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CONSTITUTIONAL LISTENING

MICHAEL W. DOWDLE*

INTRODUCTION

This essay explores a particular methodology of comparative constitutional analysis that it calls “constitutional listening.” This methodology is presented as an alternative to the structural, best-practices methodology that currently dominates comparative constitutional discourse. Derived from the interpretive “principle of charity,” constitutional listening involves interpreting constitutional discourse of other polities in their best light. This includes not simply polities whose constitutional structures and values resemble our own, but perhaps even more importantly, polities and constitutional systems whose values and structures seem alien to us, either because they do not evince the structural architectures we associate with constitutionalism, such as judicial independence or multi-party electoral competition, or because they do not endorse the particular values we associate with constitutionalism, such as political liberalism. The value of this methodology, it is argued, lies in its ability to expand our understanding of the diversity of experiences that have gone into the human project of constitutionalism, and in the diversity of human possibilities that the project provokes.

In Part I, I will explore problems with the current approach. We will see that the current approach, which is derived from American constitutional discourse, prevents us from looking for constitutional possibilities that lie outside the conceptual reach of that discourse. In Part II, I will develop an alternative methodology for comparative constitutional analysis derived from the principle of charity. Finally in Part III, I will demonstrate the comparative utility of that methodology in exposing overlooked constitutional possibilities by “listening” to the particular aspects of the constitutional discourse that was generated

* Assistant Professor, Faculty of Law, National University of Singapore. The author would like to thank both Leigh Jenco and the fourth Ernest Caldwell for their immense contributions to his thinking on this issue. This is as much their responsibility as it is my own—actually more so if you assign liability proportionally as does much of American torts law. This is particularly ironic given that neither may even remotely agree with what I’m saying here. Responsibility can be a real pill that way.

by China's draft property law, and in particular the critique of that law published by Gong Xiantian,¹ that has been largely ignored by the dominant political and legal academic communities of the North Atlantic countries.

I. THE COGNITIVE LIMITS OF THE LIBERAL VISION CONSTITUTIONALISM

In this section, I explore the limits of the liberal conceptualization of constitutionalism. These limits manifest in at least two dimensions. The first arises out of the defining emphasis of liberal constitutionalism on limiting and constraining state power. Many populations, particularly those in the more economically and culturally peripheral countries of the "Global South" are not going to be particularly attracted to such an agenda. The second arises out of a particular failure of constitutional imagination that results from liberal constitutionalism's definitional focus on particular, pre-defined institutional structures. This results in what David Scullli has presciently termed "the presupposition of exhausted possibilities."²

A. *The Metaphors of American Constitutionalism*

The liberal vision of constitutionalism is constructed primarily out of metaphors. These include a mechanical metaphor of power (e.g., power as a kind of thing)³; an anthropomorphic metaphor of institutions (e.g., Congress *intends*, the electorate *demands*, the court *determines*);⁴ and an economic metaphor of political behavior (i.e., that people's attitudes towards power are the same as their attitudes towards money).⁵

Of course, the metaphors we live by are not arbitrarily assigned. They direct attention to what are often situationally important aspects of the phenomenon they describe. The liberal vision of constitutionalism arises primarily – perhaps even exclusively – out of Anglo-American constitutional experience. The particular metaphors that are

1. Gong Xiantian, *A Property Law (Draft) that Violates the Constitution and Basic Principles of Socialism*, in 29 *LINKS: INT'L J. OF SOCIALIST RENEWAL* (May-Aug., 2006).

2. DAVID SCIULLI, *THEORY OF SOCIETAL CONSTITUTIONALISM: FOUNDATIONS OF A NON-MARXIST CRITICAL THEORY* 9-11 (1st ed. 1992).

3. Steven L. Winter, *The "Power" Thing*, 82 *VA. L. REV.* 721, 745-46 (1996).

4. HOWARD SCHWEBER, *THE LANGUAGE OF LIBERAL CONSTITUTIONALISM* 168-71 (2009).

5. *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 19-20 (1962).

used to express that constitutionalism are very well adapted to making sense out of that experience. The Anglo-American constitutional state (that of seventeenth and eighteenth century England, and post-seventeenth century United States) has never been seriously faced with external threats to its existence. By the time both England and its North American colonies started to explore for their own constitutions, their principal society threats had long since become internal rather than external. Such internal threats included political exploitation of sectarian animosity leading to political usurpation during English Civil War of the seventeenth century;⁶ growing taxation of private wealth caused by governmental expansion;⁷ and the seemingly artificial political entrenchment of an increasingly economically outdated landed aristocracy, which diverted opportunities from the newly emerging commercial class.⁸

The particular metaphors of liberal constitutionalism plainly focus our attention on the ever-present possibilities of these internal kinds of threats. The mechanical metaphor of power causes one to see the dynamics of political influence in its most threatening light—that of total loss of autonomy. The economic metaphor for political behavior focuses attention on how the attributions of political office can work to ensconce the political and social influence of its holder, as Cromwell was infamously able to do in the aftermath of the English civil war. Our anthropomorphic conception of institutions focuses attention on how institutions can work to ensconce or attack particular class and/or factional interests that threaten national cohesion and unity. This was increasingly witnessed in post-Independence America after the unifying force of English occupation (and appropriation) was removed. Shays' Rebellion, the immediate trigger for the modern constitutional reconstruction of the American state in 1787, caused reconstruction that would serve as the principal reference point for the liberal vision of constitutionalism and serves as a particularly dramatic reminder of this.⁹

6. See JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 7, 40-41 (1988).

7. See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 811-12 (1989).

8. See Gordon S. Wood, *THE RADICALISM OF THE AMERICAN REVOLUTION* 278-79 (1993).

9. MICHAEL LIENESCH, *Reinterpreting Rebellion: The Influence of Shay's Rebellion on American Political Thought*, in *IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION* 161 (Robert A. Gross ed., 1993); LEONARD L. RICHARDS, *SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE* 6-8 (2002).

But these metaphors, and their particular emphases, are of much more questionable suitability for polities whose perceived threats are more external. Whereas American society functions acceptably well in an environment in which power is constrained, a society faced with an external threat will not be so concerned with constraining their own power, but rather with constructing that power so as to repel the perceived external threat. Such perceived external threats are not limited to military threats. Economic threats, transnational political threats, and even natural-environmental threats such as famine, epidemics, and natural disasters, can all trigger a perceived demand for greater state power rather than more-constrained state power. Even threats emerging from within one's own borders, such as rampant crime, violence or poverty, can be perceived as "external" to the state to the extent they appear to be the products of non-state forces (such as criminal gangs or lack of socio-economic modernization) rather than abuses of existing state capacity. The more persistent these threats, the less attractive the power-constraining emphasis of American constitutional metaphors will be.

In fact, much of the world does indeed perceive itself as being more persistently faced by external threats, and understandably so. This is particularly true of the countries that are often referenced by the term "the global south." Lacking innate wealth and disadvantaged by their more peripheral relationship to the world's economic and cultural cores, these countries are particularly susceptible to transnational (external) economic, political and social forces.¹⁰ Examples of such vulnerabilities include colonialism; being drawn into wars brought on by the external political struggles between the Soviets and the Americans; hardships resulting from forced imposition of particular domestic, economic and regulatory practices by international organizations such as the IMF and particular countries including the United States (such as in the context of IP protection or "the war against terror"); threats to domestic stability due to the innately skittish nature of transnational (as contrasted with domestic) capital markets; and even vulnerability to large-scale campaigns mobilized by transnational civil society. This is not to accuse the advanced industrial nations of the North Atlantic of seeking to exploit or oppress peripheral countries. But the forces to which one feels vulnerable do not need

10. See Herman Schwartz, *Dependency or Institutions? Economic Geography, Causal Mechanisms, and Logic in the Understanding of Development*, 42 *STUD. IN COMP. INT'L DEV.* 115, 122-23 (2007).

to be driven by human intentionality. Countries simply need to feel constrained, intentionally or accidentally. Furthermore, due to a lack of wealth and lack of influence stemming from the lack of wealth, peripheral populations have understandable reasons for feeling externally constrained.

Under such circumstances, visions of constitutionalism will correspondingly tend to focus much more on state-building and not on state-constraining. Of course, authoritarian regimes often take advantage of and manipulate such foci as a means of perpetuating their power. And this leads many liberal comparativists to deny the reality or “legitimacy” of these foci—dismissing them as mere creations of authoritarian governments. In fact, state-building visions of constitutionalism have a rich history even in the liberal polities of the North Atlantic. Nevertheless, this is a history that has become invisible among comparativists due to an increasing political domination of the American liberal vision of constitutionalism and governance following the Second World War. As noted above, this vision has served America well, but in order to understand the full possibilities of constitutionalism as a human phenomenon, particularly as it manifests in the more peripheral part of the world order, we must look beyond these American experiences.

B. The ‘Presupposition of Exhausted Possibilities’

The other limitation in liberal constitutionalism lies in the fact that it is not particularly conducive to what we might call “constitutional learning.” The idea of constitutional learning is founded on the recognition that the human project of constitutionalism will always contain possibilities that exceed our current constitutional imagination.¹¹ The modern, liberal vision of constitutionalism tends to deny this possibility by effectively assuming that we already know everything we will ever need to know about the possibilities and impossibilities of constitutionalism as a human endeavor. It does so by primarily associating “constitutionalism” with a defining set of institutional structures including electoral democracy, in which control of government is determined by electoral competition between competing parties; separation of powers, in which an “independent” judiciary is

11. Cf. Sciulli, *supra* note 2, at 9-10 (discussing need for an understanding of constitutionalism that is not bound by the fallacy of exhausted possibilities).

critical; and the rule of law, in particular, the constraining of public governance by law as enforced by an independent judiciary.¹²

Such features are means to an end, not ends themselves. For example, despite our constitutional reverence for electoral supervision, we generally reject subjecting judges to electoral appointment because we feel that although electoral supervision contributes to executive and congressional performance, it does not improve judicial performance. Democratic elections are not an unqualified constitutional good, rather they are a good only insofar as they contribute to some higher constitutional good—representative responsiveness, political accountability and smooth transfers of power. Where such higher goods are not at issue, democratic election is similarly not at issue. Likewise, our attraction to the rule of law does not prevent us from removing large swaths of governmental activity from the purview of judicial review, again because the good of judicial review is derivative from its ability to promote higher goods, and where it does not seem to do so (such as when second guessing the expertise or even the rationality of other governmental actors), there is little moral demand for it.

In short, it is the ends achieved by these structural features, rather than their simple being, that recommends them to our constitutional attention. But a structural definition of constitutionalism hides this means-ends relationship by effectively conflating means with ends. This, in turn, prevents us from searching for possibilities that might provide alternatives, and perhaps even superior, ways to bring about these ends—ways that have not yet revealed themselves to our present constitutional understanding. For example, to say that constitutionalism is denotatively identified by the presence of some aspect of separation of powers leaves us no conceptual purchase for critical reflection into the possibility that perhaps, in some particular environments and under particular circumstances, there may actually exist other ways of achieving the particular ends that separation of powers is intended to bring about. Moreover, that in at least some of these particular environments or circumstances, these alternative means may represent as yet unidentified improvements to the more traditional separation of powers response.¹³

12. See, e.g., Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 39 (Michael Rosenfeld ed., 1994).

13. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 389, 401 (1998). See also Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003).

David Sciulli has compellingly coined this particular debilitation in American constitutional thought “the presupposition of exhausted possibilities.”¹⁴ Basically, identifying constitutionalism with a simple laundry-list of structural features effectively asserts that these structural features represent the only possible way of achieving their assigned constitutional ends. Thereby effectively asserting that we already know everything there is to know about the human possibilities of constitutionalism. Therefore, there is nothing left for us to learn. In the famous (or perhaps infamous) phraseology of Francis Fukuyama, we have achieved “the end of history”¹⁵ insofar as human constitutionalism is concerned.

II. TAKING IDEAS SERIOUSLY: CONSTITUTIONAL LISTENING

A. *Of ‘Ideas,’ ‘Charity,’ and ‘Learning’*

In sum, the dominant liberal vision of constitutionalism works very well in what we might call ‘familiar’ constitutional contexts—those in which the state is strong, stable and modern. Here a metaphor of limiting state power is useful, and the structures, which we use to identify constitutionalism, do indeed serve this limiting purpose, which is all we require of them anyway. The problem arises when we move outside the comfort of the familiar and into contexts in which the state is not suitably strong. In these cases, the liberal constitutional metaphors are of less resonance because the relevant issue includes the construction of state power, and not solely its limitation. In such circumstances, the structural focus of the liberal vision becomes positively dysfunctional. The only way we can come to understand the dynamics of constitutionalism in these environments is to learn new forms of constitutionalism. The structural vision prevents us from doing that.

Understanding the unfamiliar demands a process of learning, not simply one of evaluating. In this section, I will explore what such a process of constitutional learning entails.

1. Ideas

I start with a story:

14. Sciulli, *supra* note 2, at 9-10.

15. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 64 (1992).

Entering the 1950s, Poland was effectively a vassal of the Soviet Union. In 1952, the Soviets had imposed on Poland a constitution that was actually quite impressive from a liberal perspective. But of course, this constitution was “a fiction in nearly every respect, and the authority treated it essentially as propaganda for foreign consumption.”¹⁶ It bore no resemblance to how government actually operated.¹⁷

The death of Stalin and a slight easing of Soviet control bequeathed a certain bit of autonomy to the Polish state, and one of its first acts was to amend the 1952 Constitution to bring it closer in line with reality:

Surprisingly perhaps . . . the constitutions of Eastern Europe became somewhat less liberal as the Stalinist terror relaxed. The ‘leading role’ of the communist parties was written into these documents, as was the special role of the Soviet Union in the countries’ affairs. The litany of unenforceable social and economic rights expanded with time, while American-style political rights were scaled down.¹⁸

Paradoxically, the act of implementing a more realistic and more expressly authoritarian constitution triggered a countervailing liberalization and constitutionalization of Poland’s actual political environment. As explained by Andrzej Rapaczynski:

In a somewhat perverse way . . . the reforms reflected a movement toward the rule of law . . . [A]t least in Poland and Hungary, the leadership also tried to present a certain façade of legitimacy to the population at large. The regime made clear that it would tolerate no fundamental assaults on its core powers, but it permitted a certain amount of freedom at the margin. Therefore, the regimes returned in part to legality: at the very least a paper record was left of official action, and the increased publicity deterred most instances of the purely personal exercise of power by the lower echelons of the Party and the state bureaucracy.

To implement such a system, however, legal norms had to become somewhat more realistic; they had to give the leadership the *right* to suppress opposition to the fundamental principles on which communist authority was based, and with time these changes had to reach the constitutional level. The amendments concerning the ‘leading role’ of the Communist party, for example, removed most legal grounds from the potential political claims of the opposition. Similarly, the codification of the dominant position of the Soviet Union and the unassailable status of the Warsaw pact expressed a formal limitation on Eastern European countries’ sovereignty, and thus marked a relatively clear boundary (set by the Brezhnev Doctrine) of

16. Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 597 (1991).

17. *Id.*

18. *Id.* at 596-97.

all possible internal reforms. At the same time, however, these changes signified that constitutions were beginning to mean something. In Poland the government even took some steps to introduce a watered-down version of judicial review.¹⁹

This dynamic has also been well described in other literatures. For instance, Jon Elster has termed it “the civilizing force of hypocrisy,” and he explains it as the product of the fact that political effectiveness ultimately depends at some level on keeping one’s word.²⁰ Writing some hundred and fifty years earlier, Alexis de Tocqueville identified a similar dynamic, what Mark Barenberg has more recently termed “runaway legitimation,” which drove the progression of the French Revolution.²¹

The setting of this story introduces us to an important corrective to the liberal-structural vision. This is the recognition, obscured by the liberal-structural emphasis on structure, that “ideas matter.”²² In other words, it is the recognition that ideas can constrain independent of any particular structural design.²³ Ideas can constrain cognition by subjecting the definition of power to the constantly churning evolutions of social meaning.²⁴ Since the construction of social meaning is an innately spontaneous phenomenon, it makes “ideas” a good candidate for that non-structural motor for spontaneous constitutional evolution that we are searching for here.

Indeed, the recognition that ideas matter actually played a germinal role in the invention of modern constitutionalism. As I have described elsewhere, the modern, post-Aristotelian understanding of constitutionalism in part grew out of a new kind of political epistemology brought about by the Enlightenment.²⁵ This was an epistemology

19. *Id.* at 597-98.

20. JON ELSTER, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97, 111 (Jon Elster ed., 1998).

21. ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION* (François Furet & Françoise Mélonio eds., Alan S. Kahan trans., Univ. of Chicago Press 1998) (1856); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 *COLUM. L. REV.* 753, 833-34 (1994).

22. JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*, VOL. 1: *REASON AND THE RATIONALIZATION OF SOCIETY* 279-95 (Thomas McCarthy trans.) (1981).

23. *Id.*

24. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. CHI. L. REV.* 943, 962 (1995).

25. See, e.g., *THE SPIRIT OF THE LAWS*, at xlix (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. and trans., 1989) (1748):

It is not a matter of indifference that the people be enlightened. The prejudices of magistrates began as the prejudices of magistrates began as the prejudices of the nation. In a time of ignorance, one has no doubts even while doing the greatest evils; in an enlightened age, one trembles even while doing the greatest goods. One feels the old abuses and sees their correction, but one also sees the abuses of the correction itself. One lets an ill remain if one fears something worse;

that saw political knowledge and understanding as residing in universal reasons that were cognitively accessible to all persons, as contrasted against an earlier epistemology that saw capacity for political understanding as being limited to a particular class of the population.²⁶ In his germinal analysis of the French Revolution mentioned above, Tocqueville identified this new political epistemology, this new way of constructing political ideas, as the spontaneous motor that drove the revolution unprecedentedly, and in his mind, beyond the reach of human intentionality.²⁷ Modern constitutionalism arose as a regulatory response to this new phenomenon, and its new way of envisioning political authority.²⁸

And it was its 'Enlightened' epistemic character, not its liberal aspects, which caused this new modern notion of constitutionalism to spread outside of the Anglo-European realm. When Japan and the Ottoman Empire became the first non-European countries to import this previously European notion of a "constitution" into their own conceptualization of politics, they did not do so out of an ideological embrace of liberalism, but out of an embrace of modernism.²⁹ Such modernism carried with it a distinct epistemic character, an embrace of rational openness. In Europe, this embrace is most identified with the Enlight-

one lets a good remain if one is in doubt about a better. One looks at the parts only in order to judge the whole; one examines all the causes in order to see the results.

If I could make it so that everyone had new reasons for loving his duties, his prince, his homeland and his laws and that each could better feel his happiness in his own country, government, and position, I would consider myself the happiest of mortals.

See also Alexander Hamilton, *The Federalist Papers*, 20 (Ernest O'Dell ed., 2010) (1777-1778):

AFTER an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

26. *See* JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 14-26 (Thomas Burger trans., 1992). *Cf.* PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION VOL II: THE SCIENCE OF FREEDOM* 398-99 (1969).

27. *See* Tocqueville, *supra* note 21. *See also* LYNN HUNT, *POLITICS, CULTURE, AND CLASS IN THE FRENCH REVOLUTION* (1984).

28. *See* HANNAH ARENDT, *ON REVOLUTION* (1977). *See also* Michael A. Wilkinson, *Between Freedom and Law: Hannah Arendt on the Promise of Modern Revolution and the Burden of 'The Tradition'*, in HANNAH ARENDT AND THE LAW 35 (Marco Goldoni & Christopher McCorkindale eds., 2012).

29. *See* ROBERT DEVEREUX, *THE FIRST OTTOMAN CONSTITUTIONAL PERIOD: A STUDY OF THE MIDHAT CONSTITUTION AND PARLIAMENT* (1963); GEORGE AKITA, *FOUNDATIONS OF CONSTITUTIONAL GOVERNMENT IN MODERN JAPAN, 1868-1900* (1967).

enment. Moreover, it is therefore telling that in Japan, the import of European constitutionalism corresponded with a larger social-epistemic movement known as the “Meiji Enlightenment,” while in the Ottoman Empire, it corresponded with a transitional movement known as the “Tanzimat Enlightenment” (or “Ottoman Enlightenment”).³⁰ In both these cases, the term “Enlightenment” refers to an “Enlightened” new epistemic embrace of rationality and reasoned discourse, not to any political embrace of liberal values.³¹

Therefore, an ideational definition of constitutionalism is more inclusive of the historical antecedents and determinants of modern constitutionalism when it locates constitutionalism in efforts to accommodate more open political epistemologies. It is more inclusive both insofar as “Western” Euro-American experiences are concerned and insofar as the appeal of constitutionalism outside of the Euro-American West is concerned, than the liberal vision that tends to dominate comparative constitutional discourse at least in the Anglo-American world. It is from there, rather than from liberalism, that an investigation into a possible “constitutional learning” might most promisingly proceed.

In claiming that ideas matter, it needs to be emphasized that what matters is the idea as an epistemic phenomenon and not as a bearer of some particular content.³² The ideas that matter can be liberal, but they do not need to be—they can just as well be non-liberal or even anti-liberal, as the above example of Poland in the 1950s demonstrates.³³ They can be fictitious, as was that of the “Norman Yoke” in English constitutional history³⁴ if not blatantly and unapologetically false.³⁵ What matters is the idea’s capacity to shape the construction of cognition.

30. See Devereux, *supra* note 29; Akita, *supra* note 29.

31. See Devereux, *supra* note 29; Akita, *supra* note 29.

32. HANS-GEORG GADAMER, TRUTH AND METHOD 67 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004) (1960). Compare PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1967) with STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY (1995).

33. Rapaczynski, *supra* note 16, at 596-97.

34. Richard T. Vann, *The Free Anglo-Saxons: A Historical Myth*, 19 J. OF THE HIST. OF IDEAS 259, 259 (1958).

35. See, e.g., JOHN BRAITHWAITE, VALERIE BRAITHWAITE, MICHAEL COOKSON & LEAH DUNN, ANOMIE AND VIOLENCE: NON-TRUTH AND RECONCILIATION IN INDONESIAN PEACEBUILDING 109 (2010).

2. 'Charity'

As described above, our interest in constitutional ideas stems from an interest in their social meaning, not from an interest in their external veracity. The best heuristic for determining the meaning that a society attaches to a particular idea is simply to listen to how a speaker from that society uses those ideas, and interpret his or her words in their most reasonable light—i.e., to interpret them under the presumption that the speaker is rational in the Aristotelian sense of the word.³⁶ This is Donald Davidson's celebrated "principle of charity."³⁷ I am proposing a "constitutional" principle of charity in the service of constitutional learning.³⁸ The principle of charity argues, *inter alia*, that our best approach for interpreting a speaker's statement is to initially privilege possible interpretations that maximize the coherence or rationality in the subject's sayings. This works to maximize the amount of information—including both empirical information and what we might call 'insight'—that flows from the subject to the interpreter. As Davidson said, "[such charity] is forced on us; whether we like it or not, if we want to understand others."³⁹ This, of course, is exactly what we are seeking to achieve in the context of constitutional learning: an understanding of unfamiliar constitutional systems and experiences.

An assertion that the key to understanding unfamiliar constitutional systems lies in simply listening to what these systems have to say about themselves will strike many as a rather pedestrian observation. As Davidson said, this is our default mode for understanding the other,⁴⁰ and in this sense I seem to advocate simply what we would otherwise do. Yet surprisingly, in the context of comparative constitutional law, we almost never pay attention to what an unfamiliar constitutional system says about itself—or more precisely, what the full membership of that system says when they speak to one another. At best, we privilege a few selected voices, voices who have been selected because they seem to resonate with some external ideology like the

36. See DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* xvii (1984) (the principle of charity was first identified by Neil L. Wilson in 1959). See also Neil L. Wilson, *Substances without Substrata*, 12 *REV. OF METAPHYSICS* 521, 532 (1959).

37. Davidson, *supra* note 36.

38. Michael W. Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 *NYU J. INT'L L. & POL.* 1, 84-87 (2002-2003) (for more detailed development of this idea).

39. Davidson, *supra* note 36, at 197.

40. *Id.*

American liberal vision, or the discourse of international human rights law, or even the neo-liberal economic constitutionalism of mainstream developmental economics.

For example, many Euro-American scholars looking at constitutionalism in China will indeed listen charitably to the American-inspired ideas that Chinese constitutionalism articulated by the liberal Chinese dissident Liu Xiaobo. But they have no interest in finding charitable interpretation of the constitutional articulations of Mao Zedong. In fact, there is a dominant presumption among these scholars that charitable interpretations of Mao are impossible.⁴¹ This presumption exists, despite the fact that at least some of Mao's constitutional 'ideas' do indeed resonate with a significant portion of the Chinese population. This includes not simply the party elite, but also significant portions of the ordinary population, who not infrequently use Maoist ideas to actually challenge that elite.⁴² Clearly, there is going to be a fundamental lack of understanding when an outside observer presumptively dismisses as constitutionally "meaningless" a particular set of ideas that in fact convey important, affirmative and influential constitutional understandings to many in that population. However, this is exactly what we do.⁴³ A constitutional principle of charity requires us to listen charitably not simply to the ideas of Liu Xiaobo and likeminded Chinese liberals, but also to those conveyed in the many non-liberal voices (e.g., Maoist, Marxist, Confucianism) that participate and carry significant meaning in China's budding popular-constitutional imagination.⁴⁴

Of course, the objection to my complaint here is that Mao really was a "bad man" because he was driven by power and personal aggrandizement and did not have a genuine interest in promoting anything remotely resembling constitutionalism, that is "constitutionalism" in the sense of some epistemically-open (and hence contestable) vision of the role and responsibilities of the Chinese state

41. See DANIEL F. VUKOVICH, CHINA AND ORIENTALISM: WESTERN KNOWLEDGE PRODUCTION AND THE P.R.C 47-65 (2012). See, e.g., Perry Link, *An Abnormal Mind*, THE TIMES LITERARY SUPPLEMENT, July 22, 2005, at 22.

42. See generally MOBO GAO, THE BATTLE FOR CHINA'S PAST: MAO AND THE CULTURAL REVOLUTION (2008). See also Ching Kwan Lee, *What Was Socialism to Chinese Workers? Collective Memories and Labor Politics in an Age of Reform*, in RE-ENVISIONING THE CHINESE REVOLUTION: THE POLITICS AND POETICS OF COLLECTIVE MEMORIES IN REFORM CHINA 141 (Ching Kwan Lee & Guobin Yang eds., 2007).

43. Vukovich, *supra* note 41.

44. See Michael W. Dowdle, *Popular Constitutionalism and the Constitutional Meaning of Charter 08*, in LIU XIAOBO, CHARTER 08 AND THE CHALLENGES OF POLITICAL REFORM IN CHINA 205, 227 (Jean-Philippe Béja, Fu Hualing & Eva Pils eds., 2012)(further developing the idea of China's "popular-constitutional imagination").

and those who claim to represent that state.⁴⁵ But from our discussion above, we can see that this objection is actually irrelevant. Our interest is not in the political psychology of Mao Zedong; our interest is not in Chinese political history; our interest is not in the moral quality of Mao the man. Rather, our interest is simply in the social-constitutional meanings that attach to particular ideas that are attributed to Mao. Whether these meanings actually correspond to his own personal motivations, intentions or actions is irrelevant.

During most of the 1890s, French politics were dominated by the French Military's abusive persecution of Alfred Dreyfus on charges of espionage.⁴⁶ Dreyfus was Jewish, and many attributed this persecution to anti-Semitism.⁴⁷ Therefore, the constitutional meaning that ultimately attached to *l'affaire Dreyfus* was that the French State needed to sever itself from all religious affiliations, in particular with the Catholic Church, resulting in the still-meaningful constitutional doctrine known as *laïcité* (laicity).⁴⁸ In fact, the French Military's persecution of Captain Dreyfus was not significantly driven by any State-sponsored anti-Semitism, and the Catholic Church itself actually condemned France's treatment of Captain Dreyfus.⁴⁹ Rather, the persecution was driven by the Military's political dependency on particular conservative and Royalist elements of French civil society, elements over which particular groups that were both conservative and anti-Semitic held special sway.⁵⁰ In other words, the Dreyfus Affair had nothing to do with the constitutional lessons that were and still are drawn from that affair. However, this does not diminish in the least the constitutional import of these lessons, and their import to our own understanding of and appreciation for the distinctive secularity of French constitutionalism.⁵¹

The fact of the matter is that over the long term, the actual intention of the speaker does not really matter in determining the effect of the speech. It is the interpretation of the listener, not the speaker,

45. See, e.g., Link, *supra* note 41.

46. See generally MICHAEL BURNS, DREYFUS: A FAMILY AFFAIR, 1789-1945 (1991); GEORGE R. WHYTE, THE DREYFUS AFFAIR: A CHRONOLOGICAL HISTORY (2005).

47. Burns, *supra* note 46, at xiii.

48. Whyte, *supra* note 46, at 311.

49. Burns, *supra* note 46, at 318.

50. *Id.* at 289-90.

51. *Id.* at 329.

which determines the meanings that attach to ideas.⁵² Regardless of what Mao actually thought, it is not hard to find empathy with his consistent appeal to liberation from class-based oppressions and oppressions resulting from economic and industrial disparities, even if, *arguendo*, he himself personally did not act in accord with such beliefs. People who sympathetically appeal to Mao are not appealing to his alleged hypocrisy—to do so would be self-defeating of their own argument. They are appealing to the positive meaning they see Mao's ideas as expressing. We do not and should not deny the constitutional importance that Americans attach to what they call "Jeffersonian democracy," simply because its founder and namesake, Thomas Jefferson, willfully violated its principles by owning slaves.⁵³ The constitutional import of a human desire to be politically and economically equal, regardless of circumstance or birth or location in a particular industrial class, is equally meaningful regardless of whether it is expressed by or attributed to a modern day human-rights activist, an eighteenth century slave-owning liberal, or even a populist demagogue in mid twentieth century China.

Some might further seek to contest this by pointing out that popular constitutional discourse in China is heavily censored, and that the fact of such censorship corrupts that actual social meaning that attaches to Mao's ideas. But this requires us to examine the actual social effects of censorship.

Censorship can have two kinds of foci. One is censoring facts. The other is censoring competing interpretations of particular facts. Insofar as a principle of charity is concerned, censorship of facts need not concern us. The principle of charity does not require us to accept a speaker's factual claims as true, it merely requires us to proceed from a starting presumption that the speaker believes his or her factual claims to be true. This is because the principle of charity is a device for understanding social interpretations of reality, not reality *per se*.

Therefore, if censorship does pose a threat to the efficacy of the principle of charity, it does so by censoring opposing constructions of social reality, not opposing claims of actual reality. But the presence of oppositional constructions of some social reality does not diminish the range of useful interpretative meanings that reside within some par-

52. See Elster, *supra* note 20, at 109-12 (The innate epistemic disconnection between the intent of the speaker and the meaning of her speech is well captured by Jon Elster in his exploration of "the civilizing force of hypocrisy.").

53. See William Cohen, *Thomas Jefferson and the Problem of Slavery*, 56 J. AM. HIST. 503, 503 (1969).

ticular construction of that reality. The orthodox Christian theology of the Catholic Church ca. the fifth through thirteenth centuries CE was highly contestable, and was also fiercely protected from competing interpretations by considerable censorship.⁵⁴ Nevertheless, it was able to produce a range of still useful interpretations of social reality, including the social reality of law, as evinced by the continuing import of the ideas of St. Augustine and St. Thomas Aquinas.⁵⁵

The fact is that even under conditions of heavy censorship, even the most privileged statement conforms to a society's prior and deeper understandings of the nature of its world and the values these understandings provoke if it is to have any desired social effect. The speaker will know this. The speaker's appeals will therefore, at the very least, reflect his or her own understanding of what listeners ultimately believe.⁵⁶ They are not strategic constructions of belief, because belief cannot be dictated by fiat. For this reason, the presence of censorship does not in fact compromise the particular utility of the principle of charity, which is to identify possible understandings, not to identify object truths.

Finally, we might also note that we can further counteract the affects of censorship by focusing on discourse and not on individual statements. We will explore this further when we look at the issue of identifying interpretive coherence.

B. Taking Ideas Seriously: Searching for Coherence

As described above, constitutionalism is ultimately about a particular kind of social epistemic construct that we are calling "ideas." Moreover, we need not demand that these ideas express some particular content—we need not demand that they be "liberal"—because their ultimate constitutional import lies in their ability to simply constrain our political cognition (i.e. to constrain what can be imagined within that particular constitutional polity). The key to comparative constitutional understanding, therefore, lies in our ability to empathize with these ideas, to understand how they can be real and not simply to dismiss them presumptively as delusional, even when at first blush, they

54. See CHARLES FREEMAN, *THE CLOSING OF THE WESTERN MIND: THE RISE OF FAITH AND THE FALL OF REASON* 294 (2002).

55. See generally AUGUSTINE AND MODERN LAW (Richard O. Brooks & James Bernard Murphy eds., 2011); CHARLES P. NEMETH, *AQUINAS IN THE COURTROOM: LAWYERS, JUDGES, AND JUDICIAL CONDUCT* 183 (2001).

56. See Elster, *supra* note 20, at 109-12. See generally Dowdle, *supra* note 38.

seem to contradict our own honestly-held ideas about what comprises the constitutional. This is the lesson of the principle of charity.

In this section, I will explore in more detail how one might go about adapting the principle of charity to constitutional discourse. I will call this particular adaptation, “constitutional listening.” As derived from the principle of charity, constitutional listening involves finding the most coherent interpretations we can for constitutional discourse emanating from a foreign system, so that we may use the insights they embody to interrogate and add to our own understandings. Such a practice requires us to confront three particular conceptual issues. These include: (1) what constitutes “coherence”; (2) what constitutes “discourse”; and (3) what constitutes the “constitutional”? I already began exploring the issue of coherence above when I examined what comprises the constitutional. I will further examine each inquiry in turn.

1. Of Coherence, Culture and the Presumption of a Universal Truth

The idea of constitutional listening presumes that communication across legal systems is possible. Some comparative legal scholars, however, are skeptical that “interpretations” can meaningfully inform one another across cultures.⁵⁷

There are two responses to this kind of skepticism. The first is methodological. Quite simply, it is true that we can never really know if we accurately understand another culture, or even another individual. As Davidson himself so well described, our efforts to understand anyone, cross-cultural or intra-cultural, are ultimately heuristic: at the end of the day, they can only be founded on a *presumption* of a possibility of understanding.⁵⁸ However, in this sense, the skeptic claiming cultural incompatibility is on no firmer empirical ground than one claiming the possibility of understanding. We have no greater reason for presuming that some otherwise apparent understanding is unfounded, simply because it occurs across cultures, than we do for presuming that our own apparent understanding is accurate.

In fact, just the opposite is true. There is good reason to privilege the possibility of understanding over skepticism. Meta-studies of cultural psychology consistently find that both perceptions of experience and modes of making sense of those perceptions (e.g., rationalism, sen-

57. See, e.g., REBECCA R. FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* 57-59 (1995).

58. Davidson, *supra* note 36, at 197.

timentalism, folk knowledge) in fact do not differ significantly across cultures: both perception and cognition (reason) are human and not cultural phenomena.⁵⁹ What differs among cultures is the way perception and cognition is expressed and not differences in perception or cognition per se.⁶⁰ Interpretation and understanding occur when we understand how a particular perception or cognition, which we all generally share in common, is contextualized by the particular set of symbols and metaphors another culture uses to describe that perception or cognition.⁶¹ Since patterns of perception and cognition are not culture specific, we can safely assume congruence between ourselves and our speaker in these domains.⁶² As noted above, the idea of constitutional listening recommends itself to us precisely because it seems to promote our capacities to overcome the conceptual limitations that our cultural metaphors impose upon us, and because it allows us to recognize the diversity of possible insights that are highlighted by the diversity of other cultures' metaphors.

2. The Threat of Conventionalism

A second objection to the principle of charity is that it threatens to conflate "truth" with simple agreement.⁶³ If we are looking for interpretations that already make sense to us, then it is sometimes argued that we are in fact only looking for interpretations that we already agree with. If this is the case, the principle of charity might help us nibble at the edges of the limits of our cultural understandings, but it would not induce the more transformative forms of learning claimed of it. Indeed, by pretending to be epistemically open when it is not, it could serve to reinforce perceptual biases induced by cultural ways of talking. For instance, by creating a tautological psychological dynamic of "she agrees with me (because my charitable interpretative method-

59. See DIANNE VAN HEMERT, PATTERNS OF CROSS-CULTURAL DIFFERENCES IN PSYCHOLOGY: A META-ANALYTIC APPROACH 132-33, 136-37 (2003). See also STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 42 (2002).

60. Cf. Van Hemert, *supra* note 59, at 136-37.

61. Cf. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 200-01 (1980).

62. *Id.* at 194.

63. I thank Leigh Jenco for bringing this objection to my attention (albeit while also emphasizing that she does not actually endorse this claim). This objection is also raised in Chad Hansen, *Fa (Standards: Laws) and Meaning Changes in Chinese Philosophy*, 44 PHIL. E. AND W. 435, 438-39 (1994). One solution to this problem is found in a revised version of the principle of charity called "the principle of humanity." See Richard Grandy, *Reference Meaning and Belief*, 70 J. OF PHIL. 439, 445 (1973). However, for reasons discussed below, I argue that despite this, the principle of charity is a better methodology for the particular kind of interpretation that this essay is exploring.

ology conditions me to interpret her states in ways I find agreeable), and therefore I must be right (because, after all, my charitable interpretation shows that she shares my worldview).”

As an initial response, we might point out that claiming that we cannot distinguish conceptual coherence from agreement is clearly false. We all have experience disagreeing with people whose intelligence we respect and find coherent. Indeed, such disagreement often produces in us a distinct agitation. This agitation, I would argue, is a product of the cognitive dissonance that results when clearly reasonable people do not agree with our reasoning, a cognitive dissonance that in turn causes us to question our own reasoning. (For similar reasons, we also feel agitation when we find ourselves unable to accomplish some task that we believe we should be able to accomplish.) We do not feel such agitation, however, when we find ourselves in disagreement with a three-year old, or with someone for whose intellect we have little regard, like someone who is clearly drunk, for example. Such feelings of agitation in the face of certain kinds of disagreement indicate that we are in fact able to distinguish between agreement and coherence.

The objection of conventionalism goes even deeper than this. It might acknowledge that we can distinguish agreement from coherence at the margins. But it could still assert that we cannot distinguish disagreement from coherence insofar as our larger cultural patterns of perception (i.e., meanings) are concerned. In other words, conventionalism can help us see how new experiences might fit into existing patterns of experience, but it cannot help us perceive new patterns of meaning *per se*. This is because pattern recognition itself represents a kind of bias. It is well recognized, for example, that humans are predisposed to find patterns in phenomenon in which no such patterns actually exist. A good example of this is found in traders in the New York Stock Exchange. Studies have consistently found that it is impossible to outperform the market in that Exchange simply by studying price movements (i.e., that there are no patterns to the price movements on that exchange).⁶⁴ Yet traders routinely believe that they can perceive subtle patterns in market pricing that, if properly pursued, would allow them to outperform the market as a whole.⁶⁵ To extrapolate to the

64. See Meir Statman, *Behavioral Finance: Past Battles and Future Engagements*, 55 *FIN. ANALYSTS J.* 18, 20 (1999).

65. Cf. Kent Daniel, David Hirshleifer & Avanidhar Subrahmanyam, *Investor Psychology and Security Market Under- and Overreactions*, 53 *J. OF FIN.* 1839, 1866 (1998).

principle of charity, it would mean that we have a bias towards seeing meanings (i.e., cognitive patterns) that we are familiar with in external constitutional phenomenon, even when those meanings do not in fact exist. Accordingly this bias compromises the actual interpretive implications of a finding of coherence.

While pattern bias may not be perceived in individual evaluations of coherence, it can be perceived in the aggregate, by looking for patterns of coherence across a field of events rather than simply within a singular event. This is exactly how the pattern recognition biases that tend to infect trading on the New York Stock Exchange were identified.⁶⁶ Clearly, traders can and sometimes do outperform the market in individual transactions; they can and do sometimes outperform the market over short-term timelines. At these levels, their bias cannot be perceived. The bias becomes apparent, however, when we look at the aggregate of trades over the long term. This perspective allows us to see that while individuals do sometimes outperform the market, these incidents of outperformance are no different in pattern than what we would expect to find in a market that is completely random.⁶⁷

However, in this sense, the objection from conventionalism does offer an important correlate to the principle of charity. This is that our charitable search for coherence needs to be a field-wide search and not simply a search that focuses on individual interpretations operating in isolation.⁶⁸ It recommends, in other words, that we listen for meaning, not so much by focusing on individual statements, but by listening to entire conversations (i.e., in discourse).

C. *Focusing on Discourse*

The questions of “what constitutes coherence?” and “what constitutes discourse?” are related. We saw that to take better account of our own limited rationalities created by our received conceptual frameworks, we need to interpret foreign constitutional statements against their larger discursive background. We might call this background the “discursive space” in which the statement is located. A discursive space is defined basically by the collective communicative behavior of both the speaker and the intended audience. Coherence is evinced not simp-

66. Werner F. M. De Bondt, *Stock Prices: Insights from Behavioral Finance*, in THE CAMBRIDGE HANDBOOK OF PSYCHOLOGY AND ECONOMIC BEHAVIOUR 64, 64 (Alan Lewis ed., 2008).

67. *Id.* at 76.

68. I develop this idea further in Dowdle, *supra* note 44, at 206.

ly in the statements of the speaker, but more robustly in how the speaker and the audience seem to be responding to one another.

Note that responding in this sense is different from simply reacting. By responding, I mean that communicative patterns must be evolving, not static. If Speaker A says "X is true"; and Speaker B replies "X is false"; and Speaker A comes back with "yes it is"; to which Speaker B retorts "no it isn't," *ad infinitum*, this would not represent responsive communication. To be responsive, Speaker A's and Speaker B's statements must evolve in response to each other. Such responsiveness indicates that the speakers are themselves perceiving coherence in each other's speech. By following the coherence, not simply of the single statement, but also of responses to that statement, we can check whether our own interpretations—and the kinds of responses they might generate—are indeed accurately channeling the meaning of the statement.

Consider, along these lines, the Chinese party-state's use of the term "socialist" in the context of China's constitutionalism. It has long claimed that China's constitutional system was not only distinctly "socialist," but distinctly "Chinese socialist."⁶⁹ Interestingly, China's party-state has also patently refused to discuss or describe what such socialism means. Traditionally, it has actively suppressed societal efforts to search for the meaning of concept.⁷⁰ In this sense, there has been no responsive evolution of the party-state's discourse on socialist constitutionalism. And for this reason, as I have argued elsewhere, the Chinese party-state's idea of "socialist constitutionalism" would indeed appear to be a conception that in fact lacks meaningful coherence, despite the large number of statements in which it is used.⁷¹

On the other hand, let us consider the China party-state's use of the term "democracy." China's party-state claims to be a democracy.⁷² Observers working from Anglo-American perspectives in particular dismiss this claim as incoherent, since China's political system is certainly not "democratic" in the way that the Anglo-American perspective of constitutionalism defines the term.⁷³ But Anglo-American

69. See, e.g., Randall Peerenboom, *Social Foundations of China's Living Constitution*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 138, 155-61 (Tom Ginsburg ed., 2012).

70. See Michael Dowdle, *Of 'socialism' and 'socialist' legal transformations in China and Vietnam*, in *ASIAN SOCIALISM & LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM* 21, 36-37 (John Gillespie & Pip Nicholson eds., 2005).

71. *Id.* at 35-37.

72. See, e.g., XIANFA [CONSTITUTION], Dec. 4, 1982, Preamble, arts. 1-3 (China).

73. See, e.g., John L. Thornton, *Long Time Coming: The Prospects for Democracy in China*, 87 *FOREIGN AFF.* 2 (2008).

constitutionalism has a strong structural emphasis—that in this case tends to conflate “democracy” with multi-party elections for national public office⁷⁴—and one of the main goals of constitutional listening is to help us escape the conceptual limits that this emphasis subjects us to. With regard to China’s own constitutional-political system, there is clearly conceptual and discursive evolution with regard to its discussions of “democracy.” In particular, the claim is clearly associated with evolutions in parliamentary processes,⁷⁵ village governance,⁷⁶ access to governmental information,⁷⁷ and industrial relations.⁷⁸ Most importantly, surveys suggest that the party-state’s usage of these terms does indeed resonate with the general population, and that the population has incorporated state visions of democracy into their own discourse.⁷⁹

All of this suggests a coherence to China’s usage, albeit one that the more traditional constitutional metaphors for democracy—namely electoral appointment to high public office—perhaps works to obscure. In fact, even in American constitutionalism, there is an alternative vision of democracy that focuses on democracy as participation (i.e., “deliberative democracy”) rather than democracy as simply vote-casting. Indeed, a number of prominent scholars of Anglo-American law and politics, working out of this “deliberative democracy” tradition, have occasionally pointed to particular aspects of China’s ongoing exploration of “democracy” to help expand our own understanding of what democracy itself could entail.⁸⁰

74. See, e.g., FREEDOM HOUSE, FREEDOM IN THE WORLD COUNTRY RATING 1972-2007 at 9-10 (2008).

75. See, e.g., Dowdle, *supra* note 38, at 174-79.

76. See, e.g., Kevin J. O’Brien, *Villagers, Elections, and Citizenship in Contemporary China*, 27 MODERN CHINA 407, 425 (2001).

77. See generally Jamie P. Horsley, *Toward a More Open China*, in THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD 54-91 (Ann Florini ed., 2007).

78. See, e.g., TIANJIAN SHI, POLITICAL PARTICIPATION IN BEIJING 152-63 (1997).

79. See Lu Chunlong, *Democratic Values among Chinese People: Analysis of a public opinion survey*, 55 CHINA PERSPECTIVES 2, 6 (2004); Tianjian Shi, *China: Democratic Values Supporting an Authoritarian System*, in HOW EAST ASIANS VIEW DEMOCRACY 209, 212-18 (Yun-han Chu, Larry Diamond, Andrew J. Nathan & Doh Chull Shin eds., 2008).

80. See, e.g., ROBERTO MANGABEIRA UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE 105-11 (1998); James S. Fishkin, Baogang He, Robert C. Luskin & Alice Siu, *Deliberative Democracy in an Unlikely Place: Deliberative Polling in China*, 40 BRIT. J. POL. SCI. 1, 2 (2010); Owen Fiss, *Two Constitutions*, 11 YALE J. INT’L L. 492, 500-02 (1986). Note that it is not an objection to a finding of possible coherence to note that some people within that discursive disagree with the interpretation. The focus on discourse is a search for responsive interaction, not agreement. Many within China would indeed contest China’s official claim to be practicing and promoting democracy. But this by itself does not deny the possibility that that claim is nevertheless coherent. It could be that the disagreement stems from a disagreement over issues of fact; it could be that it stems from

D. Identifying the Constitutional

This of course brings us to the question of “what is ‘constitutional’”? Can we, as outside observers, simply attach the label of “constitutional” to any behavior that fits our fancy, without regard to whether the discursive space itself actually perceives its discourse as being constitutional in nature? But if not, what is it that distinguishes a discourse as being constitutional in character?⁸¹

As an initial response, we might recall the discussion above that since constitutional listening is concerned with listening to others’ discourses with a view to promoting our own understanding of human potential, the lack of an explicit constitutional intentionality among speakers or their audiences is not *directly* relevant to our purpose. In advancing its particular interpretation of the written 1787 Constitution, the Federalist Papers gave constitutional meaning to a wide variety of historical events that were not conceptualized as constitutional by their actual participants, including, for example, the machinations of the Athenian prostitute Aspasia in her dalliance with Pericles in Federalist No. 6.⁸² In this sense, the simple fact that the discourse we are listening to does not recognize itself as constitutional is not fatal to our own constitutional learning.

On the other hand, however, the principle of charity demands that we do seek charitable constitutional interpretations of other polity’s *express* articulations of constitutionalism, even if these articulations would seem to address issues that we ourselves would not initially regard as “constitutional.” Along these lines, the modern idea of a constitution clearly originates in Europe, and most non-European polities, in using this term, or some recognized translation of this term, are clearly referencing this initially European concept. Therefore, issues of translative correspondence are not as ambiguous insofar as the notion of constitutionalism is concerned as they are for ideas that arise independently among various cultures.⁸³ The interpretative question then becomes one of what Wittgenstein famously termed “family resem-

different value preferences; it could be that it stems from simple miscommunication or *ad hominem* biases.

81. I thank Donald Clarke for compelling me to pay attention to this argument.

82. THE FEDERALIST NO. 6, at 40 (Alexander Hamilton) (Ernest O’Dell ed., 2010).

83. For example, the Chinese word for constitution, “*xianfa*” was invented precisely to reference the European idea of a “constitution”; the same is true with regards to the Japanese word “*kenpo*.”

blances.”⁸⁴ In other words, it becomes why does a particular culture associate the particular things they do with the collectivity of historical understandings and experiences that are meaningfully referenced by the term “constitutional”? This is the question that is most consistent with the particular concerns of the principle of charity. It invites us to continually explore the possibility that our understanding of the diverse possibilities of constitutionalism is not and will never be complete. It is the epistemic parallel to Robert Kennedy’s famous exhortation (which he misquoted from George Bernard Shaw), not to “see things as they are and say why?” but to “dream things that never were and say, why not?”⁸⁵

III. A DEMONSTRATION: LISTENING TO THE DEBATE OVER THE DRAFT OF THE PROPERTY LAW OF THE PEOPLE’S REPUBLIC OF CHINA (CA. 2005-2007)

To better demonstrate how constitutional listening works, and what it might have to show us, we will use it to examine the public debate that was triggered by the drafting of the Property Law of the People’s Republic of China in 2005-2007. This debate is interesting for a number of reasons. First, it occurred within an environment which is not normally associated with constitutionalism, that of mainland, or Communist, China. Mainland China is most commonly portrayed as a political system in which the normal attributes of constitutionalism—such as judicial review, judicial protection of human rights, rule of law, multi-party election to national office—are decidedly absent. Second, the critique that triggered this debate has been largely ignored, if not dismissed, outside of China, particularly in its more affirmatively “Marxist” aspects. But in fact, as we shall see, embedded in that critique are very important reminders about what the human project of constitutionalism entails, in both its positive and its negative aspects.

84. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31^e–36^e (G.E.M. Anscombe trans., 3d ed. 1986).

85. See Robert F. Kennedy, Remarks of Robert F. Kennedy at the University of Kansas (Mar. 18, 1968), transcription available at <http://www.jfklibrary.org/Research/Ready-Reference/RFK-Speeches/Remarks-of-Robert-F-Kennedy-at-the-University-of-Kansas-March-18-1968.aspx>; GEORGE BERNARD SHAW, *BACK TO METHUSELAH: A METABILOGICAL PENTATEUCH* 6 (rev. ed., 1945) (George Bernard Shaw’s actual quote reads, “You see things; and you say ‘Why?’ But I dream things that never were; and I say, ‘Why not?’”).

A. *Overview of the Debate (I): Constitutional Development in the People's Republic of China*

Traditional constitutional analyses are somewhat dismissive of China's constitutional culture. Consistent with our discussion above, these analyses invariably focus on identifying particular structural features that are considered definitive of constitutionalism—namely judicial review, electoral democracy, juridical protection of civil and political rights, separation of powers, and rule by law. China's constitutional system is deficient in all these aspects. Neither the courts nor any other juridical organs have formal authority to decide on constitutionality.⁸⁶ China is functionally a one-party state in which all significant political authority is determined by party dictate operating outside of any democratic-electoral supervision.⁸⁷ Fundamental and legal rights, including civil and political rights, are routinely violated by public authorities, and indeed, when legal abuses are exposed, it is perhaps more likely than not that the exposé, rather than the abuser, suffers the wrath of the state.⁸⁸ China expressly disavows a constitutional doctrine of separation of powers,⁸⁹ although in actual fact, this is consistent with its parliamentary style of government, and in that way no different from England or Australia. China's legal institutions and legal professionalism are still vestigial: China's performance on rule of law indexes, while comparable to that of other countries with similar GDP per capital levels of income, is still significantly below global average.⁹⁰

But one would be wrong to conclude simply from this that the constitution has no force in China. In fact, quite the opposite is true. Ever since the re-establishment of a rationalized political order following the end of the Cultural Revolution in 1976, constitutional argument has consistently shown itself capable of shaping and disciplining political behavior, much in the same way we saw it shaping and disciplining

86. QIANFAN ZHANG, *THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS* 174-76 (Peter Leyland & Andrew Harding eds., 2012).

87. TONY SAICH, *GOVERNANCE AND POLITICS OF CHINA* 91-120 (2d ed., 2004).

88. See, e.g., Paul Mooney, "Made in China" Label Spurs Global Concern, *YALE GLOBAL ONLINE MAGAZINE*, Aug. 23, 2007, <http://yaleglobal.yale.edu/content/%E2%80%9Cmade-china%E2%80%9D-label-spurs-global-concern>.

89. DENG XIAOPING, *Take a Clear-Cut Stand Against Bourgeois Liberalization*, in 3 *SELECTED WORKS OF DENG XIAOPING* 130 (People's Daily Online ed., 1994).

90. See Randall P. Peerenboom, *Middle Income Blues: The East Asian Model and Implications for Constitutional Development in China*, in *BUILDING CONSTITUTIONALISM IN CHINA* 77, n.1 (Stéphanie Balme and Michael W. Dowdle eds., 2009).

the political behavior in post-Stalin Poland above.⁹¹ Deng Xiaoping, China's paramount leader following the re-establishment of political order, had intended to consolidate political authority entirely in the Party.⁹² But almost from the beginning of his tenure, selected aspects of political authority began gravitating to the constitutional apparatus. A key moment in this occurred in the early to middle 1980s when a senior party member named Peng Zhen successfully deployed constitutional argument within the Party itself to effectively locate some degree of autonomous political authority in the National People's Congress (NPC).⁹³ Subsequently, the NPC began revising its own international operating procedures to give greater voice to a greater diversity of social interests as a means of reifying, at least somewhat, its unique constitutional status as China's principal constitutional fount of "democratic" legitimacy.⁹⁴ Internal constitutional discussion and argument was a constant feature of this internal development.

The 1990s saw the emergence of a more "popular constitutionalism." An emerging rural activist movement began using constitutional argument to challenge local confiscations of land in court.⁹⁵ As noted above, technically, courts in China lack authority to interpret constitutional provisions, but there is evidence that these arguments had some kind of positive effect.⁹⁶ Particular constitutional tropes of resistance would diffuse from locale to locale, transferred through networks of rural activists.⁹⁷ Throughout the 1990s, these tropes would evolve from focusing on constitutional prohibitions against predatory confiscations to focusing more on constitutional protections of the right to resist such predations. The twin processes of diffusion and evolution strongly suggest that this diffusion was being driven at least somewhat by functionality. Studies by Stéphanie Balme of rural grassroots judiciaries, conducted in the early and middle part of the first decade of the 2000s, found that these judiciaries were in fact being influenced by

91. See Rapaczynski, *supra* notes 16-19.

92. See Murray Scot Tanner, *Organizations and Politics in China's Post-Mao Law-Making System*, in *DOMESTIC LAW REFORMS IN POST-MAO CHINA* 56, 74-76 (Pitman B. Potter ed., 1994).

93. *Id.*

94. See Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 *COLUM. J. ASIAN L.* 1, 22-23 (1997).

95. See, e.g., Yu Jianrong, *Dangqian Nongmin Weiquan Huodong de yige Jieshi Kuangjia [A Framework for Analyzing the Rights Protection Movement of Today's Peasants]*, 2 *SHEHUIXUE YANJIU* 49, 49 (2004).

96. See Stéphanie Balme, *Ordinary Justice and Popular Constitutionalism in China*, in *BUILDING CONSTITUTIONALISM IN CHINA*, *supra* note 90, 179-80.

97. See Yu, *supra* note 95, at 51.

constitutional argument despite the formal prohibitions against constitutional interpretation.⁹⁸

A defining moment in the growing effectiveness of constitutional argument in China occurred in 2003 when a recent college graduate, Sun Zhigang, was found beaten to death under police orders while in police custody in Guangdong.⁹⁹ It turned out that Sun was being detained illegally, and this—combined with the new speed of Internet communication—mobilized widespread public revulsion throughout China.¹⁰⁰ In addition, there was a serious constitutional problem with the particular system in which he had been detained: the infamous custody and repatriation system that was used to send rural migrants in urban centers back to their place of origin in the event they did not have formal permission to migrate.¹⁰¹ The custody and repatriation system lacked formal statutory authorization, despite both a legal and constitutional mandate that required every state action that restrained personal liberty to be authorized by national statute.¹⁰² Several constitutional law scholars used the Sun Zhigang affair to formally petition the National People's Congress to review the constitutionality of that procedure.¹⁰³ The NPC did not respond to the petition, but almost immediately after the tendering of these petitions, which were reported in the state-run press, the State Council (China's executive branch) voluntarily revoked the custody and repatriation system.¹⁰⁴

Although the State Council's revocation of the custody and repatriation system did not formally acknowledge its constitutional infirmities, the social meaning that attached to that act of revocation was that it had in fact been revoked due in significant part to its constitutional infirmities.¹⁰⁵ Following this incident, private constitutional petitions to the NPC of the kind that preceded the revocation of the custody and repatriation system became somewhat commonplace.¹⁰⁶ Some of these were reported in the press, and the reports occasionally provoked re-

98. See, e.g., Balme, *supra* note 96, at 180.

99. See generally Keith Hand, *Citizens Engage the Constitution: The Sun Zhigang Incident and Constitutional Review Proposals in the People's Republic of China*, in *BUILDING CONSTITUTIONALISM IN CHINA*, *supra* note 90, 222-23.

100. *Id.* at 223-24.

101. See Tiejun Cheng & Mark Selden, *The Origins and Social Consequences of China's Hukou System*, 137 *CHINA Q.* 644, 667-68 (1994). See also Fei-Ling Wang, *Reformed Migration Control and New Targeted People: China's Hukou System in the 2000s*, 177 *CHINA Q.* 115, 117 (2004).

102. Hand, *supra* note 99, at 224-26.

103. *Id.* at 224-30.

104. *Id.* at 225-26.

105. *Id.* at 230-32.

106. *Id.* at 232-39.

form when they generated significant popular support and response.¹⁰⁷ Rarely, if ever, did these reforms formally acknowledge the constitutional argument, but again, the social meaning that attached to these reforms was a clear recognition that constitutionalism counted.¹⁰⁸

B. Overview of the Debate (II): The Draft Property Law and the Open Letter by Gong Xiantian

It was within such an environment that the debates over the NPC's draft Property Law emerged in late 2005.¹⁰⁹ Like the constitutional argument that accompanied the Sun Zhigang affair, this debate can be seen as a significant step in China's ongoing trajectory of constitutionalization.¹¹⁰ The constitutional arguments that emerged out of the Sun Zhigang affair, while triggering wide-spread attention and reflection, were legalistic and technocratic in character.¹¹¹ There is an argument that legalistic and technocratic presentations of constitutionalism, even when widely followed, are not particularly effective at promoting emergent constitutionalization.¹¹² Rather, it is through its ideational manifestation—particularly its articulation of national identity and the existential meaning that it imparts to the national polity—that a constitution initially embedded itself and its authority into national consciousness. Such was the case, for example, with the American and English constitutions.¹¹³ Many argue that the failure to constitutionalize the European Union in 2005 was the result of the very legalist and technocratic focus of that particular constitutional project.¹¹⁴

Along these lines, and in contrast to the argument accompanying the Sun Zhigang affair, the constitutional arguments that drove the

107. *Id.*

108. *Id.*

109. See Dowdle, *supra* note 44, at 216 (further discussing trajectory of debates concerning Property Law draft).

110. *Id.* at 217.

111. Hand, *supra* note 99, at 228-30.

112. See, e.g., Eva Pils, *Rights Activism in China: The Case of Lawyer Gao Zhisheng*, in BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 90, 243.

113. See MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986) (on America); JAMES A. EPSTEIN, RADICAL EXPRESSION: POLITICAL LANGUAGE, RITUAL, AND SYMBOL IN ENGLAND, 1790-1850 at 29-69 (1994) (on England); Dror Wahrman, *Public Opinion, Violence and the Limits of Constitutional Politics*, in RE-READING THE CONSTITUTION: NEW NARRATIVES IN THE POLITICAL HISTORY OF ENGLAND'S LONG NINETEENTH CENTURY 83, 83-122 (James Vernon ed., 1996) (on England).

114. See, e.g., Michael A. Wilkinson, *Civil Society and the Re-imagining of European Constitutionalism*, 9 EUR. L.J. 451, 451-53 (2003).

national public debate over the draft property law were much more ideational and existential in focus.

The Property Law sought to rationalize the legal system governing the nature of land ownership. The transition from a state-owned to a state-managed economy had greatly destabilized the legal institutions of property in China, particularly real property.¹¹⁵ Private markets for land and other forms of property emerged that operated alongside continuing administrative-bureaucratic patterns of state ownership and control.¹¹⁶ Local officials could arbitrage between these two forms of property institutions, confiscating land or assets from local residents or local state-owned firms at very little cost via administrative processes, as per their authority under the state's bureaucratic property regime, and then selling it to private owners at much higher private market rates.¹¹⁷ This resulted in windfall returns to the confiscating officials, returns that may or may not go into the public fund. Confiscations also generated great social disruption to the large populations of local residents and local workers who had been summarily displaced from their communities and livelihoods through such confiscations.¹¹⁸

In January of 2002, the NPC began work on a draft property law that was intended to fix this problem.¹¹⁹ It sought to do this in significant part by normalizing and prioritizing the marketization of state-held land and assets.¹²⁰ A more comprehensive marketization of both state-held land and other forms of state-held assets would decrease opportunity for administrative seizure, thus reducing opportunity to realize windfalls returns by reselling through private markets, and thus restore some degree of security and fairness in both for employees of state-run firms and especially for residents of rural communities.¹²¹

Particularly to constitutional and legal scholars trained in Euro-American law, there was no question that the draft Property Law represented a significant advance in China's legal and economic develop-

115. Xiaolin Guo, *Land Expropriation and Rural Conflicts in China*, 188 CHINA Q. 422, 438-39 (2001).

116. *Id.* at 424-25.

117. *Id.* at 431.

118. *Id.* at 431-33.

119. Matthew S. Erie, *China's (Post-) Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings*, 37 HONG KONG L.J. 919, 933 (2007).

120. *Id.* at 940-43.

121. *Id.*

ment.¹²² In China, however, the draft provoked an unexpected firestorm of constitutional discussion.¹²³ In July of 2005, the NPC posted the draft Property Law on its public website for public comment. A month later, a professor of Marxist Jurisprudence on the Beijing University Law faculty named Gong Xiantian posted online a scornful critique of that draft in the form of an open letter to the NPC entitled, "A Property Law (Draft) that violates the constitution and the basic principles of socialism."¹²⁴ A print account of that open letter was subsequently published in the newspaper *Southern Weekend (Nanfang Zhoumo)* on February 23, 2006.¹²⁵

As implicated above, Gong's constitutional critique was not directed towards a particular provision in the law, it was directed towards the spirit of that law, and how it implicates the meaning of China's constitution.¹²⁶ He writes:

The absolute majority of the clauses (their essence) and the concrete principles of the Draft are correct and good . . . A difference must be drawn between the experts (jurists) and politicians; the work of the actual law drafters should be given recognition, and their labour respected, but their professional limitations exist. It's different in the case of politicians, leading officials and power institutions, as they should have a political i.e., a bird's eye perspective and a concept of the totality . . . [It is] [t]he fundamental principle and spirit of the entire law [that] I oppose . . . [N]inety-eight per cent of its clauses . . . are correct and scientifically based.¹²⁷

Gong's principal complaint with the draft law was that it effectively prioritized the development of the private economy over the public economy, which was contrary to China's constitutional status as a distinctly socialist polity.¹²⁸ Article 12 of the PRC Constitution states that "socialist public property is sacred and inviolable." This, according to Gong, is not simply a product of constitutional language, but a funda-

122. Typical is Huen Wong & Adam Arkel, *China's New Property Law: Practical Issues*, ASIALAW, May 2007, <http://www.asialaw.com/Article/1971055/Search/Results/Chinas-New-Property-Law-Practical-Issues.html> (noting that "The PRC Property Law . . . is widely hailed as a significant step forward in China's legal and economic development.").

123. See Joseph Kahn, *A Sharp Debate Erupts in China Over Ideologies*, N.Y. TIMES, Mar. 12, 2006, at A1, available at http://www.nytimes.com/2006/03/12/international/asia/12china.html?_r=0.

124. Gong, *supra* note 1.

125. Zhao Lei, *Beijing Professor Open Letter on the Property Law Violating the Constitution, Restarts Controversy between what is Socialist and what is Capitalist*, SOUTHERN WEEKEND [NANFANG ZHOUMO], Feb. 23, 2006, <http://news.sina.com.cn/c/2006-02-23/15019183436.shtml>.

126. Gong, *supra* note 1.

127. *Id.*

128. *Id.*

mental component of China's constitutional history and character.¹²⁹ The draft law focuses exclusively on privatization and marketization, without recognizing at all the contrary needs of the socialist property system.¹³⁰ In so doing, they deny the distinctly socialist essence of modern China and its constitutional history:

The most critical and core clauses of the Draft are wrong! Not only have they not protected public property rights (communal property under socialism and state property), which are the legislative expression of the socialist public ownership system that forms the material prerequisites and economic foundation of citizens' equal rights in our country. Even worse, under the impact of the prevailing privatization current of thought in our country, in reality, the economic sectors based on the public property system are no longer the main game, and the leading position of the state economy has been seriously impaired.¹³¹

Gong recognizes the ambiguities that have resulted from China's transition to a more capitalist economy, and the severe social disruptions and hardships they have caused, but he argues that the proper constitutional response to this very real problem is not to abandon the public-property system and embed the new capitalist system.¹³² The problems and injustices that China's transitional property system is currently generating—economic insecurity for farmers and workers, private appropriation of public goods—are precisely those that the socialist property system was designed to address.¹³³ As a distinctly socialist country, China should therefore address these injustices by strengthening that socialist property system, not by functionally abandoning it:

To the labouring masses and all Chinese citizens, the public ownership system and state property provide the most important and fundamental protection to and are also the material expression of the property right of each of them. In the absence of the property right of the state and the collective, the property right of individual citizens has no chance of being realised. . . . It's hard to imagine what would happen if this stipulation were gone!¹³⁴

It is privatization of property, not its remaining socialist ownership that has triggered the inequalities and injustices of the present system:

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

Since the reform and opening policy started especially under the influence in recent years of neo-liberal economics of the West and the "Washington consensus" a small minority in China, who seek to promote capitalism and to bring down the state enterprises on which the economy of New China has been based . . . In name, they are seeking to steer the state enterprises to health, but in reality, they are steering them to death, selling them at deflated prices. (Remember what Premier Zhu Rongji once said: "In what way is it a sale? It's a giveaway, a half-sale, half-giveaway.") These moves have resulted in a massive leakage of the assets of state enterprises, forcing redundancy on many workers, resulting in the serious economic and social problems that prevail today, bringing great difficulties to the work of the party central leadership as well as the government, locking all players on the chessboard into a state where taking initiatives is difficult.¹³⁵

In sum, he concludes,

We have to cultivate from scratch the legal civilization of socialism, and not follow in the footsteps of the legal civilization of capitalism! . . . To move along the grand path of legal civilization opened up by socialist countries so far is our only way forward! We should learn from and assimilate the achievements from all past civilizations, but we absolutely mustn't blindly imitate and slavishly copy the civil code of the bourgeoisie. We must create a socialist legal civilisation that carries our national characteristics! Otherwise, we can only draw up a civil code that steers the wheel of history backwards, not one that we can ever be proud of, but, rather, one that will bring shame to China's legal civilization!¹³⁶

In both its arguments and its larger concerns, Gong's complaint resonates with an emerging intellectual tradition in China which is probably best known among Anglo-Europeans as the "New Left," but which are probably better referred to as the "critical left."¹³⁷ What defines this critical left is a desire to re-invigorate the concerns and discourses of China's socialist history and identify as a necessary counter-weight—or 'countermovement', to use Polanyi's famous imagery—to China's rabid socio-economic traverse into neo-liberal marketization,¹³⁸ and this is clearly what drives Gong's complaint as well. The emergence of this new, critical left tradition has alarmed many working out of the more classically "liberal" tradition characteristic of Anglo-American political, legal and constitutional thought, not

135. *Id.*

136. *Id.*

137. See generally Pankaj Mishra, *China's New Leftist*, N.Y. TIMES MAGAZINE, Oct. 15, 2006, at 48 (Magazine), www.nytimes.com/2006/10/15/magazine/15leftist.html.

138. See also Xu Jilin, Liu Qing, Luo Gang & Xue Yi, *In Search of a "Third Way": A Conversation Regarding "Liberalism" and the "New Left Wing"*, in VOICING CONCERNS: CONTEMPORARY CHINESE CRITICAL INQUIRY 199, 201 (Gloria Davies ed., 2001).

simply because of its embrace of a Marxism in which it is the state rather than the market or civil society that does the heavy lifting in providing economic justice, but perhaps even more critically because of its embrace of a distinctly Chinese Marxism as revealed in part, albeit very imperfectly, in China's early Maoist period.¹³⁹ Mao Zedong, and by association "Maoism," is a heavily reviled figure among a large segment of people who view China from an Anglo-American or otherwise liberal constitutional perspective.¹⁴⁰ To persons of such persuasion, an intellectual movement that finds even the smallest glimmer of inspiration from anything associated with Mao or Maoism can only be morally pernicious.

Consistent with its more general treatment of China's critical left tradition, the liberal, Anglo-American constitutional tradition has been largely dismissive of Gong's critique. His honest concern for the plight of the peasant and working classes has been widely recognized, but his distinctly socialist prescriptions, and in particular his embrace of the socialist public-property system, have been dismissed out of hand.¹⁴¹ No scholar from this tradition appears to have considered his arguments seriously.

But if Gong's complaint has not received a considered reception from people looking at China from the liberal tradition, it did provoke enormous reflection from within China's own popular-constitutional consciousness. It delayed the passage of the draft Property Law that had previously been expected to pass without issue.¹⁴² As bluntly described by the *Beijing Review* (a national news-magazine sponsored by the Chinese state):

[Gong's] letter created a huge controversy in society, where large-scale ideological debates over socialism and capitalism have been largely unheard of since reform architect Deng Xiaoping called for a renewed push toward a market-oriented economy during his visit to southern China in early 1992.

While Gong was attacked by legal experts, especially the drafters of the laws, for delaying an essential part of a prospective civil code, Gong was widely supported by tens of thousands of Internet users, who worried about the widening income gap in society and about

139. See Vukovich, *supra* note 41, at 47-65.

140. See, e.g., Link, *supra* note 41, at 22.

141. See Erie, *supra* note 121, at 936-40.

142. Li Li, *Setting a Precedent: China's legislature is increasingly considering public opinion in formulating laws*, BEIJING REVIEW, Jan. 4, 2007, http://www.bjreview.com.cn/lianghui/txt/2006-12/29/content_57619.htm.

fraud and corruption in some people's headlong pursuit of private wealth.

This group posted items on online forums to support Gong and even praised him as a national hero. Gong's concerns have also been echoed by a handful of sociologists who suspect the country's first law to protect private ownership could undermine the legal foundation of China's socialist system.

The vocal war between the two camps of scholars and citizens, which sometimes evolved into a debate over who was trying to make the drafting process a political issue, immediately attracted the attention of China's legislature.¹⁴³

Eventually, the state tried to reign in the popular constitutional discourse Gong's letter had provoked.¹⁴⁴ However, the discourse flared up again in June of 2008, when the Supreme People's Court solicited public comment on its own draft rules on implementing that piece of legislation which had been passed by the NPC in March of 2007.¹⁴⁵

Given the limits of our own current understanding of the possibilities and limits of the human project of constitutionalism, it is probably not wise to reflexively dismiss as intellectually meaningless arguments that have provoked such unprecedented reflection within a polity that has both historically and recently shown considerable, if somewhat unrecognized, sophistication in its collective constitutional discourse and imagination. It is precisely in those places that we have yet to seriously explore where truly new knowledge and understanding is most likely to be found. This is as true for comparative constitutionalism as it is for anything else. Gong's critique, and the reflection it provoked, would thus seem a promising site for identifying new insights into constitutionalism, and thus a prime candidate for what we are calling "constitutional listening."

C. Listening to Gong: Possible Lessons for our Understanding of Constitutionalism

Perhaps what strikes one most directly about Gong's critique is its ideology, particularly for a listener coming from the Anglo-American constitutional perspective. Gong's critique is clearly informed by an ideological commitment to China's Marxist-Socialist heritage. Gong's Marxist-Socialist ideology is one of the reasons why comparativists

143. *Id.*

144. See Eva Pils, *Waste No Land: Property, Dignity and Growth in Urbanizing China*, 11 *ASIAN-PAC. L. & POL'Y J.* 1, 28 (2009-2010).

145. Stéphanie Balme & Michael W. Dowdle, *Introduction: Exploring for Constitutionalism in 21st Century China*, in *BUILDING CONSTITUTIONALISM IN CHINA*, *supra* note 90, at 8.

working out of the American tradition have given little respect to Gong's critique. The American vision of constitutionalism, in particular, was historically linked to Smithian economics. Even beyond this, Americans have historically been ideologically hostile to both Marxist and socialist worldviews.

Along these lines, scholars working out of American and Anglo-phone political, economic and legal traditions tend to dismiss Gong's defense of the public ownership system as simply economically unfounded.¹⁴⁶ Public ownership, they note, does not and did not promote economic growth in China.¹⁴⁷ But of course, economic growth is not the only possible function of an economic system. Prior to the advent of growth-based economics in the eighteenth century, the principal purpose of an economic system in Europe was widely seen to lie in providing security and stability to the population.¹⁴⁸ Indeed, a growing number of Anglo-European economists are again coming to question the present-day obsession with growth found within contemporary economics.¹⁴⁹

And for whatever reason, the Chinese themselves are much less convinced that the public ownership system was the failure that it is often portrayed to be outside of China.¹⁵⁰ Surveys of Chinese farmers conducted in the 1990s found that these farmers tended to like the public ownership system when it was administered fairly.¹⁵¹ Growing nostalgia among the Chinese themselves for the earlier Maoist period of the 1950s and early 1960s further belie the claim that China's public ownership system was a pure and utter failure.¹⁵²

146. See, e.g., Janet C. Sturgeon & Thomas Sikor, *Post-socialist Property in Asia and Europe: Variations on 'Fuzziness'*, 1 CONSERVATION & SOC'Y. 2 (2004). Cf. Vukovich, *supra* note 41.

147. Sturgeon, *supra* note 146, at 2.

148. GREGORY CLARK, A FAREWELL TO ALMS: A BRIEF ECONOMIC HISTORY OF THE WORLD 20-25 (2007). Cf. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 57-58 (2001).

149. See JOSEPH E. STIGLITZ, AMARTYA SEN & JEAN-PAUL FITOUSSI, REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 8-9 (2009). See also ROBERT M. COLLINS, MORE: THE POLITICS OF ECONOMIC GROWTH IN POSTWAR AMERICA 234 (2000).

150. Roy Prosterman, Brian Schwarzwald & Ye Jianping, *Implementation of 30-Year Land Use Rights for Farmers Under China's 1998 Land Management Law: An Analysis and Recommendations Based on a 17 Province Survey*, 9 PAC. RIM L. & POL'Y J. 507, 521-22 (2000).

151. *Id.*

152. Guobin Yang, *China's Zhiqing Generation: Nostalgia, Identity, and Cultural Resistance in the 1990s*, 29 MODERN CHINA 267, 268 (2003). See also CHING KWAN LEE, AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT 140-46 (2007).

Gong's defense of the public ownership system does not lie primarily in a claim of some objective economic superiority.¹⁵³ Rather, he locates it in an allegiance to China's own national history:

We have to cultivate from scratch the legal civilization of socialism, and not follow in the footsteps of the legal civilization of capitalism! In the twenty-first century, it is not possible for us to create as our ancestors did with the Tang Law a legal code encapsulating the legal civilization of feudal society nor is it possible to create something like the Napoleonic Code a legal code encapsulating the legal civilization of capitalism as the French bourgeoisie did. To move along the grand path of legal civilization opened up by socialist countries so far is our only way forward! We should learn from and assimilate the achievements from all past civilizations, but we absolutely mustn't blindly imitate and slavishly copy the civil code of the bourgeoisie. We must create a socialist legal civilization that carries our national characteristics! Otherwise, we can only draw up a civil code that steers the wheel of history backwards, not one that we can ever be proud of, but, rather, one that will bring shame to China's legal civilization!¹⁵⁴

One suspects that it is really this nationalist tone that provokes the perfunctory intellectual dismissiveness of comparativists working out of the Anglo-American tradition. That tradition deeply distrusts nationalism for at least two reasons. First, since the end of the Second World War, that tradition has increasingly settled on the American model of constitutionalism as a global standard for comparative reference. In a world in which there is only one model of constitutionalism, an appeal to any national distinction becomes constitutionally irrelevant. Second, the American constitutional model is couched in a metaphor of scientific positivism. It is a mechanistic metaphor which thinks in terms of a tangible thing called power that can be channeled and opposed against other power, and otherwise behaves in very predictable ways, as governed by a universal political psychology of power maximization.¹⁵⁵ Scientific positivism is an innately universalist epistemology. Being scientific, the mechanistic principles that govern the behavior of political power and political will are not particular to any particular nation, and thus transcend the national identities that are the focus of nationalism.

And if Anglo-European constitutional comparativists are skeptical of nationalism to begin with, they are likely to be especially skeptical of Chinese nationalism. Modern Chinese nationalism tends to celebrate

153. Gong, *supra* note 1.

154. *Id.*

155. See generally Winter, *supra* note 3.

aspects of China's society and political history that are inconsistent with the liberal vision of government that informs American constitutionalism in particular.¹⁵⁶ We have already noted this somewhat in Gong's defense of public ownership. For the most part though, liberalism has not played a significant role in modern China's political history or experiences.¹⁵⁷ There is little raw material from which one could construct a liberal vision of Chinese national identity. Instead, that history is defined by backwardness, perceived international subjugation, revolution, factionalism and more perceived foreign subjugation, more revolution, and finally modernization within the context of something called the "people's democratic dictatorship."¹⁵⁸ Liberalism finds little purchase in such a national history.

For these reasons, comparative constitutionalists tend to demand that in order to be viable, Chinese constitutionalism (in particular) has to escape its Chinese past. Gong's critique, and China's larger critical left tradition of which the critique is a part, does not escape this past. Consequently, it is invariably dismissed as constitutionally irrelevant, if not constitutionally dangerous.¹⁵⁹ But is it really possible? At its heart, a constitutionalism must both identify and distinguish its polity. It must distinguish who it covers from whom it does not, and justify its special claim to govern that polity as opposed to other possible alternatives. This is not a normative observation, it is a sociological one: a constitution that cannot establish a basis for its own authority as superior law will not have the persistence of superior law, it will not be long for this world.

Thus, particularly in its earlier stages of emergence and social entrenchment, constitutionalism is an innately nationalist endeavor.¹⁶⁰ This was as true for the United States as it was generally in other nations. During its revolutionary days, American constitutional con-

156. See Jean-Pierre Cabestan, *The Many Facets of Chinese Nationalism*, 59 CHINA PERSP. 1, 2-3 (May-June 2005).

157. Julia Tao, *The Chinese Moral Ethos and the Concept of Individual Rights*, 7 J. OF APPLIED PHIL. 119, 119 (1990).

158. See generally WANG HUI, CHINA'S NEW ORDER: SOCIETY, POLITICS, AND ECONOMY IN TRANSITION 46-77 (Theodore Hutters ed., 2003); Gan Yang, *Debating Liberalism and Democracy in China in the 1990s*, in WHITHER CHINA: INTELLECTUAL POLITICS IN CONTEMPORARY CHINA 79, 79-101 (Xudong Zhang ed., 2001). See also Zhu Suli, "Judicial Politics" as State-Building, in BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 90, 23-35. Cf. Xiaohong Xiao-Planes, *Of Constitutions and Constitutionalism: Trying to Build a New Political Order in China, 1908-1949*, in BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 90, 37-57.

159. See, e.g., Perry Link, *supra* note 41, at 22. See generally Vukovich, *supra* note 41.

160. Alexander Somek, *The Owl of Minerva: Constitutional Discourse Before its Conclusion*, 71 MOD. L. REV. 473, 487-89 (2008).

sciousness was founded critically on the Enlightenment vision of America as enjoying a unique proximity to the original state of nature, and thus representing or reifying the most perfect example of political liberty known to man.¹⁶¹ As described by Michael Kammen, for the first several generations of Americans, the social meaning that attached to the American constitution lay precisely in its distinctive contribution to American national identity, not in the details of its text and not in the technocratic genius of its particular institutional designs, which had been rendered somewhat moot by the invention of Jacksonian democracy and the mass-based political party.¹⁶² It was not really until the 1870s that the present-day vision of the American constitution as an objective project of political engineering began to predominate in American constitutional discourse. Similarly, Dicey's identification of English constitutionalism was critically founded on a desire to distinguish and celebrate England's constitutional identity vis-à-vis those of the European continent, most notably the French.¹⁶³

This is especially likely to be the case with regard to the younger and less developed or established nations of the Global South. Past experiences with colonialism, present experiences with globalization, and now increasingly global prescriptions for modernization and governance (with the paradigm for both being the United States) can give rise to real questions about what a national constitution actually means, why it is any different from, but less superior to, any other possible source of authority—be it sub-national, regional, or global.

And in identifying a political identity, history provides the best source material for constitutionalism. It is history that distinguishes the collective "people" of one particular terrain from those of another. It is through reflection on that history from which the seemingly distinctive collection of values and concerns that identify and distinguish one nation from another are derived. By emphasizing these distinctive values and concerns, a constitution can identify itself as uniquely symbiotic with that polity. And as noted above, it is not necessary for the historical tropes upon which a constitutionalism is founded to actually be accurate as a matter of objective history.¹⁶⁴ English constitutional-

161. See Gay *supra* note 26, at 563-68.

162. KAMMEN, *supra* note 113, 68-94. See GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 304-05, 347-70 (1991) (discussing American constitution being rendered moot by Jacksonian Democracy).

163. See A.V. [ALBERT VENN] DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183-205, 369-73 (10th ed., 1961).

164. See *supra* notes 33-35 and accompanying text.

ism, for example, was critically founded upon a particular historical trope—that of the “Norman Yoke”—that was demonstrably false.¹⁶⁵ More recently, John Braithwaite and others have found how demonstrable and knowingly false historical tropes of very recent historical events are. In this case, localized events of sectarian violence that raced through Indonesia in the late 1990s and the early part of the first decade of the twenty-first century have played a critical role in reestablishing shared local identities, and resultant peace, among previously warring local factions.¹⁶⁶

The point of all this is that China is unlikely to found a constitutionalism on a rejection of its past, in the way presumed by persons working out of the Anglo-European, and particularly the American, constitutional tradition. As demonstrated in China in 1912, 1949 and the late 1960s,¹⁶⁷ and in France in the 1790s,¹⁶⁸ such a rejection, even if motivated by liberal ideals, is likely to simply reproduce a new, but still illiberal political hegemony as opposed to a new constitutionalism. By contrast, what Bruce Ackerman calls liberal revolutions¹⁶⁹—such as occurred in the velvet revolutions of Eastern Europe in 1989, or in Taiwan, Mexico, Indonesia and yes, even South Africa, in the 1990s—are invariably constructed on top of constitutional structures, but institutional and ideological revolutions were paradoxically inherited from the pre-liberal *ancien régime*.¹⁷⁰

In this sense, Gong’s critique could well be very indicative of China’s constitutional future. China’s commitment to such a future is likely to be framed in terms of an accompanying commitment to its socialist past. For better or worse, this is China’s most visibly distinct history. As such, it cannot be abandoned or denied without abandoning constitutionalism itself.

As previously noted, it is precisely in constitutionalism’s embrace of history that it is able to transcend that history. The flaws of that actual experience are not obstacles to its capacity to serve as a founda-

165. See Vann, *supra* note 34, at 263-64.

166. See Braithwaite, *supra* note 35.

167. See Xiao-Planes, *supra* note 158, at 37-57; Suli, *supra* note 158, at 23-35. Cf. Qian Liquan, *Refusing to Forget*, in ONE CHINA, MANY PATHS 292, 293-95 (Chaohua Wang ed., 2003).

168. See SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 674-75 (1989).

169. BRUCE A. ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 2-3 (1992).

170. See Mattei Dogan & John Higley, *Elites, Crises, and Regimes in Comparative Analysis*, in *ELITES, CRISES, AND THE ORIGINS OF REGIMES* 3, 20-23 (Mattei Dogan & John Higley eds., 1998); Abdo I. Baaklini, *Viable Constitutionalism and Democratic Political Stability*, in *DESIGNS FOR DEMOCRATIC STABILITY: STUDIES IN VIABLE CONSTITUTIONALISM* 3, 11 (Abdo I. Baaklini & Helen Desfosses eds., 1997).

tion for constructing a new constitutionalism. The seeds for future constitutional emergence and development and the ideals and values it is used to reference are found in the social meaning of that experience and not in its factual history per se. In this light, the ideals and values that Gong attaches to China's distinctly socialist experiences seem admirable, even from a liberal perspective.¹⁷¹ These include a desire for economic equality, recognition of the state's duty to provide for the alienated and needy, and the value of providing the citizenry a safe and stable economic and social life.¹⁷² Moreover, these are not just Pollyannaish recitations of China's political elite: they are articulated precisely in the context of criticizing this elite.¹⁷³

People may question the capacity of a "socialist public economy" to deliver on these values, but at the end of the day, economic systems and property systems are simply social constructs. The common law system of private property so celebrated by neo-liberal economics was actually, up until the nineteenth century, formally crafted as a feudal property system in which the English King owned all land.¹⁷⁴ Technically, no one in England "owned" land under the traditional common law of property, they simply enjoyed secure usage rights that had been indirectly granted to them in perpetuity by its true owner, the King;¹⁷⁵ hence, the complexity of the common law of property. Interestingly, urban land in China and in Hong Kong has been marketized using a similar fiction: land is actually owned by the State who grants usage rights vesting in individuals sufficient to allow for marketized forms of transfer and redistribution.¹⁷⁶

There is nothing fixed in the potential institutional shape of a "socialist public ownership" system for land or other forms of property. What is somewhat more fixed are the particular social and political values that the term invokes. In this sense, Gong's critique is a uniquely public call to China's constitutional animus to respect these values in constructing China's property regime even in the face of the more familiar values of growth and market efficiency pressed by other, presently more intellectually prominent, conceptions of property. There is

171. Gong, *supra* note 1.

172. *Id.*

173. *Id.*

174. JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 230 (4th ed., 2002).

175. *Id.*

176. See Donald Clarke, *China's Stealth Urban Land Revolution* 4-8, 24-28 (unpublished manuscript) (Feb. 22, 2012); STEPHEN D. MAU, PROPERTY LAW IN HONG KONG: AN INTRODUCTORY GUIDE 91-93 (2010).

now some significant dissatisfaction, even in the North Atlantic, with the degree to which property is privatized in the American constitutional system, and in the corresponding degree to which that economic system privileges economic growth and efficiency over competing social values.¹⁷⁷ It is not beyond the pale to suspect that China's unique history might possibly place it in a superior long-term trajectory through which, at sometime in the future, it is able to develop a property system that better acknowledges and addresses these alternative concerns.¹⁷⁸

At the end of the day, a "listening" to Gong's critique reminds us to be open to such a possibility, and to occasionally look at what China might be doing constitutionally through such a lens. Note that I am not arguing here for the existence of some Beijing Consensus, or some "East Asian Model" of development.¹⁷⁹ I am not saying that China is anywhere close to realizing such a system. What I am suggesting, however, is that China's remembrance of its constitutional history could well make it, as a polity, particularly sensitive to these alternative concerns. And as that polity's constitutional imagination develops, and increasingly frees itself of its hyper-modernist insecurities, it may favor over the long *durée* evolutionary trajectories of constitutionalism that lead in this particular direction.

CONCLUSION: CONSTITUTIONAL LISTENING AS MORAL HUMILITY

In the end, I suspect that the principal objection to constitutional listening, at least when applied to many Asian countries, will be beyond the reach of our discussions above. That is, the real reason we do not want to listen to the constitutional discourse and interpretations of other constitutional systems is because many of these systems emanate from extreme authoritarian perspectives and we worry that such listening will threaten to legitimize these perspectives and the authoritarian regimes from which these perspectives have emerged.

However, the real world is much more complex than this objection presumes. While our tendency to classify people and the institutions

177. See GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 220 (2006).

178. See, e.g., Zhiyuan Cui, *Is it Possible to Establish "A Socialist Market Economy" in China?*, available at http://ppu.politics.ox.ac.uk/materials/cui_presentation_may08.pdf (last visited Apr. 25, 2012); Zhiyuan Cui, *Whither China? The Discourse on Property Rights in the Chinese Reform Context*, 55 *SOCIAL TEXT* 67, 68-69 (1998).

179. But see RANDALL P. PEERENBOOM, *CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST?* 26-82 (2007) (discussing a purported "East Asian Model" for development).

they produce as being either good or evil, legitimate or illegitimate, may be psychologically comforting (at least insofar as we tend invariably to classify ourselves as members of the former rather than the latter), it is not really that informative. Nothing is purely good; nothing is purely evil. By extension, nothing is purely legitimate, and most importantly, nothing is purely illegitimate.

As noted above, constitutional listening is ultimately about learning. The claim that we should not listen to odious constitutional systems simply because they are odious is to effectively assert that we have already learned all there is to know about what we might call constitutional morality. I would argue that during the twentieth century many of humanity's more egregious political-moral transgressions have been the product of feelings of moral certainty, more than of moral uncertainty.

Our best hope for leading moral lives lies in a willingness to look at even the most odious of humanity and recognize that "there but for the grace of God go I." Each of us has a capacity for moral error. We cannot eliminate it; we cannot wish it away by ignoring or pretending it does not exist.¹⁸⁰ To do so is to invite in ourselves that same blindness that led others to become what we so thoroughly condemn.

Constitutional listening—even to the constitutional discourse that takes place in more odious regimes—is one way that we can prevent this from happening. At the very least, it can help us better remember our own ever-present vulnerabilities to moral mistake. In this sense, we can think of it as a constitutionally moral form of "risk regulation." Beyond this, its continual demand that we confront and try to make sense of, rather than ignore and reflexively denigrate, constitutionally moral practices that seem to conflict with our own could help us occasionally identify some of the moral errors that inevitably infect our own moral reasoning. In this way, constitutional listening and the empathetic understanding of why an apparently odious constitutional system looks at the world the way it does is what constitutional listening seeks to generate, and could paradoxically be the key to preventing us from replicating the errors of that system.

180. Cf. BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980* (1981).