the bad habits and ideas acquired in the old society, not allow themselves to be led astray by the reactionaries, and continue to advance—to advance towards a socialist and communist society” (Mao, 1949).
29. “Party spirit includes keeping in contact with the masses, working hard and living simply, and seeking truth from facts. We have several criteria for selecting cadres, but two of them are most important. One is support for the political and ideological lines established by the Third Plenary Session of the Party's Eleventh Central Committee, and the other is strength of Party spirit and avoidance of factionalism” (Deng, 1979b).
30. Consider, for example, as Jiang reminds us, the great constitutional crisis of racial segregation and the political rights of women in the United States of the twentieth century. In both cases, the issue of the legitimacy of the constitutional order was never in question even under conditions of great political stress and, in the minds of many even at the time, of constitutional failure. See Ackerman, 1992 (applying his theory of constitutional moments as a universal concept of constitutional law applicable to developments in Central and Eastern Europe in the early 1990s), and Tushnet, 2000.

References

- ACKERMAN, BRUCE (1992) *The Future of Liberal Revolution*. New Haven, CT: Yale Univ. Press.
- BACKER, LARRY CATÁ (2008a) "Reifying law: understanding law beyond the state." *Penn State Int. Law Rev.* 26, 3: 521–63.
- BACKER, LARRY CATÁ (2008b) "From constitution to constitutionalism: a global framework for legitimate public power systems." *Penn State Law Rev.* 113, 3: 101–78.
- BACKER, LARRY CATÁ (2008c) "God(s) over constitutions: international and religious transnational constitutionalism in the 21st century." *Mississippi College Law Rev.* 27, 11: 101–54.
- BACKER, LARRY CATÁ (2009a) "Transnational constitutionalism triumphant: the end of the Honduran constitutional crisis." *Law at the End of the Day* (posted Oct. 31). <http://lbackerblog.blogspot.com/2009/10/transnational-constitutionalism.html>.
- BACKER, LARRY CATÁ (2012a) "Jiang Shigong 强世功 on 'Written and Unwritten Constitutions' and its relevance to Chinese constitutionalism." <http://lbackerblog.blogspot.com/2012/12/jiang-shigong-on-written-and-unwritten.html>.
- BACKER, LARRY CATÁ (2012b) "Party, people, government, and state: on constitutional values and the legitimacy of the Chinese state-party rule of law system." *Boston Univ. Int. Law J.* 30: 101–91.
- BACKER, LARRY CATÁ (2012c) "The structural characteristics of global law for the 21st century: fracture, fluidity, permeability, and polycentricity." *Tilburg Law Rev.* 17, 2: 177–99.
- BENHOLD, KATRIN (2011) "What is the Beijing consensus?" *New York Times*, Jan. 28. <http://dealbook.nytimes.com/2011/01/28/what-is-the-beijing-consensus/>.
- BICKEL, ALEXANDER (1962) *The Least Dangerous Branch*. New York: Bobbs-Merrill.
- BUTLER, WILLIAM E. (1983) *Soviet Law*. London: Butterworth.
- CLARKE, DONALD (1999) "Alternative approaches to Chinese law: beyond the 'rule of law' paradigm." *Waseda Proceedings of Comparative Law* 2: 49–62.
- DELEUZE, GILLES (1992) "What is a dispositif?" Pp. 159–68 in T. J. Armstrong (ed.), *Michel Foucault, Philosopher*. Hemel Hempstead, UK: Harvester Wheatsheaf.
- DENG, XIAOPING (1979a) "Uphold the four cardinal principles." In *Selected Works of Deng Xiaoping*, vol. 2. <http://english.peopledaily.com.cn/dengxp/vol2/text/b1290.html>.
- DENG, XIAOPING (1979b) "The organizational line guarantees the implementation of the ideological and political lines." *Remarks at a meeting of the Standing Committee of the Chinese Communist Party Committee of the Navy*, July 29. <http://english.peopledaily.com.cn/dengxp/vol2/text/b1320.html>.
- DILLON, SAM (2011) "Failing grades on civics exam, called a 'crisis.'" *New York Times*, May 4. www.nytimes.com/2011/05/05/education/05civics.html?_r=0.
- FALLON, RICHARD H., JR. (1997) "'The rule of law' as a concept in constitutional discourse." *Columbia Law Rev.* 97: 24–36.

- FALLON, RICHARD H., JR. (2005) "Legitimacy and the constitution." *Harvard Law Rev.* 118, 6: 1787–1853.
- FOUCAULT, MICHEL (1997) *Discipline and Punish: The Birth of the Prison*. Alan Sheridan, trans. New York: Vintage Books.
- HENKIN, LOUIS (1993) "A new birth of constitutionalism: genetic influences and genetic defects." *Cardozo Law Rev.* 14: 533.
- HERODOTUS ([before 425 BCE] 1954) *The Histories*. Aubrey, de Sélincourt, trans. Harmondsworth, UK: Penguin.
- JIANG, SHIGONG (2003) *Falüren de chengbang (Lawyer's polis)*. Shanghai: Sanlian shudian.
- JIANG, SHIGONG (2006) *Chaoyue faxue de shijie (Beyond the horizon of law)*. Beijing: Beijing daxue chubanshe.
- JIANG, SHIGONG (2010) "Written and unwritten constitutions: a new approach to the study of constitutional government in China." *Modern China* 36, 1 (Jan.): 12–46.
- JIANG, SHIGONG (2013) Summary notes of interview with Wang Keren, Beijing, Feb. 28.
- KAFKA, FRANZ (1915) "Before the law, a part of Kafka's unfinished novel—The Trial." <http://zork.net/~patty/pattyland/kafka/parables/beforethelaw.htm>.
- KOMMERS, DONALD P. and RUSSELL A. MILLER (2012) *The Constitutional Jurisprudence of the Federal Republic of Germany*. 3rd ed., rev. and exp. Durham, NC: Duke Univ. Press.
- LENHART, JOHN (2012) "New draft law allows Chinese lawyers to practice at international firms; implications unclear." *China Market Intelligence*, Mar. 12. www.uschina.org/cmi/new-draft-law-allows-chinese-lawyers-practice-international-firms-implications-still-unclear.
- MADISON, JAMES (1788) Letter to Thomas Jefferson, Oct. 17. www.constitution.org/jm/17881017_bor.htm.
- MAO, ZEDONG ([1937] 1999) "Struggle to win the masses in their millions for the anti-Japanese national united front." May. In Stuart Schram (ed.), *Mao's Road to Power: Revolutionary Writings 1912–1949*, vol. 5. Armonk, NY: East Gate Books.
- MAO, ZEDONG (1938) "The role of the Chinese Communist Party in the national war." Oct. Selected Works of Mao Zedong, vol. 2. www.marxists.org/reference/archive/mao/selected-works/volume-2/mswv2_10.htm.
- MAO, ZEDONG (1949) "On the people's democratic dictatorship: in commemoration of the twenty-eighth anniversary of the Communist Party of China." June 30. Selected Works of Mao Zedong, vol. 4. www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm.
- MCILWAIN, CHARLES HOWARD (1947) *Constitutionalism, Ancient and Modern*. Rev. ed. Ithaca, NY: Cornell Univ. Press.
- MINZNER, CARL (2013) "The rise and fall of Chinese legal education: 1978–2011." *Fordham Int. Law J.* 36, 2: 334–95.

- PEERENBOOM, RANDALL (2002) *China's Long March Toward Rule of Law*. Cambridge: Cambridge Univ. Press.
- RAZ, JOSEPH (1998) "On the authority and interpretation of constitutions: some preliminaries." Pp. 169–73 in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations*. Cambridge: Cambridge Univ. Press.
- TUSHNET, MARK (2000) *Taking the Constitution Away From the Courts*. Princeton, NJ: Princeton Univ. Press.
- VON JHERING, RUDOLF (1915) *The Struggle for Law*. 2nd ed. John L. Lalor, trans. Chicago: Callaghan.
- YU, XINGZHONG (2009) "Western constitutional ideas and constitutional discourse in China, 1978–2005." Pp. 111–24 in Stéphanie Balme and Michael W. Dowdle (eds.), *Building Constitutionalism in China*. London: Palgrave Macmillan.
- ZHU, MAJIE (2002) "Deng Xiaoping's human rights theory." In Yu Xintian (ed.), *Cultural Impact in International Relations (Chinese Philosophical Studies, XX)*. Washington, DC: Council for Research in Values and Philosophy. www.crvp.org/book/Series03/III-20/chapter_iv.htm.

Author Biography

Larry Catá Backer is W. Richard and Mary Eshelman Faculty Scholar & Professor of Law, Professor of International Affairs, 2013–14 Immediate Past Chair University Faculty Senate, Pennsylvania State University.