Article

How to Explore the Chinese Path to Constitutionalism? A Response to Larry Catá Backer

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Abstract

Larry Catá Backer and the author share nearly the same thoughts on Chinese constitutionalism, even though they approach this topic from different backgrounds and perspectives. In this article, the author reflects on how his legal-sociological approach to Chinese constitutionalism and his positioning of the Chinese Communist Party as de facto sovereign in China were first formulated in response to the argument about "constitutional adjudication" in Chinese legal academic circles more than a decade ago. As a response to Backer's review, the author discusses the points that concern Backer—such as the grand theoretical background of the European structuralist conception of power and Rousseau's theory of sovereignty, the subtle relation between Chinese lawyers and Chinese constitutionalism—and clarifies his difference with Backer on the party. The author argues that, in order to explore the Chinese path to constitutionalism, we need to think about some fundamental theoretical questions: Are we on the way to the end of history? What lessons should we take from the experience of Western countries with constitutionalism? How can one "Sinicize" universal values and reinvigorate Chinese classical civilization as an organic part of Chinese constitutionalism?

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Background

My article "Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China" (Jiang, 2010a) was the result of a great deal of reflection spanning several years. My ruminations on this topic can be traced all the way back to 2001, when the Qi Yuling case triggered a nationwide debate on "constitutional adjudication." In my 2003 paper titled "Paradoxes in the Discourse of Constitutional Adjudication," I proposed the phenomenon of constitutional adjudication and politicization, and briefly examined the distinction between "written" and "unwritten" constitutions. In that article, I wrote, "Our constitutional text does not enjoy the status of supreme authority of the law; beyond our written constitution, there is another set of laws *within* which political power operates that we turn a blind eye to." I have also noted that "the full extent of state political power not only encompasses the operation of state organs as provided for in the written constitution, but also includes the operation of those even more powerful political organs that have no clear terms of reference in the written constitution" (Jiang, 2003; 2009: 68–69). Without a doubt, these observations touch the fundamental question of the role of the Chinese Communist Party (CCP, or simply "the party") within China's constitutional order.

"Constitutional adjudication" connotes a judicial review system modeled after the American legal system. However, with even a passing knowledge of American constitutionalism, one will realize that the core of such a judicial review system rests on the sovereign power wielded by the Supreme Court justices. Ever since the landmark decisions of *Brown v. Board of Education* (1954) and *Cooper v. Aaron* (1958), when the Supreme Court confirmed the supremacy of federal courts' authority over the states in interpreting constitutional issues, the central problem in American constitutionalism was no longer defined by the tension between federal and state government as in the early days of the United States, nor was it defined by the tension between government and the economy as during the period from the Gilded Age to the New Deal era. Instead, the core issue of the U.S. constitutional system shifted to the burgeoning judicial sovereignty of the federal courts, which ignited the long-standing debate over the "counter-majoritarian difficulty" within U.S. constitutional scholarship.

It is in this sense that the proposal for "constitutional adjudication" in China is not simply a matter of judicial reform or legal professionalization. It is not a problem of judicial independence; rather, it touches on the critical

question of whether judges should be vested with sovereign power. To properly deal with the question of "constitutional adjudication," it is imperative that we focus on the arrangement of China's sovereign power under its constitutional order. Looking at the constitutional provisions, the National People's Congress (NPC) system does not leave any room for the state judicial organs to share their sovereign power—the constitution expressly provides that the right to interpret the constitution belongs to the NPC Standing Committee. This suggests that our founding fathers had a clear understanding of the concept of "sovereignty" when drafting the constitution, and they made sure that judicial organs will never be allowed to usurp sovereign powers. According to the constitution, the judiciary serves only to resolve legal disputes by applying the law; therefore, it is no surprise that under Chinese jurisprudence, courts are characterized as law enforcement agencies.

"Constitutional adjudication" in China would amount to a "constitutional revolution" rather than judicial reform, as it seeks to fundamentally alter the constitutional NPC system into a Western-style *trias politica* system. It is important to note that for many proponents of "constitutional adjudication," the goal is to trigger an all-out constitutional revolution in China. Their claim is that they merely intend to protect the integrity of our constitution and wish to see the substantive implementation of constitutional principles. But proponents of "constitutional adjudication" are in effect calling for the protection of our constitutional integrity through radical and revolutionary means that in themselves violate the current constitutional order, and this is precisely the paradox of constitutional adjudication that I have written about before. In essence, the central challenge of the Chinese constitution is the gaping chasm that separates the written text from actual practice. In my opinion, this disparity between "form" and "reality" is the result of our tendency to focus only on the written text of the Chinese constitution and on state organs such as the NPC, the State Council, and state judicial authorities, while ignoring the important role of the CCP within the Chinese constitutional order. In other words, if we can incorporate the role of the CCP within the scope of our constitutional inquiry, then we might realize that the gap between "text" and "practice" may not be as great as we had previously thought. For instance, the controversial "rubber stamp" problem of the NPC and its Standing Committee can be readily resolved by considering the provisions of the CCP constitution in addition to the text of the national constitution.

Thus, the most important challenge for Chinese constitutional scholarship is to incorporate the constitutional role of the CCP as the "de facto sovereign" within the area of inquiry in constitutional research. In my opinion, we should begin our investigation from the unwritten constitution in order to go beyond the constraints of constitutional formalism. To enrich and improve the state of

constitutional research in China, we should not merely focus on the written text of the national constitution, but also incorporate the CCP constitution, authoritative party documents, constitutional theories articulated by the leaders of the party and the state, and unwritten constitutional conventions in our research. My recommendations for Chinese constitutional scholarship are in part informed by my research on the sociology of law; or, to put it differently, it is the sociology of law that provides me with a basic awareness of a critical question: What does the Chinese constitutional order look like *in practice*? This means that in addition to the normative constitution that is formally enshrined in a written text, we must also pay attention to the effective constitution that operates on the ground. If a legal scholar fails to clearly perceive the operation of a constitutional system in which he or she is immersed, then any talk of "constitutional reform" or "constitutional revolution" may lead to acting on a dangerous, blind impulse.

My views on constitutional scholarship are also in part informed by my research on the American constitution. My inquiry into the U.S. Constitution has enabled me to gain a deeper insight into the problems of American constitutionalism. It can be said that American constitutionalism revolves around the core issue of sovereignty. For instance, the central challenge faced by the Warren court, while described as a "civil rights" struggle, was in fact a struggle for sovereign rights—a struggle for the substantive incorporation of black Americans into the previously white-dominated sovereign citizenship of "We the People." The U.S. judicial review system experienced a long period of development, but cases such as *Brown v. Board of Education* still imply a lingering ethnic tension that a minority group can employ the Supreme Court as an instrument to override laws enacted by a Congress that is controlled by a majority race, hence the "counter-majoritarian difficulty." Therefore, whether one is thinking about U.S. constitutional issues or trying to understand the Chinese constitutional system, one must begin by looking at the issue of "sovereignty"—after all, constitutional order is configured for the sovereign power to operate within.

Until very recently, few shared my perspective amidst this great mass fervor for "constitutional adjudication" in legal scholarship. The state of mainstream scholarly discourse has been enveloped in an "end-of-history-esque" ideological atmosphere, and the state of Chinese legal scholarship has been especially preoccupied with legal formalism in order to quickly adapt to international standards. Under this formalist jurisprudence framework, the CCP has virtually no legal status of its own, and therefore is seldom studied in a serious way. Likewise, constitutional scholarship has failed to treat the CCP as the sovereign; instead, it frames the CCP as merely a political party understood in the context of a typical party system. The direction for the

development of the rule of law in China has been generally modeled after the U.S. legal system in order to clear away the residual elements of Chinese legal traditions, and in particular, to purge the CCP of its legal influence. Under this ideological background, any effort to bring the CCP back into the purview of legal research and to provide an objective presentation on the legal role of the party may be seen as "politically incorrect" scholarship. An example is Su Li's study of the Chinese justice system where he only provided an abstract general description of the role of the CCP within the justice system, and purposely avoided direct analysis of the relationship between the party and the justice system. Su's apparent failure to address the party's role in the administration of justice drew criticism even from an American law professor (Upham, 2005). In response, Su has indicated that his purposeful omission was in part due to his fear of being accused of "political incorrectness" (Su, 2005). Given the state of the academic field at the time—as well as today—both intellect and courage are needed for those who dare to study the CCP as the sovereign.

Despite the adverse academic climate, I have continued to think independently and publish articles, and many of my articles have since been incorporated into the book *Legislator's Jurisprudence* (立法者的法理学). In 2007, at the "Sixtieth Anniversary of the Republic" 共和国六十年 conference organized by *Open Times* (开放时代), I presented on the "three-in-one" 三位一体 system for the president of the PRC, and that presentation subsequently became a section in my article "Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China" (Jiang, 2010a). It is important to note that during this period, my colleague Professor Chen Duanhong had been also working on issues relating to sovereignty, though we took different theoretical approaches. In his 2008 article titled "On the Constitution as the Fundamental Law and the Higher Law of the Land" 论宪法作为国家的根本法和高级法, Chen introduced the concept of "constituent power" (*verfassungsgebende Gewalt*) from political philosophy into the discourse of constitutional law, and framed "the leadership of the CCP" as "the first fundamental law" 第一根本法 of the land (Chen, 2008). Chen further expanded his work into a series of articles, which were subsequently anthologized into a book titled *Constituent Power and Fundamental Law* (制宪权与根本法).

The incorporation of the CCP into legal theory, especially the acknowledgment of the constitutional role of the CCP as the sovereign under the Chinese constitutional system, inevitably triggered a backlash within legal scholarship. It is in this sense that we are witnessing an increasingly heated debate between "judicial constitutionalists" and "political constitutionalists" among China's constitutional law scholars. Interestingly, the current debate

in the Chinese constitutional discourse has also greatly expanded the previously parochial and formalistic disciplinary horizon, with a profound impact expected in the days to come (Zhongwai faxue bianjibu, 2013).

Response

Much to my regret, I was unaware of Professor Larry Backer's research when I was working on my article "Written and Unwritten Constitutions." It is safe to say that the arguments in my article would have been much more complete had I been aware of Backer's work earlier. After "Written and Unwritten Constitutions" was published, Professor Cui Zhiyuan recommended some of Backer's work to me. But at the time I was preoccupied with other projects, and it was not until 2012, when the *Peking University Law Journal* (中外法学) asked me to contribute a paper for the special issue commemorating the thirtieth anniversary of the adoption of the 1982 constitution that I finally got the chance to systematically read and analyze Backer's research on Chinese constitutionalism (Jiang, 2012). While writing my review article for the *Peking University Law Journal*, I was unable to procure all of Backer's relevant articles from the Internet. My initial efforts to contact Backer via email and ask for his help proved to be fruitless, as I was given an incorrect email address. To my surprise, a few months later I received a message from Backer, along with his review essay on my "Written and Unwritten Constitutions" article (Backer, 2012).

Professor Backer and I have disparate academic backgrounds, and therefore have approached the same problem from slightly different theoretical angles. Backer generally uses a broad comparative analytical framework when looking at constitutional issues, whereas I tend to focus on critical issues relating to American and Chinese constitutional systems. That being said, we do share many common viewpoints on issues relating to Chinese constitutionalism.

First, both Backer and I are aware of the paradigm shift in constitutionalism that took place after World War II, especially during the post–Cold War period, when the concept of constitutionalism was transformed from a specific form of organization for a national system to a "universal" norm of governance that reflects Western constitutional standards. In other words, "constitutionalism" has emerged as a new transnational ideology, and as a discursive instrument for Western hegemony (or more accurately, U.S. hegemony) in international political discourse in the global age.

Second, both Backer and I embrace the use of a holistic theoretical approach when examining the issue of constitutionalism. We share the perspective that constitutionalism is not only a normative legal system under the

formal rule-of-law framework, but also a way of life that embodies the substantive values of a society, and it is in this sense that we tend to focus on "substantive rule of law." From this theoretical framework, Backer has made a comparative analysis of several modes of constitutionalist systems, such as American constitutionalism, transnational constitutionalism in post–World War II Germany and Japan, Islamic theocratic constitutionalism, and of course the Chinese mode of constitutionalism. The Preamble of the Constitution of the People's Republic of China articulates a living narrative that flows from Marxism-Leninism, Mao Zedong Thought, and onto Deng Xiaoping Theory and the important thought of Three Represents, and it is through these frequent amendments that substantive political principles and cultural values are being injected into the formal rule-of-law framework.

Third, within the aforementioned theoretical context, we also share the view that the relationship between the CCP and the state is at the center of the Chinese constitutional system, and it is in this sense that Chinese constitutionalism can be understood as a "party-state" constitutional state. Chen Duanhong has framed the leadership role of the CCP as the "first fundamental law" of the land, whereas I have emphasized the understanding of the CCP-led political consultative system as the basic system of the constitution. This suggests that we must rethink the notion of the separation of power in terms of the separation between the party and the state apparatus. Chen Duanhong attempts to use the concepts of "constituent power" and "constitutional power" to distinguish party and state powers, where the CCP is seen as "a permanent institution for the constituent power of the people" 人民制宪权的常在机构 (Chen, 2010: 24). In contrast, both Backer and I have borrowed a concept from political science—the distinction between "political" and "administrative" powers—to explain the party-state separation of power. The leadership role of the CCP, then, can be seen as the political right of the party, and constitutional rights delegated to various state organs can be collectively understood as the administrative power of the state apparatus for the purpose of implementing the political decisions of the party. Under this framework, the role of the CCP is not simply a permanent institution of "constituent power" for the purpose of supervising and implementing the constitution; more importantly, the CCP functions as a political decision-making apparatus that permeates the daily political activities of the nation. Of course, this power distinction faces several conceptual problems, such as the need to make similar distinctions between the existing concepts of the legislative, administrative, and judicial.

Fourth, both Backer and I hold the view that the long-term sustainability of the Chinese party-state system depends on the ability to successfully incorporate the power of the CCP under the constitutional framework and to

constrain the activity of the party under the constitution and the law. Therefore, China's path toward a "single-party constitutionalist state" requires two critical tasks. On the one hand, we must recognize the CCP's central role within the Chinese constitutional framework. This involves the incorporation of the constitution of the Communist Party of China within the constitutional order, alongside the national constitution. On the other hand, we must fully implement and operationalize constitutionalism and the rule of law by placing the party's operations under the constitution. This implies that the CCP not only must strictly adhere to the party constitution, but also to the national constitution and the law. In other words, there is no Chinese constitutionalism without the substantive authority of the constitution of the CCP, the national constitution, and the law.

Because of these shared insights, Professor Backer's comments on my research have been very pertinent. I would like to respond to the following three points. First, Backer notes that my understanding of constitutionalism has been influenced by European structuralist thought, especially Foucault's critique of power. He has also duly pointed that I have combined Foucault's thought with Rousseau's theory of sovereignty when emphasizing the uniformity of human rights and sovereign rights. This is a very astute observation. On one level, Foucault's notion of knowledge-power can help us stay vigilant against various ideological elements within Western academic discourse, especially in the increasingly pervasive legal discourse concerning constitutionalism and the rule of law. In my research, I have always treated the "rule of law" as a modern technique of "governmentality" in Foucault's sense (Jiang, 2010b), and "constitutionalism" in this sense as nothing more than an institution that harmonizes and manages the power relations between the populace and the elites in control. Likewise, the paradigm shift of constitutionalism from the classical to the modern era largely reflected the structural transformation of the elite class in power from nobles to the masses. On a deeper level, Foucault's microphysics of power can help us expand the scope of our constitutional research. In addition to power relations on the macro-level (such as the *trias politica*), we should also pay considerable attention to intricate micro-power dynamics and how individuals preserve their civil rights through everyday participation in petitions (*shangfang*), the mass line, and judicial proceedings. It is in this regard that we can appreciate the importance of a judicial review system—a microphysical power mechanism that internalizes constitutional norms into the daily lives of individuals.

Of course, my decision to frame the concept of "human rights" within the notion of sovereignty was in part influenced by Rousseau's writings. But more importantly, this conceptual merger is grounded in my reflections on modern history. It can be said that modern history is a narrative of Western

nations imposing their way of life on other nations. Modern states emerged from this dialectical process, and regardless of whether or not one is willing to accept it, everyone's life is now inextricably linked to his or her own country. Hannah Arendt made insightful observations on the devastating effect the rise of nation-states in Europe had on minority groups. As the Jews in the diaspora did not have a state of their own, they quickly became a target for discrimination across Europe. Even when European nations were embattled, their secret police forces closely coordinated the rounding up of Jews and sending them to concentration camps. It is through this historical experience that Hannah Arendt lodged her criticism of the "human rights" concept articulated by Enlightenment philosophers. She argued that one must have achieved his or her full citizenship in a country in order to enjoy the full extent of civil rights. As we can see from the afflictions suffered by transient stateless individuals and refugees who flee broken homelands, people without citizenship will be left in the most vulnerable position when calamity strikes (Arendt, [1951] 2008: chap. 9). The reactivation of citizenship in modern history implies that the sovereign "rights of the state" do not exist in opposition to the rights of the citizen; rather, state sovereignty is the prerequisite for the realization of civil rights. It is in this sense that modern Chinese history can be understood as a narrative of the national struggle for independence, for liberation, and for the liberty of all. Historians have tended to focus on the intrinsic ideological tensions between the ideas of "enlightenment" and "national salvation" in China since the May Fourth Movement; however, it is also important to note that many "enlightenment" ideas in fact originated as a means to attain "national salvation." In this regard, the enlightenment of the toiling masses, including women and youths, was necessary in order to escape from semi-colonial exploitation and establish an independent sovereign nation, and it is through this collective struggle that the People's Republic finally emerged.

Thus, in terms of political philosophy, I perceive the relationship between the rights of the individual and sovereign rights differently from the social contract theories of Locke and Rousseau. But speculative philosophy aside, by examining how societies develop through history, historical sociology can often provide us with much better insight. Likewise, in addition to theoretical abstractions, the investigation of constitutional issues should also be grounded in a sense of history and reality. Furthermore, we should also expand the scope and depth of our investigations, and broaden our perspectives from the domestic level to the international or even global level. In addition to paying attention to the intrinsic tension between the individual and the sovereign, we should also pay attention to the relationship between sovereign entities, as these two sets of relationships are invariably linked together, especially when

the international community is in a Hobbesian "state of war." For instance, during the incipient days of U.S. history, foreign threats had a major impact in shaping U.S. constitutionalism. Federalists frequently made reference to the enmity between Great Britain and Spain when making their case for a strong federal government under a constitution, so that all internal factions could unite against common external enemies (Hamilton, Madison, and Jay, [1788] 2009). In this global era with growing international competition, China still finds itself mostly in a subjugated position, and desperately needs to strengthen its national sovereignty in order to protect the interests and rights of its citizens. Therefore, constitutional analysis should not be based on the presumption that sovereign power and individual liberty are naturally in opposition with each other. Rather, we should focus on finding the balancing point between state authority and civil rights.

Second, Backer has duly noted my view on the relationship between lawyers and the constitutional framework. In Western history, there is an intrinsic connection between lawyers and constitutionalism. In *Democracy in America*, Tocqueville perceptively summarized the difference in the roles Anglo-American lawyers and French lawyers played during the era of democratic transformation. Tocqueville observed that Anglo-American lawyers helped to maintain the constitutional order by acting as a balancing force against the "tyranny of the majority," whereas lawyers in France acted as a critical force driving the French Revolution. An important underlying cause for differences such as this is the disparate legal ethos of the two countries. Anglo-American lawyers, guided by common law principles, tend emphasize the past over the present, and therefore retain a high degree of respect for social order grounded in customary and traditional prerogatives. In contrast, French lawyers, under the influence of the civil law tradition, quickly became a driving force for radical political reform and revolution (Tocqueville, [1835–1840] 2000). Despite the efforts of Chinese legal professionals to learn from their American counterparts, our legal system continues to operate in the civil law tradition, thus leading to the inherent tension between Chinese lawyers and the development of Chinese constitutionalism.

Indeed, lawyers in China tend to embrace American legal traditions; they often advocate the adoption of the U.S. judicial review system, in hopes of establishing an independent judiciary that functionally holds sovereign power. From the perspective of a lawyer's interest, the United States has done a superb job on a global scale in terms of pursuing the maximum interests of its lawyers. However, Chinese constitutionalism is not a *trias politica* system—it is a system of political consultation and the National People's Congress under the leadership of the Chinese Communist Party. Under the Chinese constitutional system, substantive political issues are resolved

through a process of political consultation, and political decisions are finalized and codified through the NPC structure. The state judiciary, on the other hand, does not possess sovereign authority, and therefore cannot usurp political power. It is in this sense that we can understand the antagonistic feelings many Chinese lawyers hold against their country's constitutional system, as the substantive Chinese constitutional framework fundamentally contradicts their ideals and wishes.

While Chinese legal professionals generally admire the eminent role Anglo-American lawyers have played in constitutional development, Chinese aspirants often overlook the substantive common law values of honoring tradition, respecting customary order, and maintaining professional ethics through self-discipline. As lawyers in China are trained in the civil law tradition, many of them have adopted a "tyrant's mentality," believing they have somehow mastered "universal truth" and are destined to destroy traditions and customs by advocating radical reforms and revolution. Those Chinese legal lawyers, by deeply engaging themselves in iconoclastic yet haughty "intellectual political discourse," are like the French "literary men" Tocqueville described (Tocqueville, 1856), seeking to realize constitutionalism and the rule of law through iconoclastic means. In American constitutional jurisprudence, the "counter-majoritarian difficulty" was raised largely in response to the judicial activism of the Warren court. After the tumultuous years of the civil rights movement, the U.S. Supreme Court gradually returned to its usual conservative and restrained tendencies, and largely eschewed radical judicial activism during the long period between the Burger court and the Rehnquist court.

Against this backdrop, I believe that Chinese legal education should adaptively incorporate both civil law and common law elements. Given rapid globalization and the transnationalization of the U.S. legal system, Chinese legal education should do more to provide a comprehensive study of the American common law tradition, especially in areas such as international economic law, financial law, corporate law, and commercial law. Likewise, lawyers and judges should also be given more law-making powers in the above areas of law, in order to better adapt to market conditions and promote innovation. It is important to note that the common law framework is better suited to areas of the law where economic efficiency and technological innovation are of primary importance. As increasing numbers of Chinese law students are pursuing study abroad in American law schools, professional legal practice in China is well on its way toward complete Americanization. That being said, I believe the Chinese legal system, too, has much to learn from the United States. In more traditional legal areas such as criminal law, civil law, and family law, I believe we should remain committed to the civil law tradition

and to the principle of legislative supremacy. The primary duty of legal professionals in China should be administrative in nature. Cases relating to fundamental political issues and substantive social values (such as the equivalent of *Roe v. Wade*) should be handled by the CCP and the NPC instead. As legal professionals must adhere to the formal separation of law and morality, and have the duty to defend the authority of the law, they should not bear the responsibility to deal with disputes that touch on the fundamental substantive values and mores of society. In recent years, the active involvement of lawyers and judges in divisive public issues concerning the death penalty, marriage, filial piety, and so on has only invited growing public skepticism of the legal profession. Moreover, the public backlash against untactful "judicial activism" in China should serve as an excellent lesson for all of us. In a similar vein, while I fully support establishing a constitutional review system for China, such a task should not fall within the domain of the state judiciary; instead, a separate "constitutional committee" should be established by the CCP to handle constitutionality review.

Third, despite much common ground between us, Backer is also fully aware of the differences in our understanding of the CCP. I prefer to analyze the role of the party under the classical framework of "sovereign" or *Tianzi*, whereas Backer tends to understand the CCP as a Marxist political party. There is no doubt that the founding of the CCP was influenced by the international communist movement, which originated in Europe, but I would argue that the CCP has experienced extensive "Sinicization" throughout its historical development. The CCP chose a divergent revolutionary path from its European and Soviet counterparts since the early days of the People's Republic, and has always been committed to exploring its own path of socialist development. To be sure, the CCP was heavily shaped by Marxist thought, and communism was the primary ideological force driving the Chinese Revolution and the early stages of Chinese socialist development. We ought to ask ourselves, then, why did the Chinese people so quickly and completely abandon the communist ideology in the aftermath of the Cultural Revolution? One of the possible answers to that question is perhaps ideological incompatibility, which prevented communism from becoming a long-term spiritual belief for the Chinese people. When looking at the genealogy of Western thought, communism can be seen as a derivative of Judeo-Christian ideology. The logic of communism remains grounded in Judeo-Christian linear temporality, and it merely replaced redemption theology with historical determinism to fulfill the internal spiritual needs of the individual (Löwith, [1949] 2002). In this regard, communism is merely the counterpart of liberalism, an alternative narrative for "the end of history." The historical theology of communism, grounded in a "Judgment Day"-style jeremiad, is perhaps intrinsically incompatible with the *spirit* of the Chinese people. Chinese culture and

theology tend to embrace a more cyclical temporality, which helps to preserve a secular outlook in the daily lives of individuals—there is no need to fear a "Final Judgment"; nor is there any need to pursue a communist "heaven." From a broad historical perspective, communism represents an idiosyncratic episode in China's history, when the Chinese people were under existential threat and became desperate for a gospel of salvation. Communist ideology ultimately failed to integrate into the Chinese ethos, and cannot be used as a spiritual pillar supporting the Chinese people. Therefore, in addition to pursuing its own path of revolution and socialist development, the CCP must also gradually Sinicize at the fundamentally spiritual and ideological level. This is undoubtedly a difficult challenge that requires the party to further develop its own theories and doctrines.

From Mao Zedong's "serve the people" to Jiang Zemin's "great rejuvenation of the Chinese nation" and to the current administration's "China Dream," all of these narratives have been in fact made under the guidance of Confucian ethics. It can be said that traditional Confucianism, not Marxist ideology, is the substantive spiritual pillar for the CCP. More importantly, the articulation of the "Three Represents" theory by the CCP marked its official departure from the Marxist proletarian party framework, but nonetheless retained the Leninist notion of the vanguard party. Therefore, in terms of constructing a constitutional framework, the CCP must on the one hand maintain its characteristics as a Leninist vanguard party, yet at the same time carry on the classical mandate of *Tianzi* and uphold the ideal of *Tianxia weigong* 天下为公 ("the world is held in common"). Rather than adopting the Western multiparty system, this is the only way for China to truly unite the different factions of society under a single party. The universalism of the CCP constitutes its core distinction from Western political parties. In other words, once the CCP no longer maintains its party line, abandons its substantive values, work ethic, and progressiveness, it will no longer be able fulfill its mandate of *Tianxia weigong* and "serve the people," and therefore will inevitably disintegrate along with the current constitutional order. In fact, currently there are many individuals in China seeking to introduce a Western multiparty system in China, and their cause is grounded in the notion that the CCP has become completely corrupt, and has degenerated into an interest group and no longer serves the people.

Looking Forward

Behind the current debate on constitutional issues lies a larger theoretical debate. In order to clear a conceptual path for the continued exploration of Chinese constitutionalism, we must first deal with the more fundamental theoretical problems.

The first problem relates to the debate on universal values, that is, on whether the Western notions of freedom, democracy, constitutionalism, and the rule of law are truly universal concepts, and whether the Chinese people should necessarily adopt these "universal" values. On this issue, it is important to distinguish "universal values" themselves from the path to pursue these universal values. Modern society has reached a consensus on the universality of these values listed above, and needless to say, we must embrace them, as the acceptance of their universality is the basic criterion for us to step into modern society. Whether we like these ideas or not, and regardless of whether doubts remain over their universality, in order to enter modern society we must take a leap of faith and face our historical destiny. In fact, this has been the goal that the Chinese people have been struggling to achieve for more than a century. The fundamental values of modern society are indeed universal; however, every state, every nation, and every civilization must take its own path to pursue and achieve these universal values. This implies that a nation's endeavor to achieve these modern values will be invariably linked to its historical traditions, culture, mores, and its special historical circumstances, as well as its relative position within the global order. Even among Western nations, we can see that Great Britain, the United States, France, and Germany all took different paths to modernity. The transition from the old democratic revolution (the 1911 Revolution) to the New Democratic revolution in China, too, represents its own, unique approach to achieving universal values, given the special historical context. Since the economic reform, we have been exploring the market economy, trying to improve democratic institutions and the rule of law, and implementing constitutionalism and human rights protections. However, there are many factors that constrain our endeavor to achieve those universal values: our long historical tradition, our population of 1.3 billion and 56 different ethnicities, yet-incomplete national unification, and fierce international competition and our subjugated position within the global order. Therefore, we have named our own struggle "socialism with Chinese characteristics," but this is, in fact, "the Chinese path toward achieving universal values." In this regard, copying the paths of others and transplanting the American-style three branches of government will not help China realize constitutionalism. We must walk our own constitutional path and achieve substantive constitutionalism based on our own challenges.

The second problem touches on the idea of "the end of history"—that is, whether the historical development of humankind has really reached its final point, and whether new systems will emerge to replace the market economy and democratic constitutionalism. Looking at human history, the rise of new civilizations brings a new lifestyle and new momentum to the entire human

civilization, and it is in this sense that historical progress is possible. I believe human civilization will not simply end at this point, and that future generations will not replicate our current lifestyle ad infinitum. To think otherwise is to accept the tragic end of human progress and innovation. Many are familiar with Fukuyama's narrative on the "end of history," but few realize the dramatic tragedy intrinsic to his historical narrative. That is, the end of history implies the entry into Nietzsche's "last man's world," and even if we have really entered into such a world, there will be people that rise up like Nietzsche's *Übermensch* and attempt to create a new world. Thus, if we maintain that the Chinese people should contribute to human civilization, and if we want China's rise to have universal historical significance, then it must inject fresh energy into human history and bring forth a new lifestyle. If the rise of China only amounts to an extension of the Western lifestyle, and if China were merely to copy the American constitutional system, then China can make no meaningful contribution to human civilization. This would be, undoubtedly, a tragedy for both China and humankind.

I believe behind this global attention paid to the rise of China lies a shared sentiment of anticipation—for better or for worse—of how China will reshape the way of life for all of us. Such anticipation does not arise because the Chinese people possess some sort of exceptional capability for innovation; rather, it is because we have millennia of continuous civilization behind us. But in this age of global Westernization, the historical sensibility of Chinese civilization does, in fact, provide something new. This means that the Chinese people must maintain their cultural and civilizational self-consciousness in this global age, and transform their civilizational and cultural elements into institutions, developing a form of "institutional self-realization." Perhaps this would suggest that the Chinese people must undergo a second enlightenment. If the first enlightenment was the awakening from traditional civilization and accepting modernity introduced by the West, then this second enlightenment, perhaps, would entail the awakening from global Westernization, which in turn would authenticate civilizational and institutional self-realization. This would mark the revival of the classical ideals and brings them back into modern society (Gan, 2011). We are only in the very beginning of this undertaking, which will involve continuing exploration. Therefore, we should look at contemporary events with a "grand historical" gaze and explore the "Chinese path" toward a renaissance of classical ideals. We also need the courage to maintain a proper distance from various "prepackaged products" of the West, and to genuinely forge a new path toward liberty, democracy, rule of law, and constitutionalism.

The third point I want to emphasize is that advocating the "Chinese path" does not necessarily imply self-isolation and ceasing to learn from Western

civilization. In this age of globalization, not a single state or civilization can avoid influence from others and mutual exchange among civilizations is the inevitable trend of this age. In fact, learning from Western civilization, especially from the United States, should be seen as an indispensable part of our march on the Chinese path. In many aspects, America should be seen as an excellent example for us to learn from in developing our own constitutionalism. But we must keep in mind the things we absorb. Do we want to learn America's doctrines, or its spirit? Do we want to appropriate America's external appearance, or its substance? Should we focus on the end result of Americans' own endeavor, or focus on the process of *becoming* America? These are questions we must ask ourselves when gazing over the fence.

The reason the United States was able to develop its own constitutional system is based on its initial determination to stand up against the Old World. At a time when European nations organized their constitutional system around an all-powerful sovereign and ushered in the age of absolutism and statism, America took a leap of faith by going beyond that old concept of sovereignty, revived certain constitutional principles from medieval Europe, and synthesized the first modern constitution. For instance, whereas Great Britain had already adopted a strict separation between the legislature and the judiciary, the United States instead brought back some of the classical notions of intermixing the two, and thus developed its own judicial review system. While the European states largely abandoned the decentralized framework of the feudal era and collectively embraced the framework of centralized sovereign nation-states, the United States, on the other hand, retained many classical elements of decentralization and formed its unique federalist system. And at the time when the British monarchy relinquished most of its sovereign power and adapted a more ceremonial role, the United States, in contrast, inherited many classical elements of the British monarchy, and synthesized its own powerful "elected" monarchy. Samuel Huntington once observed that while the Americans preserved the monarchy, the British only preserved the crown (Huntington, [1968] 1988: 113). In other words, America's innovative contributions were largely due to its ability to eschew simply relying on copying the "latest" models of the day from the Old World. America was committed to a path grounded in its actual needs and was able to forge a unique form of constitutionalism with American characteristics. This path does not simply involve innovation, but rather adeptly reviving many classical principles from the past and utilizing them according to one's needs.

Likewise, when learning from the United States, we should not stop at the surface level, but instead excavate deep into the underlying artifacts of the American spirit. We should not understand America through the lens of formalism and dogmatism. Instead, we should grasp the core essence of

American pragmatism. Similarly, we should not adopt the vanity and ostentation of French "literary men," but learn from America's modesty, pragmatism, respect for traditional customs, self-confidence, and independent spirit that stops Americans from blindly following the "fashionable" ideas of others. It is only in this way that we can take advantage of both traditions from the past and innovation, and eclectically utilize different ideas, old and new, domestic and foreign, to serve our practical needs. Perhaps this is the framework we ought to build in order to lead us to a constitutionalism that is both sensitive to China's unique circumstances and will contribute meaningfully to human civilization.

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