

“CONFUCIUS” AND AMERICA’S DANGEROUS MYTHS ABOUT CHINESE LAW

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ABSTRACT

American legal scholars can’t stop talking about Confucius: there were over 100 law review articles in 2022 alone that reference Confucian ideas, and nearly 1,500 during the last five years. Almost all of them are wrong about what Confucius has meant for Chinese legal culture. In the face of five decades of contrary historical scholarship, these law review articles argue or imply that Chinese law started to become “Confucian” about 2,000 years ago and has never really changed since. That continuity (or stagnation), these scholars claim, is one of the keys to understanding contemporary Chinese law. As this Article will show, the reality is very different.

From the sixteenth century to the present day, scholars, politicians, and others with an axe to grind have constructed a series of legally influential “Confuciuses” to score points in the debates of their day. Unfortunately, American legal scholars are stuck repeating these self-interested stories with little idea of where they came from or what they mean. American authors largely view this “Confucian” legal legacy as something suspicious, or at least exotic, and their descriptions exacerbate the Sino-American cultural and political gulf. Chinese authors, on the other hand, often view it as a

<https://doi.org/10.58112/jil.45-3.3>

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matter of national pride, a demonstration of the power, and centrality of a Chinese civilization destined to sway modern Asia.

In this Article, I argue that these erroneous views of the “Confucian” nature of Chinese legal culture have profound implications, impairing our ability to clearly understand contemporary Chinese law and contributing to a global and domestic atmosphere of suspicion and hatred. Only by untangling where our ideas about “Confucian law” come from and what they really imply can we hope to avoid exacerbating Sino-American hostility on the one hand and nationalist Chinese expansionism (of the kind felt most sharply in Tibet, Hong Kong, Taiwan, and Xinjiang) on the other.

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INTRODUCTION

It may surprise some to learn that the U.S. Supreme Court building features images of the Chinese thinker Confucius, not once but twice: carved into the exterior and painted onto the courtroom wall.¹ Around the back of the Supreme Court (facing away from the Capitol) is the East Pediment, which “visitors often miss,”² installed when the building was constructed in 1935.³ The pediment displays thirteen ancient legislators, of which the central figure is Moses, flanked on his left by Solon and on his right by Confucius. The Chinese sage’s position suggests that his ideas are a part of the legal tradition in which the Supreme Court Justices participate. The pediment’s sculptor, Hermon Atkins MacNeil (1866-1947), made the connection explicit in his submission to the Supreme Court Building Commission:

Law as an element of civilization was normally and naturally derived or inherited in this country from former civilizations. The “Eastern Pediment” of the Supreme Court Building suggests therefore the treatment of such fundamental laws and precepts as are derived from the East.

¹ It would certainly surprise ChatGPT, the generative artificial intelligence whose eerily human-like answers to natural-language questions have so impressed and worried academics. When I asked it, “Which American courthouses display images of Confucius,” it responded:

I’m not aware of any American courthouses that display images of Confucius specifically. Confucius is a Chinese philosopher and educator who lived in ancient China and his teachings are considered an important part of Chinese culture and history. While his teachings and philosophy have been studied and respected in many parts of the world, it would be more common to see images of Confucius in Chinese cultural centers, museums, and educational institutions, rather than in American courthouses.

It is also important to note that American courthouses are generally designed to be neutral spaces, and therefore, would not typically display images or other forms of artwork or decoration. The main focus in courthouses is the administration of justice, and the emphasis is on creating an environment that is professional, respectful, and conducive to the fair and impartial conduct of legal proceedings.

OpenAI, Response to “Which American Courthouses Display Images of Confucius?,” CHATGPT, <https://chat.openai.com/>.

² Office of the Curator, *The East Pediment (Information Sheet)*, SUP. CT. OF THE U.S. (Nov. 19, 2023), https://www.supremecourt.gov/about/east_pediment_11132013.pdf [<https://perma.cc/5KDW-8NPR>].

³ *Id.*

Moses, Confucius and Solon are chosen as representing three great civilizations and form the central group of this Pediment.⁴

This idea of American law as emerging from a lengthy civilizational chain that includes ancient China is further reinforced by Confucius' second appearance at the Supreme Court, this time inside the building. On the south wall of the courtroom, Adolph Weinman's (1870-1952) frieze, "Great Lawgivers of History," depicts the development of law from ancient pharaohs to John Marshall, including the pre-imperial Chinese philosopher.⁵ These are far from the only such examples of Confucius in American courthouses: as early as 1899, he began appearing in courts all over the country, from New York to Baltimore and Minneapolis.⁶

Confucius' place of honor is especially surprising given what many prominent Americans were saying about him at the time. In 1879, Senator James Blaine (1830-1893) of Maine declaimed: "We have this day to choose whether we will have for the Pacific coast the civilization of Christ or the civilization of Confucius."⁷ Senator Blaine's associations with Confucius were considerably less lofty than those rendered in marble and paint by MacNeil, Weinman, and their fellow artists. He inveighed in vivid and specific detail about the evils that Chinese immigrants brought to American shores, evils which derived from their outlandish and reprehensible "Confucian"⁸ socialization.

Treat them like Christians, my friend says; and yet I believe the Christian testimony from the Pacific coast is that the conversion of the Chinese on that basis is a fearful failure; that the demoralization of the white is much more rapid by reason of the contact than the salvation of the Chinese race . . . there was not, as we understand it, in all the one

⁴ *Id.*

⁵ Office of the Curator, *Self-Guide to the Building's Interior Architecture*, SUP. CT. OF THE U.S. (May 11, 2022), https://www.supremecourt.gov/visiting/interiorbrochurewebversion_final_may2022.pdf [<https://perma.cc/87EP-29VH>].

⁶ Eric Hutton, *On Ritual and Legislation*, 13(2) EUR. J. FOR PHIL. RELIGION 45, 46 n.2 (2021).

⁷ 8 CONG. REC. 1303 (1879).

⁸ Since the central claim of this Article is that there is no such thing as a transhistorical "Confucianism" that meant the same thing at all moments of Chinese law, the word will always appear in quotation marks, as will "Confucius" when I am discussing later constructions rather than the person himself.

hundred and twenty thousand Chinese . . . the relation of family You cannot work a man who must have beef and bread, and would prefer beer, alongside of a man who can live on rice. It cannot be done. In all such conflicts and in all such struggles the result is not to bring up the man who lives on rice to the beef and bread standard, but it is to bring down the beef and bread man to the rice standard. [Manifestations of applause in the galleries.]⁹

In Blaine's telling, Chinese representatives of the "civilization of Confucius" were biologically and culturally totally alien to Christian Americans, whose morals and livelihoods they threatened by their mere presence on the same soil. Neither his views nor his desire to shield America from the effects of this dangerous foreign creed was unusual. As the *New York Times* wrote in 1876, "[l]et us have an act of Congress against Confucianism."¹⁰ To those who feared the influence of Confucius' adherents, the answer was obvious: keep them out. Thanks to the advocacy of Blaine and many other politicians and journalists, in the 1870s, Congress began passing a series of laws designed to drastically curtail the immigration of Chinese people into the United States.¹¹

Though the Supreme Court did not adopt the exclusionists' language about "Confucianism," it adopted nearly everything else, upholding their laws in a series of starkly racist decisions beginning in the 1880s.¹² Therefore, the roughly 60-year period between the mid-1870s onset of Chinese exclusion and the 1935 enshrining of Confucius at the Supreme Court saw the simultaneous entrenchment of anti-Chinese theory and practice in American law *and* the imagistic veneration of the single figure most prominently associated with the Chinese characteristics the exclusion laws were designed to keep out, in the places responsible for upholding those laws. We were putting him on pedestals while locking out his ostensible successors.

Unraveling the apparent historical mystery of what Confucius is doing at all these American courthouses is the key to a far more

⁹ James G. Blaine, U.S. Senator of Maine, Speech Delivered in the U.S. Senate (Feb. 14, 1879) (transcript on file with author).

¹⁰ *Foo-Che-Pang*, N.Y. TIMES, June 8, 1876, at 4.

¹¹ See, e.g., Page Act of 1875, ch. 141, § 1-5, 18 Stat. 477, 477-78 (repealed 1974); Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58, 58-59 (1882) (repealed 1943); Geary Act of 1892, ch. 60, § 1-2, 27 Stat. 25, 25 (repealed 1943).

¹² The first of these cases was *Heong v. United States*, 112 U.S. 536, 569 (1884). Further cases discussed *infra* note 155.

pressing contemporary mystery: what is he doing all over contemporary American legal scholarship? Over 100 law review articles published in 2022 alone reference Confucian ideas, and approximately 1,500 such articles have appeared in law reviews over the last five years.¹³ In the analysis that follows, I suggest these articles deploy "Confucius" according to one of three modes, which

¹³ This tendency is far from unique to law reviews. The words "Confucius" and "Confucianism" appear in many descriptions of China in general and of its legal culture in particular. These terms are rarely considered controversial. See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (2011) (dividing the world into several competing social and legal regimes, of which one is "Confucian," the ideology that has supposedly defined a unified Chinese culture for many thousands of years). Zhang Jinfan, a prolific and much-cited historian of Chinese law working in China, identifies "Confucianism" as one of the core features of "Chinese legal civilization" in his recent historical overview of the topic. ZHANG JINFAN, *THE HISTORY OF CHINESE LEGAL CIVILIZATION 4* (2020). The tendency has been deplored by other scholars, who nevertheless note its persistence. TAISU ZHANG, *THE LAWS AND ECONOMICS OF CONFUCIANISM: KINSHIP AND PROPERTY IN PREINDUSTRIAL CHINA AND ENGLAND* 265 (2017) ("Whatever qualms historians may have about the term 'Confucianism,' it is, and will probably continue to be, a central concept in modern Chinese political discourse, constantly being redefined and attached to any number of social and political causes."). Li Chen, another Chinese legal historian, seconds Zhang's opinion, decrying views like Huntington's that stress "the inability of late imperial China—stuck in its Confucian and Sinocentric tradition and tributary system—to effectively respond to the 'civilizing' impact of modern (Western) capitalism, diplomacy, culture, technology, and so on." While "this framework has come under severe criticism . . . its influence remains strong among some academics and hardly diminished among the general public." LI CHEN, *CHINESE LAW IN IMPERIAL EYES: SOVEREIGNTY, JUSTICE, AND TRANSCULTURAL POLITICS* 5 (2016). In her study of Western perceptions of Confucius, Anne Cheng goes further:

We could say that "China" has never been anything else but a pretext, an argument for or against, in various different debates, and Confucius a convenient pawn to be displaced from one category to another, from morality to religion, and back, according to the needs of the day. However, the problem is that this use of China as the *Other*, either as an idealized model or a vilified foil, is still frequent today after so many centuries, and continues to be quite successful, at least among less-informed people.

Anne Cheng, *Morality and Religiousness: The Original Formulation*, 41 J. CHINESE PHIL. 587, 606 (2014).

It is difficult to dislodge Confucius as a stand-in for Chinese law (among other elements of Chinese civilization) because "he" has been so useful to Western thinkers. The damaging nature of such dichotomous cultural descriptions has been noted by scholars of Chinese law like Philip C.C. Huang and William Alford, though both Huang and Alford sometimes also use "Confucian" as a catch-all description for pre-modern Chinese law. See, e.g., Philip C.C. Huang, *Our Sense of Problem: Rethinking China Studies in the United States*, 42 MODERN CHINA 115, 144-47 (2016).

I label evocation,¹⁴ engagement,¹⁵ and reliance.¹⁶ But no matter how they talk about him, almost all the pieces that I have reviewed make the same mistaken assumptions: that “Confucius”/“Confucianism” explains or gives rise to most of what matters in Chinese law and that the “Confucian” core of Chinese legal culture has not really

¹⁴ See, e.g., Kevin Werbach, *Orwell That Ends Well? Social Credit as Regulation for the Algorithmic Age*, 2022 U. ILL. L. REV. 1417, 1450-51 (2022); Tran Hoang Tu Linh, *Should Countries Sign the Singapore Convention on Mediation? The Vietnamese Perspective*, 15 CONTEMP. ASIA ARB. J. 121, 124 (2022); Vladimira Dolinskaya & Tatiana Letuta, *Justice in Tort Law of Russia and China*, 9 BRICS L.J. 87, 96-98, 110 (2022); Douglas Bujakowski, *The Decline and Resurgence of People's Mediation in China: An Empirical Analysis of Chinese Provinces*, 17 J. L. ECON. & POL'Y 1, 4 (2022); Chun-Yuan Lin, *Disaster Politics, Law and Insurance in Climate Change Era: The Case of Taiwan*, 17 NTU L. REV. 1, 1, 6 (2022); Adrian L. Bastianelli II et al., *Strategies for Successfully Navigating Cultural Differences in Construction Negotiation and Mediation*, 40 CONSTR. LAW. 11, 12, 17 (2020); Nathan Golden, *Conspicuous Prosecution in the Shadows: Rethinking the Relationship Between the FCPA's Accounting and Anti-Bribery Provisions*, 104 IOWA L. REV. 891, 919-20 (2019); Jennifer Lei, *Makeup or Fakeup?: The Need to Regulate Counterfeit Cosmetics Through Improved Chinese Intellectual Property Enforcement*, 88 FORDHAM L. REV. 309, 313, 339 (2019); Thomas E. Simmons, *A Chinese Inheritance*, 30 QUINNIPIAC PROB. L.J. 124, 124, 127 (2017); Tom Ginsburg et al., *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184, 1196-97 (2013); Jennifer Wai-Shing Maguire, *Progressive IP Reform in the Middle Kingdom: An Overview of the Past, Present, and Future of Chinese Intellectual Property Law*, 46 INT'L L. 893, 895-97 (2012); Claire Wright, *Censoring the Censors in the WTO: Reconciling the Communitarian and Human Rights Theories of International Law*, 3 J. INT'L MEDIA & ENT. L. 17, 112-13 (2010); Jonathan B. Wiener, *Climate Change Policy and Policy Change in China*, 55 UCLA L. REV. 1805, 1820 n.46 (2008); Paul Lansing & Marlene Wechselblatt, *Doing Business in Japan: The Importance of the Unwritten Law*, 17 INT'L L. 647, 648-50 (1983).

¹⁵ See, e.g., Sophia Gao & Aaron J. Walayat, *The Compatibility of Confucianism and Law*, 41 PACE L. REV. 234, 236 (2020); Norman P. Ho, *Chinese Legal Thought in the Han-Tang Transition: Liu Song's (d. 300) Theory of Adjudication*, 35 UCLA PAC. BASIN L.J. 155, 157-58 (2017); Norman P. Ho, *Confucian Jurisprudence, Dworkin, and Hard Cases*, 10 WASH. U. JURIS. REV. 1, 1 (2017); Thomas J. Horton, *Confucianism and Antitrust: China's Emerging Evolutionary Approach to Anti-Monopoly Law*, 47 INT'L L. 193, 193 (2013); Paul A. Barresi, *The Chinese Legal Tradition as a Cultural Constraint on the Westernization of Chinese Environmental Law and Policy: Toward a Chinese Environmental Law and Policy Regime with More Chinese Characteristics*, 30 PACE ENVTL. L. REV. 1156, 1170 (2013); Tom Ginsburg, *Constitutionalism: East Asian Antecedents*, 88 CHI.-KENT L. REV. 11, 18-19 (2012); Haiting Zhang, *Traditional Culture v. Westernization: On the Road Toward the Rule of Law in China*, 25 TEMP. INT'L & COMP. L.J. 355, 373-75 (2011).

¹⁶ See, e.g., Richard Wu & JaeWon Kim, *An Empirical Study of Values of Law Students in South Korea: Does "Americanized" Legal Education Impact Their Confucian Ethics?*, 17 U. PA. ASIAN L. REV. 209, 209 (2022); Bei Feng & He Jiang, *Strengthening China's Diplomatic Soft Power: Taking the Basic Categories of International Law as the Path*, 3 FOUND. L. & INT'L AFF. REV. 82, 93-95 (2022); John Sutton, *Comparing the Australian and Chinese Approach to Defining a Terrorist Act: A Transnational Legal Comparison*, 2018 LAWASIA J. 83, 85 (2018).

changed in thousands of years. To take one example among hundreds, a 2022 article on corporate social responsibility asserts that, to engage with companies in China today, one must understand that "[m]ost scholars today agree that Confucian philosophy, though its popularity has ebbed and flowed throughout Chinese history, was never abandoned by the Chinese people."¹⁷

As I will show, historians have known for decades that these views are false, but almost none of that knowledge has penetrated law reviews. A few scholars have noted these ahistorical representations of "Confucianism" in histories of Chinese law,¹⁸ and some have explored the shifting nature of Western views of Chinese law¹⁹ and of Confucius.²⁰ What has not been observed in any detail is the role of "Confucianism" in the Western construction of narratives about Chinese legal culture that continue to be repeated today. This Article, therefore, presents a much-needed account of where American legal scholars' views of "Confucian" law come from and why they are wrong.

It also describes some of the perils of continuing to repeat these views. First, legal scholarship that gets Chinese legal culture wrong in this way contributes to xenophobia and hostility that make the world more dangerous. William Alford, a preeminent legal academic who has written extensively about Chinese legal history, notes the disastrous real-world impacts of over-simplified uses of Chinese legal culture in American legal scholarship, citing the Vietnam War as (so far) the worst consequence of Orientalist othering.²¹ Alford's warning appears increasingly apt as Americans and Chinese increasingly see the world as a zero-sum competition between their governments and cultures. Violence is also likely to

¹⁷ Yongmin Bian & Xiaobao Liu, *Corporate Social Responsibility with Chinese Characteristics: A Rivalry of Western CSR?*, 19 *US-CHINA L. REV.* 167, 169 (2022).

¹⁸ See, e.g., Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System"*, 2 *WASH. U. GLOB. STUD. L. REV.* 37, 42 (2003) ("Confucianism and various 'Chinese' cultural traits have been blamed for holding back modernity, in particular the realization of democracy, rule of law, human rights, and capitalism . . ."); Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 *COLUM. J. ASIAN L.* 253, 254 (2002) ("A paper that deals with law, culture, and Confucianism is perhaps doomed to be a collection of vague and general platitudes. This is because all three of these terms are notoriously plagued with definitional problems.").

¹⁹ See TEEMU RUSKOLA, *LEGAL ORIENTALISM* 35-36, 44-46 (2013).

²⁰ See MICHAEL NYLAN & THOMAS WILSON, *LIVES OF CONFUCIUS: CIVILIZATION'S GREATEST SAGE THROUGH THE AGES* 373-78 (1st ed. 2010).

²¹ William Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 *TEX. L. REV.* 915, 972 (1985).

spill over from the international to the interpersonal, as the recent spate of anti-Asian violence attests: the killer of six Asian women in Atlanta-area massage parlors in 2021, for example, attended a church²² at which the pastor preached sermons highlighting China's unchristian nature, saying, "Confucius will not take anyone to heaven."²³

Second, as these kinds of attacks demonstrate, claims about Confucius and "Confucianism" are ultimately just as much ethnic as they are philosophical: one way you know someone is "Chinese" is that they're "Confucian." Moreover, the damage of this confusion between culture and ethnicity is not limited to violence perpetrated by the relatively powerless and mentally ill. Rather, prevailing beliefs about Chinese legal culture are part of the same essentialist attitude toward Chinese culture in general that has, for example, caused the U.S. Department of Justice ("DOJ") to investigate and arrest people it perceives as "Chinese" based on a very expansive and cultural notion of Chinese-ness.²⁴ As Margaret Lewis has shown, the way the DOJ picked its China-related targets was for years infected by the belief that culture is at the root of what it means to be Chinese and that anyone who shares that culture (however minimally) is thereby worthy of suspicion. The disappearance of this specific policy seems to have little effect on the suspicion Lewis describes.²⁵

Third, Americans cannot understand their own legal culture without understanding how Chinese law has been represented in America. The doctrine of plenary power in immigration law;²⁶ America's extensive and powerful immigration bureaucracy;²⁷ the

²² Lucas Kwong, *The Yellow Peril's Second Coming*, THE REVEALER (June 3, 2021), <https://therevealer.org/the-yellow-perils-second-coming/> [https://perma.cc/FN3V-2LWV].

²³ Milton Community Church, *Christ's Return, Part 2*, at 14:46 (Aug. 16, 2020), <https://www.listenotes.com/podcasts/milton-community/christs-return-part-2-2-ixP1GLQz-09/>.

²⁴ Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145, 190 (2021).

²⁵ Leo Yu, *From Criminalizing China to Criminalizing the Chinese*, 55 COLUM. HUM. RTS. L. REV. 45, 101 (2024).

²⁶ See RUSKOLA, *supra* note 19, at 145-48 (arguing that Supreme Court cases deciding that the power of the federal government to exclude foreigners was largely unchecked made America itself more despotic).

²⁷ See ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943*, at 5-11 (2003).

hardening of racial categories in American jurisprudence;²⁸ and the system of biometric surveillance necessary to enforce these things²⁹ all stem at least in part from the late nineteenth century desire to exclude Chinese people, based on the fear that their "Confucian" legal culture was incompatible with America's.

Finally, just as in America, the idea that Chinese law has always been "Confucian" is a powerful ethnic argument in China, too, and the consequences are even more severe. For the Chinese Communist Party ("CCP"), the ostensibly "Confucian" legal tradition erases the historical role of non-Han peoples in the formation of "Chinese" culture, helping to justify—among other expansionist projects in Tibet, Hong Kong, and Taiwan—the incarceration and forced assimilation of millions of Uyghurs. In turn, this effort, which requires ever greater state resources and central coordination, increases the authoritarian style and capabilities of Chinese President Xi Jinping and his administration. These policies depend in part on the claim that an ethnically and culturally homogenous core people have always defined what it means to be Chinese, and we reinforce these myths when we repeat the truism that Chinese law is "Confucian."

The main argument of this Article is that the conviction that "Confucianism" has been the most important source of Chinese law for millennia—a conviction treated as neutral fact in American legal scholarship—was in fact constructed to play different roles in different historical arguments and should thus be regarded with a great deal of mistrust. Part I explains how those tropes about Confucius are generally invoked in American legal scholarship today and points out the glaring errors in some representative samples. Part II offers a brief description of the two historical periods said to be most crucial for the "Confucianization" of Chinese law: the early imperial Western Han (202 BCE-9 CE) and the medieval early Tang (618-907 CE). It also suggests what is lost when we inaccurately impose this belief in "Confucian" continuity on Chinese legal culture. Most notably, we fail to see the ethnic diversity that (contrary to the politically motivated pronouncements of the CCP) have defined large swaths of "Chinese" history.

²⁸ Mae Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 69 (June 1999).

²⁹ See SIMON COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 121-27 (2002).

Part III traces the construction of major views of “Confucianism” in response to their various historical contexts, from Jesuit missionaries in China, to European thinkers during and after the Enlightenment, to early Americans, and to twentieth century scholars in China whose synthesis of these views has become the most entrenched in contemporary American understandings. Each Section argues that the religious, economic, and political motives of the thinkers of these periods shaped the way they represented “Confucianism,” repurposing the ostensibly ancient philosophy to address their own contemporary problems. Finally, Part IV makes some suggestions about how scholars can approach the topic more carefully and reiterates the potentially devastating consequences of failing to do so.

I offer all this history³⁰ to provide American legal scholars with a rudimentary key to their own academic enterprise – with a more informed understanding of why and how Confucius still looms so large in legal scholarship – so that when they see these names, periods, or ideas invoked in their colleagues’ work, they will begin to have some idea of what they actually mean and why it might be inadvisable to simply keep repeating such stereotypes. The point of scholarship is to help us make sense of a complex and often dangerous world, but in a great deal of American legal writing on China, “Confucianism is simply assumed to be what is doing the explanatory work, when other alternatives seem just as likely.”³¹ As Lawrence Friedman has written, “My impression is that . . . far too many law professors really have no idea what legal history is all about.”³² But American legal scholars clearly want to talk about

³⁰ Two caveats are in order. First, the history presented in what follows will necessarily be somewhat sketchy because it addresses both the 400-year period of the development of (largely) Western views of Chinese legal culture and two pre-modern Chinese eras (about 2,100 and 1,600 years ago). For reasons of concision and coherence, some important debates about all these eras receive only a passing mention (or no mention at all), and many significant details are omitted. Second, the article is based largely on English-language sources – though these questions are extremely relevant to debates and arguments raised by Chinese scholars – because my focus here is mostly on Western views of Chinese law. The longer work from which this article is drawn is based mostly on modern Chinese scholarship and classical Chinese primary sources, and I am happy to furnish those references on request. I nevertheless believe this project is significant because it is important for Westerners to get the whole picture of how the stories that are told today came to be and therefore what it means to keep telling them.

³¹ Peerenboom, *supra* note 18, at 92.

³² Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. U. L. REV. 661, 667 (1997-98).

Chinese history, so I intend to provide them with some of the resources they need to do so. Only by incorporating historical scholarship of the kind cited in this piece can we see that it is just as wrong to talk about Han dynasty law and contemporary Chinese law as unified by "Confucianism" as it is to, for example, discuss ancient Roman Christianity and American evangelical Protestant Christianity today as if they are the same thing.³³ In both cases, the pre-modern and modern periods may share certain images, language, or ideals, but there is clearly much more which divides than unites them. At a time when we all need greater clarity about China's motivations, scholarship of the kind critiqued here obscures the true features of a culture and country as complex as any other, promotes stereotypes designed to support jingoism and nationalism, and elevates the risk of violence against governments and people.³⁴

I. LAW REVIEWS

To reiterate, nearly 1,500 law review articles have referenced "Confucianism" in the last five years, almost all treating it as a

³³ It's possible (even necessary) to talk about "Christians" and "Christianity" in both ancient Rome and the United States today, but no serious scholar would suggest that those words mean the same thing at both times and in both places, or even that everyone at any one time would have agreed on their meaning. Among many works that trace the historical development of Christian ideas and observe that the same cultural or religious terms may refer to completely different objects, see JAROSLAV PELIKAN, *JESUS THROUGH THE CENTURIES: HIS PLACE IN THE HISTORY OF CULTURE 2* (Yale Univ. Press 1999) or much of the writing of Bart Ehrman.

³⁴ It is crucial to note that much of the best work on Chinese legal culture has now abandoned the Confucian frame, but without explicitly challenging previous paradigms. (Some authors on Chinese legal history *have* made this challenge: I encourage interested readers to explore the works of Matthew Sommer, Jedidiah Kroncke, Teemu Ruskola, Zhang Zhaoyang, and Glenn Tiffert). This change has ceded ground to those who are less careful or more ideological, whose continued expositions of "Confucian" Chinese law still dominate journalistic and scholarly representations. These authors do not necessarily share the political goals of those who created the stories on which they rely, and it is certainly not my intention to accuse everyone writing about "Confucianism" of purposefully advancing narratives that serve the interests of their governments. I am also not saying that it is always wrong to describe certain ideas as "Confucian," but that such uses must always be carefully defined and historically contextualized. For an example of an author who makes compelling use of a Confucian frame to capture significant features of late imperial Chinese law while simultaneously critiquing the ahistorical "Confucianism" that appears in much Western scholarship, see TAI-SU ZHANG, *supra* note 13, at 265-67.

coherent philosophy that remained unchanged for millennia. References to “Confucianism” in legal scholarship fall into three broad modes: (1) passing evocations in pieces that are really about something else; (2) apparently substantial engagement with major or emerging scholarship or primary sources in Chinese legal history; and (3) significant reliance on figures, texts, or ideas identified as “Confucian” without mention of historical or interpretative complexities. The purpose of identifying these modes is to help readers who encounter them see that, though the articles that use them may look quite different, they are all repeating the same stereotypes about Chinese legal culture and thus make it harder to understand the contemporary realities of Chinese law.

In what follows, I present and critique an example of each mode, but first, a caveat: my critiques are not attacks on the good faith, motives, or scholarly preparation of the authors. Rather, my point is that the assumptions on which their claims rely have become so widespread that it either would have been quite difficult for them to encounter contradictory ideas or they simply would not have thought to go looking for them. However, the inaccuracy of those assumptions undercuts the entire purpose of these articles, which is to help their readers better understand why China behaves as it does.

a. Evocation

Explicit articulations of a supposedly transhistorical Confucianism and its role in law sometimes occupy only a very minor portion of an article’s arguments. For example, writing in the *Cornell Law Review*, Jill Goldenziel describes several ways in which she sees China engaging in “lawfare,” defined as the use of law to achieve “a particular strategic, operational, or tactical objective” against an adversary, to bolster the legitimacy of one’s own use of law, or to weaken the legitimacy of an adversary’s use.³⁵ In its analysis of China’s interactions with various international bodies, the article implicitly claims that “Confucianism” is a significant factor in the country’s deployment of lawfare. Goldenziel writes that, “[i]n traditional Confucian societies, one’s dignity and self-respect are tied to one’s ability to fill social obligations in front of

³⁵ Jill I. Goldenziel, *Law as a Battlefield: The US, China, and the Global Escalation of Lawfare*, 106 CORNELL L. REV. 1085, 1097 (2020).

others. This form of guilt and shame stems from not having lived up to standards or values."³⁶ The conclusion highlights the ostensible significance of this view in the geopolitical competition the article describes: "[t]he importance of guilt and shame related to law-breaking in Chinese culture," *i.e.*, "Confucian" culture, "suggests that the nation's perceived violations of law would be especially culturally significant."³⁷

China's shame at being found to violate UNCLOS [the United Nations Convention on the Law of the Sea] in the Philippines/China arbitration is evident in its attempts to denounce the arbitration as a violation of law itself, and in the massive domestic and international media campaigns that it launched at the time the arbitration was filed, at the time of the decision on jurisdiction, and at the time the decision came out. The government appeared afraid of not living up to the international community's standards or values, and thus had to frame its denunciation of the decision in terms of those same legal values.³⁸

In this view, a major reason for China's rejection of significant theories and organs of international law and its consequent turn to more hostile legal strategies—strategies that increasingly carry the risk of violence—is its millennia-old "Confucian" culture.

It might be objected that this is overreading. The article's principal argument concerns legal and military actions by the current Chinese government in the South China Sea and litigation over the technology company Huawei (as well as similarly aggressive Russian activities), claiming that the CCP is weaponizing law in a variety of international fora and urging the U.S. government to do the same. In this context, its single explicit reference to Confucius might be said to constitute little more than a colorful embellishment that all but the most committed pedants should ignore to focus on the article's substance. However, the reference to "traditional Confucian societies"—which comes in the second-to-last paragraph of the section on China's "lawfare" strategies—supports a major claim about the CCP's approach to international law. Significantly, no evidence is provided for this claim, and there is no effort made to explain how "Confucianism" makes China any

³⁶ *Id.* at 1160.

³⁷ *Id.*

³⁸ *Id.* at 1160-61 (alteration in original).

more sensitive to public embarrassment over having been found to violate international standards than any other government. The result is obscurity, rather than clarity, about China's motives and likely future actions.

More importantly, other references in the article demonstrate that the belief in an ancient culture, statically preserved and still guiding China's actions in the twenty-first century, lurks in the background, like the largely unnoticed figure of Confucius in American courthouses. The first sentences introducing the concept of "lawfare" as understood in China cite an ancient author followed by a claim about his contemporary relevance: "[i]n the 5th Century BC, the Chinese military strategist Sun Tzu famously wrote that 'supreme excellence consists in breaking the enemy's resistance without fighting.' His philosophy remains influential in Chinese military doctrine today."³⁹ The quotation from the *Art of War* is attributed to Sunzi 孫子 (sometimes anglicized as "Sun Tzu"), said to have composed the work in the fifth century BCE. Yet as Michael Nylan writes in her new translation of the *Art of War*, "[h]owever gratifying this tale, it cannot be verified at this remove, and indeed is unlikely to be true."⁴⁰ There is in fact no historical evidence of Sunzi until the first century BCE, hundreds of years after he ostensibly wrote the work famously ascribed to him. But even if he did exist, it is highly unlikely that he wrote the *Art of War* because, despite present-day conventions that attribute ancient Chinese work to single authors, "all early Chinese texts are 'composite texts,' texts compiled over time from impressive rhetoric ascribed to certain authors, often on vague impressions and little or no evidence."⁴¹ As for the *Art of War*, "not knowing its author or date of compilation," we cannot know "the meaning it had for its author or compiler, within the textual community that generated it and to which it was addressed."⁴² The article's second reference to the author of the *Art of War* is even more pointed:

Such use of information lawfare can be a powerful tool in affecting the will to fight—the importance of which cannot be overstated. As discussed above, China has identified the will to fight as crucial to military victory *from the time of Sun*

³⁹ *Id.* at 1091.

⁴⁰ SUN TZU, *THE ART OF WAR* 8 (Michael Nylan trans., W.W. Norton & Company, Inc. 1st ed., 2020).

⁴¹ *Id.* at 7.

⁴² *Id.* at 26.

*Tzu through its most recent publications on the Three Warfares.*⁴³

This claim makes clearer the article's view that such ancient ideas have played a continuous and largely static role in Chinese social and intellectual conceptions in the two thousand years or more since they were ostensibly first stated. Furthermore, the article suggests that they continue to matter because the keys to current Chinese actions can be found in ancient texts. In other words, it is simply assumed without sufficient evidence and based on erroneous historical supposition that an ill-defined "Confucianism" drastically affects contemporary Chinese policy.

In this context, these evocations of transhistorical "Confucianism" make it harder to understand Chinese strategy in the South China Sea and before various bodies of international law, two arenas in which the United States increasingly finds itself in competition with China and thus in particular need of clarity. More problematically, this story about "Confucianism" and law is derived, as the following sections will show, from eighteenth and nineteenth century stories designed to emphasize and exacerbate difference and hostility, and to justify Western aggression toward China. To employ it here is thus to imply that something in either the method or the nature of this conflict is (from the Chinese perspective, at least) not merely a product of normal geopolitical competition or even recent historical circumstances, but rather a function of deeply ingrained cultural attitudes that are both alien to those of the United States and highly unlikely to change in response to shifting conditions. In other words, an article accusing China of anti-Western hostility and suggesting an aggressive response invokes stereotypes that risk worsening the very problem described. Perhaps even more strikingly, references to such a "Confucianism" simultaneously concede the position of the CCP, whose unified, continuous, and Han-centric view of Chinese legal culture depends in large part on this theory. For an article so attuned to Chinese efforts to secure a superior geopolitical position through mechanisms of persuasion, it is particularly surprising that it would in some sense *further* the Chinese government's similar efforts in the cultural arena, participating in the perpetuation of a story about the history of Chinese law that underpins the very strategy against which the article warns.

⁴³ Goldenziel, *supra* note 35, at 1169-70 (emphasis added).

b. Engagement

Although not all law review articles employ references to “Confucianism” to underscore conflicts between Chinese and American interests, they largely rely on the same assumption of a transhistorical “Confucianism” that made a profound impact on Chinese legal culture. This is true even of works that engage with that culture in detail. For example, Jingyuan Ma and Mel Marquis devote half of their article, “Moral Wrongfulness and Cartel Criminalization in East Asia,” to pre-modern Chinese law. The second half argues that the cultural and historical legacies of “Confucianism” in China, Japan, and Korea require criminal laws against anti-competitive “cartel conduct” to be framed in a manner responsive to those legacies to be effective: “[w]e submit that debates concerning the morality of cartel conduct and the legal prohibitions of cartels in East Asia should be informed by an understanding of norms derived from Confucian principles.”⁴⁴ Their article is striking both for the breadth of its research and for its acknowledgment of the complexity of the questions it is dealing with. It even notes the problems associated with the term “Confucianism” and suggests we would be better off not using it, for many of the same reasons I explore in this Article: “‘Confucianism,’ . . . apart from being a western invention, can be applied variously to a broad range of ideas and ideologies, including diverse philosophical strains as well as the distinct official ideology of the ancient Chinese State”⁴⁵ This is essentially the same as my claim here: “Confucianism” is an idea constructed long after the period in which it supposedly originated, containing many possible meanings that confuse much more than they clarify.

Despite these acknowledgments, however, the article does not take their implications seriously. First, although the article is at pains to point out that “Confucianism” is a term created many centuries later than the ideas it is used to describe, carrying a range of meaning so wide as to make its use inadvisable, it continues to employ the label throughout, even referring explicitly to the “Confucianization of the law.”⁴⁶ That phrase (as explained later) usually equates ideas from the Western Han with those of the early Tang, nearly 900 years

⁴⁴ Jingyuan Ma & Mel Marquis, *Moral Wrongfulness and Cartel Criminalization in East Asia*, 35 ARIZ. J. INT’L & COMP. L. 377, 385 (2018).

⁴⁵ *Id.* at 394.

⁴⁶ *Id.* at 405.

later, which hardly suggests a significant concern with overbreadth. Moreover, while the article cites major works of scholarship (many among the most respected today) about the historical periods on which its argument is based, it does not read them with sufficient care. This is perhaps because doing so would weaken, if not completely disprove, one of its core theses: that Chinese law has been "Confucian" for thousands of years, which is why we need to care about those qualities today.

One of the clearest examples of this inaccurate citation comes in the article's statement of one of its foundational historical premises, *i.e.*, that Chinese law's "Confucianization" began in the Western Han.⁴⁷ The footnote to this claim references both Homer Dubs's "Victory of Han Confucianism" – a 1938 article that is no longer considered reliable but does at least say the same thing the article wants to say – and Michael Loewe's essay "'Confucian' Values and Practices in Han China." This is a surprising double citation. While Loewe's piece does mention the theories of Otto Franke and Homer Dubs, its *entire point* is to cast doubt on their conclusions. In Loewe's summation: "A view of Han China in terms of the 'Victory of Confucianism,' that came into existence during the last decades of Western Han can only be subject to question."⁴⁸

The thrust of recent Sinological scholarship is that, no matter what you call it, there is simply no such thing as a stable, unitary "Confucianism" that was the same in the Western Han as it was in the Tang and in China today, and that it's therefore largely an obfuscation to talk about a long-running intertwining of "Confucianism" and law. If that's true, we *cannot* (as the article discussed here does) use appeals to such a "tradition" to understand how best to regulate corporate collaboration in China today. Such appeals will in fact only make it harder for readers to understand the true nature of the contemporary phenomena the authors describe.

⁴⁷ *Id.* at 401 ("The Qin dynasty's excessive use of penal law was constrained when Confucian philosophy and ideology were adopted in the Western Han—a development depicted in the 1930s by Otto Franke and Homer Dubs as the 'victory of Confucianism.'").

⁴⁸ Michael Loewe, "Confucian" Values and Practices in Han China, 98 T'OUNG PAO 1, 29 (2012).

c. Reliance

Some other scholars make no such attempt to grapple with such textual and historical complexities, simply taking continuities for granted. For example, Amy Rosen begins with some remarks about pre-modern Chinese law that clearly indicate a robust belief in the essential stasis of Chinese history: “During the Han (206 BC-220 AD) and Qing (1644-1911) Dynasties, Li [*i.e.*, Confucian ritual, as used here] and Rule of Law were combined.”⁴⁹ To discuss both the Han and Qing eras—separated by 1,400 years at the closest point—in the same breath in this manner demonstrates a belief that Chinese law has always been more or less the same. It quotes other law review articles making similarly sweeping claims: “from as early as 3000 B.C., and continuing until the turn of the last century [*i.e.*, for 5,000 years], China was isolated from the rest of the world.”⁵⁰ There are many more such general statements in this article, but its specific purpose is to highlight the importance of “Confucianism” to contemporary Chinese contract law.⁵¹ The article identifies and defines three “Confucian” virtues—*li* 禮 (ritual or propriety), *ren* 仁 (humanity), and *yi* 義 (righteousness)—via a few references to classical works. It then offers a brief introduction to several Chinese laws designed to regulate contracts, before speculating about the influence of the previously identified virtues on those laws.⁵² The article is more nuanced and specific in its discussion of other influences (such as Communism and the rules of international trade organizations) on contemporary Chinese contract legislation, but, in the “Confucian” context, never moves beyond identifying superficial similarities between today’s regulations and classical ideas. For example:

Righteousness (Yi) is a guiding principle for all human relations; it involves trying to achieve a situation in which both sides are satisfied. The purpose of Yi is to achieve

⁴⁹ Amy Lee Rosen, *Chinese Contract Formation: The Roles of Confucianism, Communism, and International Influences*, 20 U. MIAMI INT’L & COMP. L. REV. 189, 196 (2012) (alteration in original).

⁵⁰ *Id.* at 197 (alteration in original).

⁵¹ *See id.* at 190.

⁵² *See id.* at 204 (“Article 5 of CCL [the Chinese Contract Law] includes fairness, which is derived from Yi. Article 6 of CCL incorporates good faith, which is derived from Ren. Chinese scholars believe that Chinese moral tradition was one important influence on the doctrine of good faith. Good faith enforces and recognizes the ‘traditional Chinese notions of morality and business ethics.’”).

"social justice" in society. Article 5 in CCL states that, under the Obligation of Fairness, "[t]he parties shall abide by the principle of fairness in prescribing their respective rights and obligations." Under the basis righteousness (Yi) in Confucianism . . . the CCL has treated the concept of "fairness" as a fundamental principle.⁵³

This is somewhat like is picking out a passage from the King James Version of the Bible – say, 1 *Corinthians* 13: "And now abideth faith, hope, charity"⁵⁴ – and claiming that § 205 of the Restatement of Contracts directly embodies Biblical values because it requires "good faith and fair dealing." The article lacks any sophisticated analysis of the classical terms it references, terms whose precise meaning has been subject to intense debate by scholars for hundreds if not thousands of years and cites almost no Sinologists or historians. Regarding broad points about Chinese ideas or history, the article's citations are limited almost exclusively to other law review articles, mostly those relevant to contemporary Chinese business law. The conclusion warns that, "Chinese contract formation differs from contract formation law in other countries" because "Chinese contract law has been influenced by," among other things, "Confucian concepts."⁵⁵ This kind of argument is exceptionally misleading for anyone who actually wants to understand things like Chinese contract law, since they will be left with the vague sense that ancient and inscrutable cultural factors play one of the most dominant roles in contemporary Chinese business practices.

II. PRE-MODERN CHINA

American legal scholarship makes many such specific mistakes about Chinese legal culture, and they almost all depend (wittingly or not) on the same big story about the history of Chinese law: Chinese law began to be "Confucianized" in the early imperial period – specifically the Western Han (202 BCE-9 CE) – and became completely "Confucian" in the medieval period, especially the Tang

⁵³ *Id.* at 213.

⁵⁴ 1 *Corinthians* 13:13 (King James).

⁵⁵ Rosen, *supra* note 49, at 228.

(618-907 CE) dynasty. This is largely incorrect in the medieval era and completely wrong in the early imperial.

a. Western Han

Pre-imperial China (before the late third century BCE), the so-called “Warring States” period, was divided into a fluctuating number of polities engaged in frequent and bloody conflict. In 221 BCE, one of those states (Qin), finally conquered its remaining competitors and established the first unified empire. Its rule was short lived, and the Western Han dynasty was established in 202 BCE, after the war that followed the empire’s collapse. The story that Qin was a militaristic state and thus governed by a harsh philosophy called “Legalism,” in which everyone was treated equally and subjected to extreme penalties for violating the law, has become commonplace in writing about pre-modern China. This philosophy, the story goes, was part of what both led to Qin’s collapse and motivated the Western Han’s “Confucianization” of the law, in which severe punishments were abolished and defendants were treated differently according to their social status or their familial relationships. Ever since, according to this story, Chinese law has been defined by a mix of “Legalist” and “Confucian” principles – associated with law (*fa* 法 in Chinese) and ritual (*li* 禮), respectively – with “Confucianism” in the predominant position.⁵⁶ Scholars commonly refer to the “Legalist-Confucian” synthesis as one of the principal bases of the continuity of Chinese law and the political stability that it engendered.⁵⁷

“Confucianism,” in this view, analogized the family and the state.⁵⁸ It held that rulers should lead by virtuous example, thereby promoting respectful or obedient relationships between family members. “Confucians” also rejected the harsh punishments of Legalism because they saw draconian sanctions as inferior tools of governance compared with more humane persuasive techniques: “The Confucianists hold that moral influence is fundamental, and

⁵⁶ See, e.g., Barresi, *supra* note 15, at 1182.

⁵⁷ See, e.g., John W. Head, *Feeling the Stones When Crossing the River: The Rule of Law in China*, 7 SANTA CLARA J. INT’L L. 25, 43 (2009).

⁵⁸ *Id.* at 39.

punishment is supplementary."⁵⁹ According to this approach, "Confucianism" thus achieved powerful political expression during the Western Han by defining itself against the excessive "Legalist" cruelties of the Qin.

Sinological scholarship has demonstrated, however, there was no such Western Han "Confucian" takeover. As previously referenced, Michael Loewe, the doyen of English-language Han dynasty studies, demonstrates that "[a] view of Han China in terms of the 'Victory of Confucianism,' that came into existence during the last decades of Western Han can only be subject to question."⁶⁰ As evidence, Loewe explains that Western Han authors did not seem particularly interested in Confucius himself, citing or alluding to him only rarely.⁶¹ Even when the works attributed to him began attracting imperial attention, Confucius himself did not become the subject of the kind of expressions of official reverence accorded to other important figures: sacrifices to him "seem to have been by no means regular or frequent in Western Han times."⁶²

Moreover, the concern with hierarchy and familial relationships that contemporary authors (especially those writing about the effects of "Confucianism" on Chinese law) attribute to Confucius and his followers was just as evident in other pre-imperial settings. Both the emphasis on elite rulership supported by talented, self-cultivated men and the notion of orders of nobility conferring social status – two ideas associated with early imperial "Confucianism" in contemporary scholarship – were common Warring States views, and were in fact most closely associated with the Qin systems of law and administration that the Western Han "Confucians" were supposedly rejecting.⁶³ Not even the preoccupation with ritual (*li*) that many scholars of Chinese law treat as ironclad proof of "Confucianism" is especially evident in Western Han works.⁶⁴ As for the law itself, Western Han statutes, which began to be archeologically excavated in the 1970s, show "a nearly comprehensive continuation of Qin legal norms and procedures into

⁵⁹ Tao Wang, *The Temporality of Law in Traditional China and Its Contemporary Implications*, 18 *LOY. U. CHI. INT'L L. REV.* 133, 144 (2022).

⁶⁰ Loewe, *supra* note 48, at 29.

⁶¹ *Id.* at 6.

⁶² *Id.*

⁶³ *See id.* at 11-12.

⁶⁴ *See id.* at 14-15.

the early Han, with only minor modifications and innovations.”⁶⁵ There was no radical change from the legal or social ideology of the Qin, whose laws continued to be used by Western Han administrators. They saw no conflict between their values and those expressed in the legislation of the preceding dynasty.

Perhaps most damaging to the “Legalist-Confucian” synthesis hypothesis: Western Han thinkers would not have classified themselves as adherents of these ideologies, or probably even as members of any identifiable philosophical schools at all. As several of the most prominent scholars of early China have argued, it is likely that there were no coherent self-identifying philosophical schools of the kind we talk about today in pre- and early imperial China.⁶⁶ While some pre-Han authors compared the ideas of particular thinkers—even lumping them together on the basis of those ideas—these groupings were subject to change and focused always on the individual “persuader” rather than on any internally consistent ideology captured in certain writings.⁶⁷ Therefore, “it would be rash to see these elements as yet forming an established, let alone an approved or orthodox, system of values, modes, or thought or behavior that molded public or private conduct”, *i.e.*, a unified “Confucianism.”⁶⁸

There was also no unified Legalist school against which a coherent “Confucianism” was opposed to produce the dialectic that many scholars claim defines the Chinese legal tradition.⁶⁹ Even its most basic term—the *fa* 法 (today translated as “law”) of *fajia* (“Legalism”)—is used quite differently in different texts of the so-called “Legalist canon.” Some of those uses even encompass precisely the kind of moral language that many scholars today would identify as exclusively “Confucian,” and thus definitionally opposed to the ostensible philosophy of the “Legalist” works that use it. It is difficult to see how a “school” supposedly defined largely

⁶⁵ See 1 ANTHONY J. BARBIERI-LOW & ROBIN D.S. YATES, *LAW, STATE, AND SOCIETY IN EARLY IMPERIAL CHINA: A STUDY WITH CRITICAL EDITION AND TRANSLATION OF THE LEGAL TEXTS FROM ZHANGJIASHAN TOMB NO. 247, 220* (2015) (building on Michael Loewe’s work in *China’s Early Empires*).

⁶⁶ See, e.g., Mark Csikszentmihalyi & Michael Nylan, *Constructing Lineages and Inventing Traditions Through Exemplary Figures in Early China*, 89 *T’OUNG PAO* 59, 68-69 (2003); Kidder Smith, *Sima Tan and the Invention of Daoism, ‘Legalism,’ ‘et cetera’*, 62 *J. ASIAN STUD.* 129, 151 (2003).

⁶⁷ See Csikszentmihalyi & Nylan, *supra* note 66, at 62-63.

⁶⁸ Loewe, *supra* note 48, at 15.

⁶⁹ See Paul R. Goldin, *Persistent Misconceptions About Chinese “Legalism”*, 38 *J. CHINESE PHIL.* 88, 88-90, 94-95 (2011).

by its adherence to a particular idea can be considered coherent when its foundational texts express such significant disagreement over the basic meaning of that idea. This is not merely a terminological question that might be resolved by calling each group by some other name. Supposed "Confucians" advocated for ostensibly "Legalist" ideas, and vice versa. This state of affairs appears baffling, until one realizes that it is only the attempt to impose categories on an intellectual environment that would not have recognized their premises that gives rise to this confusion. The confusion is ours, not theirs.⁷⁰

b. Early Tang

The 400-year period between the dissolution of the Eastern Han in 220 CE and the founding of the Tang dynasty in 618 CE was characterized by massive social upheaval which often expressed itself in armed resistance to the government, and combating those rebellions provided opportunities for ambitious generals to develop independent power bases. Rulers of tiny states were in constant competition for authority and land both with their rival states and with their own subjects. The northern portion of the former Han

⁷⁰ This isn't to say that contemporary scholars are wrong in all the details. As Loewe points out, there are elements of *later* law and society that might be identified as "Confucian," and the genesis of some of those elements can be seen as early as the *Eastern Han* (25-220 CE), though that's still several centuries after what most modern writing claims. But there is no blanket philosophical label that can be applied to the law of the early empires that either accords with the way in which thinkers of the period would have seen themselves or which serves as a useful analytical tool for illuminating otherwise invisible features of the era. The only function of such a blunt instrument is to make claims about the modern world. As John Head (cited above as an example of the "Legalist-Confucian" synthesis view) writes:

Despite the fact that Chinese dynastic law does seem to meet the "rule of law" standards in these several aspects, its failure to meet the other two standards—those regarding applicability to the government and comprehensiveness of coverage—is fatal. I would conclude from this very abbreviated review that dynastic China was not governed by the "rule of law" as defined above.

Head, *supra* note 57, at 47. Head is interested in this "failure" of imperial Chinese law because of what it reveals, he argues, about the current approach of the Chinese Communist Party: "the urge of the CPC in modern China to exercise firm control over the country's people, and over the state apparatus in its entirety, reflects an ages-old approach that dominates Chinese dynastic legal history." *Id.* A view of early imperial China that takes account of its complexity doesn't lend itself so easily to such sweeping comparisons.

empire was fragmented into many small, unstable states dominated by non-Han groups. This “Sixteen Kingdoms” period—during which “on average, a kingdom lasted for thirty-one years”⁷¹—extended to the 386 establishment of the Northern Wei, a dynasty of former nomads from present-day northeastern Mongolia lasting two centuries, until the founding of the Sui in 581 and the Tang in 618. The Tang code was the earliest example of extensive codification in Chinese legal history and was enormously influential, serving as the model for nearly 1,500 years of subsequent Chinese law as well as for legal reforms in Japan and elsewhere. Moreover, this code used major terms drawn from early and pre-imperial law to characterize its own systems, reinforcing the claims of Tang legislators to simply be carrying on ideas that had initially been articulated by China’s oldest and most famous rulers.⁷²

In many scholarly accounts today, the Tang are seen as having either restored or perfected the unified culture of the early empires, often represented by “Confucianism.” While there was no neat continuity from early imperial “Confucian” institutions—which, as the previous section explains, did not exist—there is some sense in calling certain features of Tang law and administration “Confucian.” Even Michael Loewe, so staunch in rejecting the label for the Western Han, acknowledges that “[a] number of elements may properly be taken to be integral parts of the approved way of life and training that may be termed ‘Confucian’ for Tang . . . times . . .”⁷³ Specifically, “[b]y Tang times there were examples of sophisticated institutions of imperial administration on which a government could call; a systematic means of training officials was being evolved that would make possible a more intensive form of government than hitherto.”⁷⁴ The Tang government seems to have been interested in promoting ideas explicitly called “Confucian”—veneration of Confucius himself and the texts associated with him; worship of Heaven as the source of human life and political authority; promotion of ancestral, familial, and political hierarchies

⁷¹ 1 HAROLD TANNER, CHINA: A HISTORY, FROM NEOLITHIC CULTURES THROUGH THE GREAT QING EMPIRE 297 (2010).

⁷² Medieval Chinese thinkers and contemporary scholars alike have accepted this Tang-era claim, and “this narrative [of Chinese legal development] always finds its happy ending with the reformed scale of penalties included in the Tang Code.” TIMOTHY BROOK ET AL., DEATH BY A THOUSAND CUTS 83 (2008) (alteration in original).

⁷³ Loewe, *supra* note 48, at 4.

⁷⁴ *Id.* at 24.

justified through references to Confucius; promotion of ritual (*li*)—and it controlled a powerful and unified state apparatus that allowed it to spread those ideas. Many scholars therefore argue that the process of "Confucianization" they see as originating in the Western Han culminated in the establishment of the Tang dynasty in the seventh century.⁷⁵

The general view is that this Tang-era completion of the process of "Confucianization" was how the nascently "Confucian" Han law was firmly cemented into the Chinese legal tradition and thus continues to exert influence over contemporary Chinese law. The "Confucianization" of Western Han law, writes Tao Wang, was "the way in which Han Dynasty connected past, present, and future in its legal system."⁷⁶ He describes the standard view of the harsh Qin law (*fa*) leavened by the gentleness of "Confucian" ritual (*li*): the Western Han "Confucians" "introduced the past's *li* into the present's law so as to make right the statute's rigidity and improve the state governance for the future," and as a result, "the judicial practice of [deciding cases according to the Confucian classics] was in operation until the formulation of the Code of Tang Dynasty (618-907 A.D.), which comprehensively absorbed the Confucian classics into its articles . . . [Thus,] Han law transcended present, past, and future"⁷⁷:

The connection of the past, present, and future formed in Confucianized law was conducive for imperial China's sustained existence for over two thousand years as an ideologically stable society, in which the Confucian ideology was coupled with the imperial political structure of a single unitary authority. The diachronic coupling of *li* and law over the whole imperial period of China defined for scholar-officials the purpose of their judicial duties, which was not arbitrary punishment but moral persuasion.⁷⁸

Such arguments are almost invariably linked to claims about the present state of Chinese law: Wang points to the new People's Republic of China Civil Code as an example of a return to "Confucianism" offset by the "Legalist" authoritarianism of other

⁷⁵ See, e.g., CHÜ T'UNG-TSU, *LAW AND SOCIETY IN TRADITIONAL CHINA* 280 (1961).

⁷⁶ Wang, *supra* note 59, at 161.

⁷⁷ *Id.* (alteration in original).

⁷⁸ *Id.*

CCP legal reforms.⁷⁹ In other words, according to this view, the “Confucianization” of Chinese law—incorporating ritual (*li*), eliminating harsh punishments, and focusing on familial relationships—began in the early imperial Western Han, was cemented in the medieval Tang, and to this day has never ceased to serve as the foundation of Chinese legal thought.

However, just like the other actors telling stories about “Confucianism” described in the subsequent sections, the Tang government was strongly motivated to call what they were doing “Confucian,” whether or not it really was. The Tang had just managed to exert control over a long-fractured territory harboring many competing ethnic and cultural interests, and they needed a figure and a language that would allow them to assert that a unified civilization now reigned. The best place to look was the repository of earlier Chinese figures, from which they selected Confucius.⁸⁰ When we call Tang law “Confucian,” we are in part accepting the millennia-old propaganda of a fledgling court desperate to exercise power in a rapidly shifting and bloody world.

In fact, some of the most significant features of Tang law were neither “Confucian” nor even “Chinese.” One of the principal pieces of evidence scholars offer for the Tang Code’s “Confucianization” is its system of criminal punishments, which officially eliminated some of the harshest sanctions in Chinese history. Before the Western Han, the five official punishments “had been tattooing (*mo* 墨), amputation of the nose (*yi* 劓), amputation of one or both feet (*yue* 剕), castration (*gong* 宮), or death (*dapi* 大辟).”⁸¹ By Tang times, however, the situation was completely different: there were only “three types of punishments (beating with a bamboo stick, deportation, and death)”⁸²

The death penalty in particular had changed radically: while decapitation was still practiced, strangulation was the far more common method of execution. This change has been seen as enormously significant because it assuaged the supposedly “Confucian” fear of bodily mutilation, which had made the pre-Tang punishments so fearsome to Chinese people.⁸³ While many

⁷⁹ See *id.* at 170-71.

⁸⁰ See Loewe, *supra* note 48, at 23.

⁸¹ 1 ENDYMION WILKINSON, CHINESE HISTORY: A NEW MANUAL 577 (6th ed. 2022).

⁸² *Id.* at 578.

⁸³ See BROOK ET AL., *supra* note 72, at 11.

contemporary Chinese scholars view this process as a major advance for Chinese law, early modern European observers saw what they took to be the "Confucian" preference for slow strangulation over quicker methods of execution as a symbol of longstanding and ineradicable Chinese barbarism that reflected a primitive spirit in need of enlightened European guidance. This difference in views perfectly encapsulates the divide in how Chinese and Western scholars have seen "Confucian" legal culture: as a source of national pride on the one hand and as an ideological tool for justifying Western impositions on China on the other.⁸⁴

But both views are wrong about the actual history that underlies their debate. Both early modern Europeans and Chinese scholars today ignore the extent to which Tang laws were in fact influenced by the non-Han cultures that dominated the centuries after the fall of the Eastern Han. The replacement of the pre-imperial approach of mutilating offenders' bodies by a system that largely left those bodies whole was not a development arrived at by the native inhabitants of the North China Plain (*i.e.*, the ethnic Han). In work that, a decade after publication, has gone almost completely unnoticed in any English-language writing about Chinese legal history, Itaru Tomiya demonstrates that strangulation as a method of execution is not found in Chinese sources until the Northern Wei dynasty, founded by the Xianbei, an Inner Mongolian nomadic group that conquered northern China in the fourth century. Because the Xianbei left no written records prior to the conquest, we do not know either the origins of strangulation as they practiced it or how they conceived of it, though Tomiya suggests that it may have come from the way in which they killed animals for sacrificial purposes, reflecting their nomadic origins.⁸⁵ Whatever the Xianbei thought of it, strangulation introduced a radical change into the Chinese theory and practice of punishments. "[W]ith the coming of strangulation, the death penalty was no longer the ultimate mutilation; nor was it

⁸⁴ See, e.g., CHEN, *supra* note 13, at 156-57.

⁸⁵ Tomiya has no evidence for this supposition, but offers comparisons to Biblical texts describing animal strangulation. See Itaru Tomiya, *The Transition from the Ultimate Mutilation to the Death Penalty: A Study on Capital Punishment from the Han to the Tang*, in CAPITAL PUNISHMENT IN EAST ASIA 1, 52 n.42 (Itaru Tomiya ed., 2012). Some ancient Indian groups appear to have employed the same practice. See Annette Yoshiko Reed, *From Sacrifice to the Slaughterhouse: Ancient and Modern Approaches to Meat, Animals, and Civilization*, 26 METHOD & THEORY STUDY RELIGION 111 (2014).

the banishment or elimination of criminals from the realm of the living. It became the mere deprivation of life.”⁸⁶

No trait reminiscent of the basic philosophy of punishment in ancient China—injuring the body or banishment from society—can be identified in these five forms of punishment. This was a turning point that marked the second stage in the history of punishment in China, which was brought about by strangulation.⁸⁷

In Tomiya’s view, the inclusion of this punishment in the influential Tang Code effectively broke the chain connecting the penal philosophies of the early empires to those of the Tang, enshrining a non-Han conception as a core component of Chinese law.

The unwillingness of scholars to acknowledge this history has major consequences for the world today. By failing to recognize the significant and lasting changes non-Han groups made to Chinese legal and administrative ideas, “Confucianization” has become as much an ethnic claim as it is a cultural one, *i.e.*, that the Han Chinese population of the North China Plain are the only ones who created and perpetuated the real Chinese legal tradition. In its modern form, this thesis argues that groups like the Northern Wei were absorbed inexorably into Han Chinese cultural practices due to the latter’s evident superiority (a process referred to as Sinicization or Sinitification). For example, the much-cited Chinese legal historian Zhang Jinfan writes:

During the more than one and a half centuries of ruling by Northern Wei Dynasty, after absorbing the advanced legal culture of the Han nationality . . . the policy of overall Chinesization [sic] was introduced . . . all doubtful cases were judged according to Confucian classics, which not only sped up the process of the feudalization and confucianization of laws, but also indicated the direction of the development of the legal system of the Northern Dynasty and fostered the progress of the entire society.⁸⁸

Zhang claims that the Northern Wei were merely copying and transmitting the laws of the earlier Han-dominated societies that previously occupied the territory they had conquered. Similar views

⁸⁶ Tomiya, *supra* note 85, at 53.

⁸⁷ *Id.*

⁸⁸ ZHANG JINFAN, THE HISTORY OF CHINESE LEGAL CIVILIZATION 408-09 (2020).

appear in the English-language survey-style works on Chinese legal history available in American law libraries,⁸⁹ as well as in the numerous law review articles that cite Zhang's work. In the view of these authors, the Northern Wei and their inheritors are remarkable primarily for their continuation and development of pre-existing Chinese legal ideas, serving as a conduit between the Eastern Han and the Sui and Tang.

The full implications of the importation of Northern Wei (and other non-Han) legal practices and the philosophies underlying the "Chinese" legal tradition have yet to be explored. At a minimum, however, they formed a major part of the legal system that Western observers encountered and have been describing ever since as part of a coherent, continuous, and ethnically homogenous legal culture that has long obscured (and continues to obscure) the contributions of non-Han and non-Central Plains people to what is today characterized as Chinese "Confucian" law.

III. CONSTRUCTING "CONFUCIANISM" IN LAW

So if these stories about the "Confucianization" of Chinese law in the Western Han and Tang era are wrong, how did they become so powerfully entrenched in American legal scholarship, even in the face of fifty years of books and articles demonstrating their inaccuracy? The reason is that they were carefully and intentionally constructed over hundreds of years to serve pressing contemporary needs.

a. Missionaries

The first and most foundational story about Confucius for today's legal scholars—that he is the representative of the most important and enduring parts of Chinese culture—was told by sixteenth and seventeenth century European Christian missionaries

⁸⁹ See, e.g., JOHN WARREN HEAD & YANPING WANG, LAW CODES IN DYNASTIC CHINA: A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING 111-12 (2005); see also HE QINHUA 何勤华, AN OUTLINE HISTORY OF LEGAL SCIENCE IN CHINA 98 (Fu Junwei et al. trans., 2016).

who needed a way to make their ideas comprehensible in China.⁹⁰ The Confucius of Jesuit accounts therefore looked very much like the pagan philosophers of the ancient Western world whom the Jesuits identified as the forbears of their own tradition.⁹¹ These views made him very attractive to Jesuit “accommodationists” – those trying to create a bridge between Christian and Chinese culture – who could use such familiar-sounding attitudes to argue that Confucius was channeling the same divine spirit as their own venerated prophets.⁹²

But while the missionaries were very interested in Confucius, they did not believe that the contemporary legal systems they observed were based on his ideas. For example, Pierre-Joseph-André Roubaud (1731-91), whose “opinion of Confucius was typical,” saw him as “a philosopher of sublime reason, a ‘legislator of the world’ and the author of not only the ‘true code of humanity’ but also a political system of unequalled beauty based on the chief principles of a rational morality.”⁹³ “However, Roubaud wrote that those principles had never been put into practice as the authentic guide of governments and the conduct of subjects, which was regulated not by virtue and honour but by the stick and the inflexible application of a pitiless, oppressive law.”⁹⁴

For many Jesuits, Chinese law was a system driven by the will of an autocratic emperor who some saw as enlightened and some as despotic. His personal actions might be restrained by Confucian morality, but a Confucian program as such was never implemented at a governmental level. Nevertheless, the people themselves might, like the emperor, consult their sense of Confucian morality (perhaps

⁹⁰ See, e.g., Huang, *supra* note 13, at 139; see also LIONEL M. JENSEN, MANUFACTURING CONFUCIANISM: CHINESE TRADITIONS AND UNIVERSAL CIVILIZATION 33-39 (1997). But see Nicolas Standaert, *The Jesuits Did NOT Manufacture “Confucianism”*, 16 E. ASIAN SCI., TECH. & MED. 115, 116 (1999).

⁹¹ Matteo Ricci, one of the most influential Jesuit missionaries, made Confucius out to be a kind of secular saint. The texts attributed to him made moral pronouncements similar to those found in Greek and Christian sources: “‘Overcome yourself to return to the spirit of the rites’ (*ke ji fu li* 克己復禮) and ‘Do not unto others what you would not have them do unto you’ (*ji suo bu yu wu shi yu ren* 己所不欲勿施於人).” See Cheng, *supra* note 13, at 591.

⁹² However, they did not understand him as a religious figure. See *id.* (“[T]he Jesuits presented the cults of Confucius as being devoid of any religious content.”).

⁹³ Guido Abbattista, *Chinese Law and Justice: George Thomas Staunton (1781-1859) and the European Discourses on China in the Eighteenth and Nineteenth Centuries*, in LAW, JUSTICE AND CODIFICATION IN QING CHINA: EUROPEAN AND CHINESE PERSPECTIVES 1, 45 (Guido Abbattista ed., 2017).

⁹⁴ *Id.*

more than the formal law itself) when making decisions.⁹⁵ The initial Western vision of Confucius as a (if not *the*) major figure of Chinese civilization was therefore as a secular moralist who had little to do with law in everyday life, a man whose ideas could easily be equated with foundational Christian and classical principles and in the process (it was hoped) make Christianity more appealing to potential Chinese adherents.

The Jesuit vision of Confucius had an enormous impact on broader European perspectives. The process of Jesuit accommodation played out for a global audience, as the lenses through which the Jesuits needed to view what they perceived as Chinese ideas were fulsomely transmitted back to the missionaries' European points of origin. In addition to making translations of important texts available to other aspiring missionaries and European scholars, Jesuits were writing long and detailed accounts of their impressions of Chinese thought and society that became very influential among their literate Western consumers.⁹⁶ For Westerners, these works first cemented Confucius as the central figure through which Chinese culture was best understood, a view that almost inevitably produced both historical and cultural reductionism: if everything in contemporary China could be explained by reference to an ancient thinker—as the Jesuits were understood by many to be saying, though they themselves were often considerably more sophisticated in their portrayals—the culture must consist of a core essence that has largely resisted change over millennia. Their influence has had remarkable staying power⁹⁷ and deeply colored Western understandings of China as a whole. "The teachings and canonical texts which were associated with him coincided with the idea of 'China' as an essentialized entity. Traces of this way of identifying them are still to be found nowadays, three centuries later, in the form of deeply enrooted preconceived ideas."⁹⁸

⁹⁵ See *id.* at 46.

⁹⁶ See Cheng, *supra* note 13, at 590.

⁹⁷ See *id.* ("Ever since [these Jesuit writings] at the very beginning of the seventeenth century, 'China' has been treated synonymously with the teachings and legacy of Confucius . . .") (alteration in original).

⁹⁸ *Id.* at 595.

b. Early Enlightenment

Once “Confucius” had come to stand in for China, he became a useful symbol for European Enlightenment thinkers in search of a contrasting example with which to criticize their own societies. Jesuit ideas about China and Confucius circulated widely, thanks in part to the support of powerful patrons, including royalty.⁹⁹ As they spread, these ideas were no longer limited to the specific accommodationist projects of the missionaries seeking an intellectual and moral foundation for their proselytizing. Instead, their descriptions of China were coming to occupy a major place in the way Europeans conceived of the world and humanity in general and could thus serve as important ammunition in Enlightenment-era arguments.¹⁰⁰ China’s usefulness as a foil in scholarly discourse created a great hunger for information about the country that Jesuit writings were uniquely positioned to satisfy. It is something of a historical irony that, while the Jesuits’ project of bridging China and European ideas to make Christianity more appealing to potential Chinese converts did not result in waves of new adherents in Asia, it *did* convert many Europeans to an interest in, and then a passion for, China and its culture.¹⁰¹

The image of Confucius that early Enlightenment thinkers adopted fit neatly into the outlines of debates already underway. The Jesuits had “invented a ‘philosophical Confucius’ which they compared favorably with other ‘ethnic philosophers,’ Plato and Aristotle in particular.”¹⁰² This depiction of Confucius allowed authors like Voltaire, who wanted to elevate the status of human reason and undermine the influence of religion on thought and society, to claim that Chinese history demonstrated the feasibility of a purely secular morality.¹⁰³ This Confucius thus became for Sinophilic Enlightenment thinkers a moral and philosophical figure,

⁹⁹ See *id.* at 593.

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 595 (“[T]he Jesuits were less successful in converting the Chinese to Christianity than they were in converting European elites to an out-and-out Sinomania, which all over Europe affected philosophers, scholars, and even monarchs.”).

¹⁰² *Id.*

¹⁰³ See *id.* at 596 (“For him, the Confucian religion had the extraordinary merit of fulfilling the functions reasonably expected of a religion (*i.e.*, making people believe in a transcendental form of justice that ultimately punishes evil and rewards good) while at the same time being free of fanaticism and superstition.”).

in whose thought personal virtue predominated over rules. Indeed, followers of Confucius should need no laws, guided as they ostensibly are by orientations toward compassion and harmony. "Confucius and Chinese literati thus became the incarnation of an ideal of sophistication and integrity, and the emperors of China (in reality, Manchu and somewhat authoritarian), models of well-reasoned classicism and enlightened despotism, readily brandished against monarchical arbitrariness and religious fanaticism, which Voltaire considered as being 'infamous.'"¹⁰⁴

Unlike the early Jesuit missionaries, however, Voltaire *did* believe that Confucius' philosophical principles were put into practice in the law. He based this view in part on the writings of late seventeenth and early eighteenth century missionaries like Louis Lecomte (1655-1728 CE), who praised the Chinese legal system in an influential work on the country, emphasizing the justice and effectiveness of its rewards and punishments.¹⁰⁵ A few decades later, another influential Jesuit, Jean-Baptiste Du Halde (1674-1743 CE), echoed Lecomte's sentiments "in favorably reviewing the Chinese legal system for its graded system of punishments, which he judged especially effective both in deterring crime generally and in preventing the most serious crimes . . ." ¹⁰⁶ Du Halde's assessment was championed by "Sinophiles" like Voltaire, who pointed to his representation of humane Chinese rulers, such as the Kangxi emperor who "condemned the use of torture as contrary to Confucian ideals of good governance."¹⁰⁷

Echoing both the accommodationist missionaries and Du Halde, "Voltaire praised both the efficacy of the laws in China, which ensured the reward of virtue, the people's well-being and the protection of property, and China's humane and simple religion, which was free of intolerance and superstition."¹⁰⁸ The "Philosopher" entry of his *Philosophical Dictionary* expresses this complex mix of views:

By what fatality, perhaps shameful for western nations, is it necessary to go to the extreme east to find a simple sage, without ostentation, without imposture, who taught men to

¹⁰⁴ *Id.*

¹⁰⁵ See BROOK ET AL., *supra* note 72, at 161.

¹⁰⁶ *Id.* at 162.

¹⁰⁷ *Id.*

¹⁰⁸ Paul Bailey, *Voltaire and Confucius: French Attitudes Towards China in the Early Twentieth Century*, in 14 HISTORY OF EUROPEAN IDEAS 817, 820 (1992).

live happily 600 years before our common era, at a time when the entire north knew nothing of the alphabet, and the Greeks had hardly begun to distinguish themselves by wisdom? This sage was Confucius, who, alone among the ancient legislators, never sought to deceive mankind. What finer rules of conduct have ever been given on earth?¹⁰⁹

His ideas were echoed by François Quesnay, who explained to his contemporaries that “the moral philosophy of Confucius is the law of” China, adding that:

The emperor of China is a despot, but in what sense is he given this name? It seems to me that fairly generally in Europe, we have unfavorable ideas about that empire. I have noticed, on the contrary . . . that its constitution is founded on wise and irrevocable laws which the emperor causes to be observed and which he himself observes strictly.¹¹⁰

For Voltaire and other Enlightenment Sinophiles, Confucius was sage, moralist, and legislator whose wisdom lived on in the administration of the laws of contemporary China. That wisdom, they claimed, demonstrated both the past and present inferiority of Europe’s own moral and legal culture and thus could be used to challenge religious and monarchist Europeans.

c. Later Enlightenment and Beyond

But while “Confucius” and the legal tradition he was now seen as representing could be used to attack European institutions, he could just as easily be employed by Europeans who wanted to demonstrate not the failings but the superiority of their own ways of doing things. Voltaire’s view of Chinese “Confucian” law, though shared by some, was far from the only one, and it was ultimately displaced by a far more hostile characterization: “[t]he unfortunate habit of imagining ‘the Enlightenment’ as homogeneous has too often tended to obscure the intense controversies of that period, one of which was Europe’s heated mid-eighteenth-century debate on Confucian government.”¹¹¹

¹⁰⁹ FRANÇOIS VOLTAIRE, PHILOSOPHICAL DICTIONARY 334-35 (2004).

¹¹⁰ FRANÇOIS QUESNAY, DÉSPOTISME DE LA CHINE 6 (1767).

¹¹¹ BROOK ET AL., *supra* note 72, at 164-65.

Du Halde's work, for example, which had significantly shaped positive appraisals of Chinese law, was susceptible to very different interpretations. In his 1748 *De l'esprit des lois*, Montesquieu (1689-1755) wrote that the works of Du Halde and other Jesuits in fact demonstrated China's despotic character, pointing both to their claims that the fear of punishment was responsible for the maintenance of social order and harmony and to their descriptions of aristocrats being punished without regard to their status. Montesquieu, a "champion of the French nobility as a check on Bourbon power,"¹¹² thus concluded that the Chinese government ruled despotically, and therefore illegitimately. It was Montesquieu's vision that won out, as the Jesuits' power collapsed during the late eighteenth century.¹¹³ More broadly, as Enlightenment thinkers increasingly cast their own thinking about ideal societies and legitimate governments in terms of republican governance and individual liberties, China served as a useful foil against which to define their own aspirations.¹¹⁴ By the late eighteenth century, Europeans had largely adopted Montesquieu's description of Chinese (or Oriental) despotism (based on his reading of Du Halde¹¹⁵).

This was also a fight about money as much as it was about philosophies of ideal social orders. Views of "Confucius" and law became increasingly negative as colonialism's economic imperatives replaced the evangelical impulses of the missionaries who had previously defined China to the West. Europeans were working harder and harder to tap the large potential Chinese market more effectively. Moreover, many European countries were acquiring (or hoping to acquire) pieces of land in and around China, from which they could launch ever more extensive trading operations. These operations led both to greater hostility between European and Chinese governments, who resented the encroachment, and much more frequent contact between European merchants and Chinese authorities.¹¹⁶ With increasing regularity, this contact resulted in the punishment (including execution) of European traders, whose cases

¹¹² *Id.* at 164.

¹¹³ See, e.g., Part VII *Anti-Jesuitism, Enlightenment, and the Suppression*, in THE OXFORD HANDBOOK OF THE JESUITS 834 (Ines Zupanov ed., 2019).

¹¹⁴ See BROOK ET AL., *supra* note 72, at 167.

¹¹⁵ Cheng, *supra* note 13, at 598.

¹¹⁶ See generally 2 HAROLD TANNER, CHINA: A HISTORY, FROM THE GREAT QING EMPIRE THROUGH THE PEOPLE'S REPUBLIC OF CHINA 72-110 (2010) (describing the Qing Dynasty's nineteenth-century crises).

were then widely reported in Western media eager to support the expansionist economic and territorial projects of their governments by demonstrating China's unworthiness as a partner. China's harsh punishments—seen before as efficient means of social regulation, mitigated by sympathetic emperors—were recast as fatal civilizational defects in need of Western-led reform.¹¹⁷

As Europeans became more hostile to China in both philosophical and economic terms, some began to embed the country into their universal theories of social and intellectual development, largely in denigrating ways. The Enlightenment, it seemed, had achieved its ends: many European thinkers believed that their scientific rationality grounded in the Greek tradition had overthrown the superstitious religiosity that had benighted their continent. As such, they had no need, as Voltaire had done, to look to China for philosophical or moral models. Europeans had demonstrated their superiority through reason, and it was now *their* tradition that should serve as the standard against which every other should be judged. Indeed, "philosophy was one of the areas which would most strongly determine and reaffirm European identity (and then supremacy)."¹¹⁸ The shift was so profound that Immanuel Kant (1724-1804) could say in a lecture in 1756 that, "[i]n his writings, their Master Confucius teaches nothing else but a moral doctrine for the attention of princes," and "the concept of virtue and morality has never sunk into Chinese minds."¹¹⁹ Where China's ancient accomplishments in rationality had been lauded by early Enlightenment figures, their successors recast Chinese thought as "primitive religion," exactly the kind of ignorant superstition from which European philosophy was trying to free mankind.¹²⁰

Whereas the 'invented' European discourse of Confucianism had served as a medium for early Jesuit missionaries and their Sinophile readers like Leibniz to synthesize or accommodate Christian-Chinese differences before the mid-eighteenth century, Oriental despotism became an influential analytical framework by which European

¹¹⁷ See BROOK ET AL., *supra* note 72, at 154.

¹¹⁸ Cheng, *supra* note 13, at 600.

¹¹⁹ *Id.* at 601.

¹²⁰ *Id.* at 602.

commentators differentiated China as well as other Asian countries from their own by the end of the century.¹²¹

This conception of China was taken up by the social and historical theorists whose ideas became foundational to many Western academic disciplines. For example, Georg Wilhelm Friedrich Hegel (1770-1831) savaged China and its prototypical intellectual in the interests of upholding Eurocentric views of society, history, and race.¹²² He disputed Enlightenment-era praise for Confucius, concluding "that his reputation would have been better preserved *had he not been translated*."¹²³ Hegel's critique was particularly pointed where law was concerned, contrasting Western and Oriental commitments to what would later be characterized as "rule of law," which he thought was completely lacking in Asia.¹²⁴

Hegel's approach was influential among some of thinkers, including Karl Marx and Michel Foucault, whose work would shape contemporary Western ideas of Chinese law.¹²⁵ One such thinker was Max Weber (1864-1920), the German sociologist, whose views of Chinese history were likewise heavily influenced by nineteenth century European imperial expansionism, as European nations sought to reverse their trade imbalances with China and grow their Pacific territorial holdings ever more aggressively, inflicting a series of humiliating military defeats on China.¹²⁶ Seeking an explanation for China's failure to live up to the advanced state of Western technology and society, Weber identified as one of the central culprits "Confucianism" and its effect on the development of Chinese legal theory and practice. He claimed that, since the dominant norms governing social interaction and relations of authority derived from family-oriented Confucian philosophical principles rather than state-created statutes, rulers were free to make whatever laws they wanted and did so in an unsystematic and unrestrained fashion in pursuit of private ends.¹²⁷

¹²¹ CHEN, *supra* note 13, at 115.

¹²² PETER PARK, AFRICA, ASIA, AND THE HISTORY OF PHILOSOPHY: RACISM IN THE FORMATION OF THE PHILOSOPHICAL CANON, 1780-1830, 129-30 (2013).

¹²³ *Id.* at 127.

¹²⁴ *Id.* at 124-25.

¹²⁵ See RUSKOLA, *supra* note 19, at 43.

¹²⁶ Jack Barbalet, *Max Weber and China: Imperial Scholarship, Its Background and Findings*, in SINO-GERMAN ENCOUNTERS AND ENTANGLEMENTS: TRANSNATIONAL POLITICS AND CULTURE, 1890-1950, at 133, 133 (Joanne Miyang Cho ed., 2021).

¹²⁷ See KAREN TURNER ET AL., 美国学者论中国法律传统 [RECENT AMERICAN ACADEMIC WRITINGS ON TRADITIONAL CHINESE LAW] 24 (2004).

Neither law nor any principles underlying law, therefore, played any role in the government's theoretical or practical right to rule its people. After Weber, one major strand of Western thought held that Chinese law, hampered by Confucian "particularism," was inherently incapable of developing, or even living up to, the enlightened principles of "modern" legal systems. These views had serious consequences when they were employed to support colonial and other exploitative arrangements that European nations foisted on China.¹²⁸ For Hegel's followers, the primitive and static qualities of Chinese law justified the imposition of European will.

All these approaches were united in the works of Karl Wittfogel (1896-1988), who needed a way to justify the West in the political and ideological conflict of the Cold War, and whose views remain extraordinarily influential in accounts of Chinese legal culture. According to Wittfogel's theory of "hydraulic despotism," the fact that governments in pre-imperial China had to develop complicated water control projects led to an eventual concentration of power in the hands of the emperor who, needing to legitimize that concentration, turned to patriarchal "Confucianism," styling himself the father of a nation-family whose tyrannical rule could be justified by ancient precepts. This despotism, he claimed, persisted into the twentieth century China he was describing and explained both the fact and the justice of European superiority.¹²⁹

As other Sinologists noted at the time of his most influential publications, Wittfogel's invocation of "hoary stereotypes" of Oriental despotism had "an understandable appeal in the present cold war situation."¹³⁰ Wittfogel marshalled all the theories of the European thinkers who called Chinese law always and forever "Confucian" to explain its primitive and static nature, thereby justifying the political and military conquests of their governments, forging out of them a more effective ideological weapon for use in the Sino-Western conflict of his own time. Our scholarship today remains bound by these war-born ideologies:

Today, despite the arguments made by such Western scholars as Voltaire that [the] Chinese constitution was the

¹²⁸ See BROOK ET AL., *supra* note 72, at 177.

¹²⁹ See Jonathan Lu, *Reassessing the Needham Question: What Forces Impeded the Development of Modern Science in China After the 15th Century*, 21 CONCORD REV. 209, 227 (2011).

¹³⁰ E. G. Pulleyblank, *A Comparative Study of Total Power*, 1 J. ECON. & SOC. HIST. ORIENT 351, 351 (1958).

best in the world, the dominant view of Chinese law remains largely the same as that of Montesquieu, Marx, and Wittfogel. Scholars in both China and America argue that China has only the rule *by* law or the rule *by* men and the concept of the rule *of* law is alien to China.¹³¹

Put another way, many academics in both China and the West "have yet to advance substantively beyond the Weber and Wittfogel stereotypes of 'Confucianism' as either fundamentally 'irrational' or 'despotic.'"¹³² The power of these stereotypes persists in part because the battles that gave rise to them are always about to recur, so we still need a way of explaining why *we* are better than *them*.

d. America

American views about Confucius and law traced a similar trajectory from admiration to denigration, seeking first ideals to aspire to and then—as America's global influence and self-confidence grew, bringing it into greater competition with China—negative examples with which to demonstrate its own superiority.

The first American stories about Confucius were told to offer cultural and legal models to a nascent country eager to distinguish itself from Europe. Many influential early Americans inherited Voltaire's very positive views of a Confucian-identified Chinese law, even looking to it for inspiration for the new society they sought to create. For example, Benjamin Franklin published essays called "The Morals of Confucius," seeking to "disseminate the political vision of the Chinese sage . . . with approving references to China's restrained judicial administration and discouragement of needless litigation."¹³³ The seriousness of Franklin's interest in what he took to be a "Confucianized" Chinese law was so profound that, just before the American Revolution, he even "wished to ask the Emperor of China for permission to use his 'code of laws' as a model for the new republic."¹³⁴

The fact that late eighteenth century America was not engaged in colonial projects in Asia meant that people like Franklin were far

¹³¹ Qiang Fang, *The Spirit of the Rule of Law in China*, 13 EDUC. ABOUT ASIA 36, 36 (2008).

¹³² TAISU ZHANG, *supra* note 13, at 265.

¹³³ RUSKOLA, *supra* note 19, at 44.

¹³⁴ *Id.*

less incentivized than European thinkers to cast China in negative terms.¹³⁵ The image of Confucius as a secular moralist that appeared in those writings was very attractive to men who both saw themselves as the inheritors of Enlightenment rationality and wished to distinguish themselves from European prejudices and imperialism. Moreover, Confucius and the culture with which he was identified was lauded by figures like Thomas Paine, Jedidiah Morse, John Adams, and Benjamin Rush.¹³⁶ These Americans were encountering not only the “philosophical China” or “philosophical Confucius.”¹³⁷ Instead, their admiration was based too on “the study of China’s specific legal and political institutions.”¹³⁸

In America, the most popular Jesuit writing of the era was Père Du Halde’s *The General History of China*, which included descriptions of Chinese law as well as its civil service examination system, methods of national taxation, and procedures for centralized resource management. A range of other Founding era thinkers and politicians called upon the young nation to learn from Chinese law given its reputation for reasoned impartiality. To wit, Charles Thomson, secretary of the Continental Congress, urged Americans in 1771 to learn from China in both science and law. The first volume of the American Philosophical Society in 1785 idealized Chinese governance, and the influential *New Hampshire Magazine* followed suit in 1793. Early American diplomat Arthur Lee sought a delegation to China to express to the emperor the sentiment that Americans were “desirous of adopting the wisdom of his Government, and thereby wishing to have his code of Laws.”¹³⁹

While “[n]o particular institution or law was ever transplanted from China *in toto*,” partly because “there was still very little specificity to the knowledge about Chinese law possessed by the Founders,” there was nevertheless a great deal of interest in Chinese legal ideas in

¹³⁵ See JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* 23 (2015) (“Without the need to justify a colonial foreign policy, Americans were more strongly influenced by the direct representations of China present in Jesuit writings than the broad denigrations of Sinophobic writers.”).

¹³⁶ *Id.*

¹³⁷ Cheng, *supra* note 13, at 595, 597 (2014).

¹³⁸ KRONCKE, *supra* note 135, at 23.

¹³⁹ *Id.* at 23-24.

early America, legal ideas strongly and positively identified with the figure of Confucius.¹⁴⁰

This early desire for emulation did not last: Chinese roadblocks to free trade were a major catalyst of American antipathy toward Chinese legal and governmental institutions. As in seventeenth and early eighteenth century Europe, most late eighteenth century Americans initially saw China as a distant ideal, a place that could be learned about and even copied but that had little practical effect on their daily lives. But as the newly formed United States sought to establish an economic base for its political independence, it too discovered that trading with China could be difficult, and "direct U.S. involvement with China" engendered "a continuous cross-cultural process of interaction against which Western social, economic, and political values were constantly measured and contrasted."¹⁴¹

A great deal of American resentment derived from Chinese restrictions, both the goods Western traders could purchase and the area within which they could conduct business—an area the government required remain subject to Chinese law.¹⁴² The "Confucian" laws that had seemed so appealing to America's constitutional theorists were deeply begrudged by the merchants who actually experienced them, merchants who then complained of their treatment in the strongest and most culturally essentializing terms. As one wrote, the "despotism" which began with the "Confucian" emperor was seen by these men as an "impure source from whence the black stream of vice flows to infect the whole nation."¹⁴³ As always, the supposed characteristics of Chinese civilization served a nation in search of its own self-definition. As Americans were coming to understand themselves as a free-spirited, entrepreneurial people, they looked increasingly to China to tell them how not to be: "Slavish behavior, attributed to any outside limits imposed upon one's freedom in the liberal marketplace, was automatically thought to be a sign of despotism."¹⁴⁴ As a result, the frustrations of American merchants in China contributed to the development of a laissez-faire attitude among American thinkers

¹⁴⁰ *Id.* at 25.

¹⁴¹ JOHN KUO WEI TCHEN, *NEW YORK BEFORE CHINATOWN: ORIENTALISM AND THE SHAPING OF AMERICAN CULTURE, 1776-1882*, at 38 (2001).

¹⁴² *See id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

who had previously been inclined to welcome governmental economic intervention.¹⁴⁵ In other words, increased contact with contemporary China exacerbated American hostility to the culture they had identified as Confucian, a culture upon which they had heaped praise when it seemed confined to the ends of the earth or the ancient past. That hostility rebounded, producing an even firmer American commitment to economic deregulation.

Moreover, although the United States “ultimately rejected the idea of territorial imperialism in China”¹⁴⁶ – maintaining the same resistance to colonialism in Asia that allowed its founders to embrace Chinese philosophical and institutional principles (at least theoretically) – it nevertheless sought an unequal arrangement in its dealings with the country that helped spur this degradation in American attitudes to Chinese law. As American merchants sought to live and do business in China, they increasingly sought exemption from the control of the Chinese state they had come to hate.

Though unsuccessful at first, the American government was eventually able to force concessions from the Chinese, and “[t]his exemption from local law became established as the right of extraterritorial jurisdiction.”¹⁴⁷ Extraterritoriality required the same philosophical justifications of Chinese inferiority as European colonialism, and the “Confucianism” that had been so appealing to the founders could now serve as evidence of China’s failure to modernize. Although the country “was organized functionally in the form of a centralized bureaucratic state and could thus hardly be dismissed as a grouping of tribal savages, yet rhetorically its sovereignty was structured in the moral terms of Confucianism,” *i.e.*, a primitive, family-oriented value system that was out of place in the modern world.¹⁴⁸ “To European international lawyers, this

¹⁴⁵ See TCHEN, *supra* note 141, at 40 (2001) (“Contact with the realities of Chinese society, economic policy, and politics had soured the Jeffersonian and Franklinesque admiration for China, but the passionate coveting of refined Chinese things continued unabated. American traders were unable to understand and accept Chinese differences or suspend their ethnocentric judgments. Their notions of a proper universal human being were defined by behavioral norms that disdained the cultural differences they encountered. And as these exemplars of the rising US culture distanced themselves from these foreign “others,” so too they differentiated themselves from the not so distant Anglo-American republican heritage of a strong governmental hand regulating economic activity.”).

¹⁴⁶ RUSKOLA, *supra* note 19, at 113.

¹⁴⁷ *Id.* at 119 (alteration in original).

¹⁴⁸ *Id.*

signaled a paradigmatically Oriental confusion of the logics of politics and kinship," and China was thus "located uneasily somewhere between civilized and savage, fully sovereign and colonizable. Extraterritorial jurisdiction in turn became the chief institutional expression of that status."¹⁴⁹ American lawyers echoed these critiques as they sought to justify their own extensive regime of extraterritoriality.

This brings us back to Senator Blaine and his fears that the "civilization of Christ" would be supplanted by the "civilization of Confucius."¹⁵⁰ The vision shared by Blaine and his supporters of unassimilable "Confucian" Chinese hordes overwhelming a defenseless America—a vision motivated by the nineteenth century American need to justify its culture, its treatment of Chinese in China, and its fear of cheap Chinese labor in the United States—found its way into American law first through the Congressional enactments barring Chinese immigration and naturalization, then through the court decisions upholding them.¹⁵¹ Speaking in support of the 1882 Chinese Exclusion Act, Senator John Miller of California explained that for "forty centuries or more," the Chinese "people . . . have endured without change."¹⁵² According to Lucy Salyer,

Restrictionists warned that if allowed to remain, Chinese with their distinctive character and traditions would endanger American civilization. They portrayed a Chinese character ill-suited to the American system of self-government and free labor. An imperial, despotic government had always ruled China, restrictionists argued, and as a consequence had created a people "utterly unfit for and incapable of free or self-government."¹⁵³

To supporters of the Act, it was "self-evident that Congress's exclusion of the Chinese from immigration was not based on 'color' but cultural disqualification for citizenship. That is, the Chinese were so radically illegal that they were simply not capable of the kind of self-governance that was required by America's 'republican form of Government.'"¹⁵⁴ Beginning in 1884, the Supreme Court

¹⁴⁹ *Id.*

¹⁵⁰ LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 16 (1995).

¹⁵¹ *See id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ RUSKOLA, *supra* note 19, at 45-46.

started deciding cases arising under the Chinese exclusion laws almost always in favor of the government¹⁵⁵ because, like Senator Blaine, the Justices also believed that Chinese people were civilizationally opposed to Americans. In the first such case, the Court echoed both Blaine's fears of an America consumed by Chinese invasion and his language of the Christian civilization they were obliged to defend from such assaults.

Thoughtful persons who were exempt from race prejudices saw, in the facilities of transportation between the two countries, the certainty, at no distant day, that from the unnumbered millions on the opposite shores of the Pacific, vast hordes would pour in upon us, overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization.¹⁵⁶

The opinion described the Chinese in America as completely unassimilated and unassimilable, especially in matters of law.

[T]hey have remained among us a separate people, retaining their original peculiarities of dress, manners, habits, and modes of living, which are as marked as their complexion and language. They live by themselves; they constitute a distinct organization with the laws and customs which they brought from China. Our institutions have made no impression on them during the more than thirty years they have been in the country. They have their own tribunals to which they voluntarily submit, and seek to live in a manner similar to that of China. They do not and will not assimilate with our people; and their dying wish is that their bodies may be taken to China for burial.¹⁵⁷

How rooted this anti-Chinese sentiment became in Supreme Court jurisprudence is reflected in Justice John Harlan's dissent in *Plessy v. Ferguson*, in which—even while inveighing against racist discrimination against African Americans—he acknowledged the logic of discriminating against Chinese people: “There is a race so

¹⁵⁵ See, e.g., *Ping v. United States*, 130 U.S. 581, 606-10 (1889); *Ting v. United States*, 149 U.S. 698, 743-45 (1893); *Sing v. United States* 158 U.S. 538, 547-58 (1895); *United States v. Toy*, 198 U.S. 253, 260-62 (1905).

¹⁵⁶ *Heong*, 112 U.S. at 569.

¹⁵⁷ *Id.* at 566-67 (alteration in original).

different from our own that we do not permit those belonging to it to become citizens of the U.S. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."¹⁵⁸ By the 1920s, this sentiment was sufficiently widespread throughout the federal judiciary that one U.S. District Court judge in Washington state could write:

The yellow or brown racial color is the hallmark of Oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of these despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were not fitted and suited to make for the success of a republican form of Government. Hence they were denied citizenship.¹⁵⁹

In 1924, the Johnson-Reed immigration act ushered in America's most restrictive legal and administrative immigration regime, instituting a quota system based on the country's population according to the 1890 census, *i.e.*, after the passage of the Chinese exclusion laws. The law clearly echoed the Court's views on race and assimilability.¹⁶⁰

As numerous authors have pointed out, this fear of an immutable Chinese civilization stemming in large part from late nineteenth century American stories about "Confucian" legal culture drove major changes in American law and society. Teemu Ruskola writes that the desire to keep "lawless" Chinese people out of the United States resulted in enormously significant increases in domestic American lawlessness. So eager were judges to exclude Chinese warped by millennia of despotism that they contributed to the development of a more despotic American president with a largely unchecked "plenary power" over immigration.¹⁶¹ Along similar lines, Lucy Salyer and Erika Lee have shown that the systems designed to keep these legally and culturally unassimilable people out of the country gave rise to the modern system of American immigration controls and the legal theories that underlie them.¹⁶²

¹⁵⁸ *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896).

¹⁵⁹ RUSKOLA, *supra* note 19, at 45 (citing *Terrace v. Thompson*, 274 F. 841, 849 (W.D. Wash. 1921)).

¹⁶⁰ See Ngai, *supra* note 28, at 87-88.

¹⁶¹ See RUSKOLA, *supra* note 19, at 145-48, 229-32.

¹⁶² See LEE, *supra* note 27, at 6-7.

This cultural shift was given dramatic effect in law and bureaucracy: “[t]he doctrines established primarily in Chinese litigation before 1905—the extraconstitutional status of aliens, the characterization of deportation as a civil proceeding, the plenary congressional power over immigration policy, and judicial deference to administrative findings”¹⁶³ The xenophobic anxieties over a people whose ostensibly static “Confucian” legal culture that contributed to America’s newly exclusionary sense of itself in the late nineteenth century, as well as the bureaucratic machinery and legal doctrine that allowed Congress to act on those anxieties, are still operative in America’s efforts to exclude Muslims, Mexicans, and those from “shithole countries.”¹⁶⁴

But one mystery remains: why were the judges, who were so hostile to Chinese people and their culture that they were willing to reshape foundational allocations of American constitutional authority to keep them out, willing to have their courthouses adorned with images of the man most generally associated with that culture? Strikingly, my research has revealed not a single derogatory reference to Confucius in the entire history of American jurisprudence. On the contrary, beginning in the early nineteenth century, Confucius was being treated in American judicial opinions with the respect appropriate to the depictions of him as a “great legislator” that were going up on courthouse walls. These opinions, unlike the visual representations, did not generally focus on the potential connections between early Chinese and contemporary American legal ideas. However, they almost all acknowledged Confucius as a world-historical figure like Brama, Buddha, Moses, Mohammed, or Jesus, whose influence (according to American judges) was still the predominant, essential element in the social and religious culture of Chinese people.¹⁶⁵

As it turns out, this paradox reflected the state of the country at large. As David Weir describes, “the European stereotype of the devious, uncivilized Oriental was kept alive in the United States

¹⁶³ SALYER, *supra* note 150, at 118.

¹⁶⁴ Alan Fram & Jonathan Lemire, *Trump: Why Allow Immigrants from ‘Shithole Countries’?*, AP NEWS (Jan. 12, 2018), <https://apnews.com/article/immigration-north-america-donald-trump-ap-top-news-international-news-fdda2ff0b877416c8ae1c1a77a3cc425> [<https://perma.cc/3ZXK-SE7W>].

¹⁶⁵ See, e.g., *Hendrickson v. Shotwell*, 1 N.J. Eq. 577, 638 (Ch. 1832); *Fryatt v. Lindo*, 3 Edw. Ch. 239, 241 (N.Y. Ch. 1838); *City of Newark v. Bd. of Educ.*, 30 N.J.L. 374, 377 (1863); *Hale v. Everett*, 53 N.H. 9, 87 (1868); *Moore v. Connecticut Mut. Life Ins. Co.*, 17 F. Cas. 672, 676 (E.D. Mich. 1874).

through the popular press . . . even as members of the cultural elite found inspiration in Indian antiquity and ancient China."¹⁶⁶ Weir points out that, in the late nineteenth century, America's elites were amusing themselves by attending lectures on ancient "Asiatic" cultures and investigating Buddhist sutras while the exclusion laws were being passed, often on the basis of claims about the detrimental contemporary effects of precisely those cultures. "Not until the latter half of the nineteenth century did Americans come face to face with any of the Orientals they had hitherto known only from books," and "[n]ot surprisingly, the admiration of Asian culture and the parallel antagonism toward Asian people intensified as immigration became an increasingly uncomfortable fact of American life."¹⁶⁷

This is the answer to the mystery of Confucius' appearance on the buildings of the courts who were dedicated to keeping Chinese people out of the country based on their racial and cultural characteristics (partly understood as the legacy of "Confucianism"). American judges combined the respectful attitude toward pre-modern Asian culture typical of their class at that period – the legacy of the admiration of Voltaire and Benjamin Franklin – with the hostility toward contemporary manifestations of that culture expressed by Kant, Hegel, and their intellectual heirs, as well as the American politicians who saw Chinese immigrants as a convenient target of populist outrage. American courts, with their statues, their respectful invocations of Confucius, and their anti-Chinese decisions simultaneously embodied both sides of this contradiction in a manner that has never before been observed.

e. China

Finally, the image of Confucius in American law reviews today cannot be fully understood without some grasp of how he has been represented in China over the last century. The scholars who most influentially articulated the theories of "Confucianized" law were Chinese intellectuals deeply affected both by what their own country had experienced and by the Euro-American ideas about Confucius and Chinese legal history they studied.

¹⁶⁶ DAVID WEIR, *AMERICAN ORIENT: IMAGINING THE EAST FROM THE COLONIAL ERA THROUGH THE TWENTIETH CENTURY* 5-6 (2011).

¹⁶⁷ *Id.* at 6.

The final story about “Confucian” law necessary to understanding its representation in American legal scholarship was told by nineteenth and twentieth century Chinese scholars who need to explain why China kept losing to the West. Beginning with the Opium Wars in 1840, China was regularly defeated and subjected to humiliating terms of surrender as Western powers sought to wrest ever greater economic and territorial concessions from the country. This state of affairs naturally shook the confidence of late-imperial intellectuals of the Qing dynasty (1644-1911):

Once proud of being a central power in East Asia, late Qing scholar-officials witnessed China’s abrupt decline by the late nineteenth century. Western powers “opened up” the Middle Kingdom through a series of military conflicts and diplomatic arrangements and gradually placed the country within a system that was dominated by global capitalism, colonialism, and imperialism.¹⁶⁸

Late-Qing thinkers were cognizant of the connection between how China was being characterized in Western theory and how it was being treated by Western powers,¹⁶⁹ and “[i]t therefore became an urgent intellectual challenge to make sense of China’s decline in the globalized world.”¹⁷⁰ Just as Americans and Europeans needed a justification for their attacks on China, Chinese thinkers likewise needed to rationalize why they kept losing those fights, and they looked for them in the same place.

One answer was to elevate the status of Confucius. Prior to the late nineteenth century, Chinese thinkers considered Confucius only one significant historical and moral figure among many.¹⁷¹ It was not until he was coopted by a late-Qing reformer as part of a “highly eccentric reading of Confucian tradition as the basis for a new ‘state religion’ in China”¹⁷² that Confucius began to take on (in China) the central importance he is accorded today. In the 1890s, after the extent of Western military and cultural incursions in China had become painfully clear, Kang Youwei 康有為 (1858-1927), in “an attempt to

¹⁶⁸ XIN FAN, *WORLD HISTORY AND NATIONAL IDENTITY IN CHINA: THE TWENTIETH CENTURY* 20 (2021).

¹⁶⁹ *See id.* at 21.

¹⁷⁰ *Id.*

¹⁷¹ *See* NYLAN & WILSON, *supra* note 20, at 92, 250-51; Fukagawa Maki, *Understanding “Confucianism Becoming the Dominant School of Thought”*, 51 *CONTEMP. CHINESE THOUGHT* 123, 124 (2020).

¹⁷² NYLAN & WILSON, *supra* note 20, at 194.

resist the twin evils of Western colonialism and Christianity,"¹⁷³ advocated making Confucianism a "'national religion' . . . modeled on Christian sects and equipped with its own churches and a unifying ideology combining the best features (the 'essence') of Chinese culture."¹⁷⁴

This was the beginning of a process that would turn Confucius into "'a free-floating signifier' (*i.e.*, a pseudo-historical figure on which propaganda points were inscribed in the name of the Sage)."¹⁷⁵ While Kang argued that Confucius' ideas could save China, his opponents countered that he had done too much already, citing Western accounts of the primitive state to which his philosophy had condemned Chinese law and society. Like the Jesuits who needed a canvas on which to project the images that would best support their projects in China, Chinese thinkers, too, required a powerful indigenous, ancient figure that could be made to serve a variety of contemporary political ends.

As part of that process, Kang Youwei's student Liang Qichao 梁啟超 (1873-1929) applied the Confucian frame to Chinese legal history. Liang divided imperial rulership into different types, each associated with broad intellectual movements that continue to define how scholars understand social and ideological trends in imperial China: "Confucianism," whose adherents governed through their mastery of virtue, status, and ritual, and "Legalism," an anti-status (anti-particularism, in Weber's terms) philosophy of equality before the law that ostensibly advocated for ruling a populace through frequent and inflexible application of draconian punishments. Liang's categories gave rise to a strict association of "Confucianism" with ritual (or *li* 禮) and "Legalism" with law (or *fa* 法).

That effort had a profound effect on the author whose theory of legal "Confucianization" remains the single most powerful idea behind most contemporary scholarship touching on Chinese legal history. The historian Chü T'ung-tsu (1910-2008), whose *Law and Society in Traditional China* "remains required reading for anyone working in this field today,"¹⁷⁶ absorbed the denigration of "Confucian" law of both the Chinese intellectuals seeking to account

¹⁷³ *Id.* at 192.

¹⁷⁴ *Id.* at 193.

¹⁷⁵ *Id.* at 195; see also MICHAEL NYLAN, THE FIVE "CONFUCIAN" CLASSICS 337-39 (2008).

¹⁷⁶ MATTHEW SOMMER, A SCHOLARLY REVIEW OF CHINESE STUDIES IN NORTH AMERICA 114 (2013).

for China's military and apparent cultural failures *and* the Euro-American scholars who were continuing to argue for their own civilizational superiority at China's expense.¹⁷⁷

Chü argues that all areas of society (including law) began to be "Confucianized" in the Western Han dynasty, a process that culminated in the medieval Tang dynasty. According to Chü's notion of "Confucianization of the law," the most significant change from the harsh Legalism of the Qin dynasty (221-206 BCE) to the beginnings of Confucianization in the Western Han was the insertion of Weberian "particularism," *i.e.*, the law's different treatment of different classes of people. Whereas, Chü believed, Qin law dealt with all offenders strictly according to the nature of their offenses, Han law worried about such things as family relations and official rank, characteristics that might be used to aggravate or mitigate punishments.¹⁷⁸ Weber's immense influence on Chü led him to implicitly evaluate early imperial Chinese law against "an ideal type of 'the modern West,'" with the result that "China's failure is simply taken for granted." "The purpose of historical inquiry," therefore, "is to illuminate the inadequacies that predestined its failure."¹⁷⁹

Chü's work, which continues to provide the most basic lens through which the origins and features of Chinese imperial law are viewed by vast numbers of scholars, is thus at least partly dedicated to proving the deficiencies of the legal culture it describes. Chü's legal "Confucianization" hypothesis and the "Legalist-Confucian" dialectic that supposedly drove the development of Chinese law¹⁸⁰ are largely what we are still stuck with today.¹⁸¹ American legal scholars have inherited Chü's critical view of "Confucian" law, while many Chinese scholars identify the blend of Legalism and Confucianism as the most distinctive feature of imperial Chinese law and therefore view the process of their combination as a significant source of national pride.

¹⁷⁷ Perhaps unsurprisingly, Chü T'ung-tsu was educated at an American missionary school in China and invited to study in the United States by Karl Wittfogel. See Don S. Zang, *The West in the East: Max Weber's Nightmare in "Post-modern" China*, 14 MAX WEBER STUD. 33, 37 (2014).

¹⁷⁸ See CHÜ, *supra* note 75, at 267-79.

¹⁷⁹ SOMMER, *supra* note 176, at 113-14.

¹⁸⁰ See, e.g., DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 18 (1967); JOHN W. HEAD & YANPING WANG, *LAW CODES IN DYNASTIC CHINA* 103 (2005).

¹⁸¹ See Chi Zeng, "Confucianization of Law" Revisited, 31 ASIAN PHIL. 88, 88 (2021); Ernest Caldwell, *Social Change and Written Law in Early Chinese Legal Thought*, 32 L. & HIST. REV. 1, 3 (2014).

Confucius' stock has risen and fallen dramatically since early twentieth-century Chinese thinkers began to deplore his influence on law, blaming him for their failures to resist the high-handed abuses of the Western powers. Today's CCP often celebrates the ancient sage, identifying themselves as the inheritors of the tradition he had the greatest hand in making glorious. "As part of the opening ceremony of the 2008 Summer Olympic Games in Beijing, a worldwide audience listened as the words of Confucius were read by a legion of performers parading as the 3,000 disciples of the Master."¹⁸²

In the wake of China's economic growth by the end of the twentieth century, Confucius was requisitioned by Communist leadership as an approachable posterchild for increased cultural and economic expansion abroad . . . 2010 saw a proliferation of socio-political uses/celebrations of Confucius, including (to name just a few examples) the monumental Confucian Canon project, the founding of the Institute for Confucius Studies at Peking (Beijing) University, and the creation of the Confucius Peace Prize.¹⁸³

Perhaps the most dramatic demonstration of the newly close association between the CCP and the figure of the ancient sage – and the Sino-American antagonism framed in anti-Confucian terms – is the Confucius Institutes, the centers (often attached to universities) whose mission is to teach Chinese language and culture and outside of China. During the Trump administration, the Confucius Institutes were increasingly targeted as agents of a foreign government and, in 2020, the U.S. Senate unanimously passed the CONFUCIUS ("Concerns Over Nations Funding University Campus Institutes in the United States") Act. "Alabama Representative Tommy Hanes . . . is pushing legislation to make Confucius Institutes fully illegal in the state of Alabama, expressing what he considers to be his 'strong effort to stop Communism in America.'"¹⁸⁴

Though such efforts may be somewhat overblown, they do reflect the fact that Confucius has become an important political tool for the CCP. As a recent study of CCP-aligned academics fleshing out the details of Xi Jinping's focus on the virtues of "traditional

¹⁸² KEVIN DELAPP, PORTRAITS OF CONFUCIUS: THE RECEPTION OF CONFUCIANISM FROM 1560-1960, at 875 (2022).

¹⁸³ *Id.* at 876-77.

¹⁸⁴ *Id.* at 877.

Chinese culture” has shown, “Confucianism” receives the most laudatory attention. “Confucian legal culture,” according to these authors, emphasizes “people-centered thought,” just as the contemporary CCP claims to do. The “reappearance in contemporary political life” of this supposedly traditional tenet, “proves, for some authors, that [China’s ‘excellent traditional culture’] represents a lineage of society-oriented political theory and practice which runs uninterrupted from ancient rulers all the way up to the current communist leaders.”¹⁸⁵ For Xi Jinping and the CCP today, Confucius and the law on which he ostensibly exerted so much influence are no longer the source of China’s backwardness; instead, they constitute the basis of both the country’s strength and the legitimacy of the government’s claim to rule it.

IV. WHAT FOLLOWS?

Whether one views it positively or negatively, to talk today about China’s “Confucian” law is usually to tacitly admit one of the most dramatically inaccurate premises of Chü T’ung-tsu’s argument, which is that nothing changed after the Tang-era completion of legal “Confucianization”: “after that law had been crystallized by the Confucianists, there were no fundamental changes in it throughout the history of China The law retained its general characteristics for centuries, until the promulgation of modern law.”¹⁸⁶ It is hardly revelatory to say that there were of course major legal and social changes in the region now called China over a millennium and a half, but many contemporary authors blithely continue to act as if continuity or stagnation (depending on whether it’s supposedly good or bad) were one of the core elements of Chinese culture. To assert the existence of a transhistorical “Confucian” law is either to evoke a Euro-American history that began with an effort to peg everything Chinese to a single figure—first to aid the spread of Christianity, then to score points in Western debates, then to justify imperialism—or to validate a Chinese Communist Party narrative designed to augment the ethnic and cultural rootedness of the current government. The first emphasizes

¹⁸⁵ Aleksandra Kubat, *Morality as Legitimacy Under Xi Jinping: The Political Functionality of Traditional Culture for the Chinese Communist Party*, 47 J. CURRENT CHINESE AFFS. 47, 56 (2018) (alteration in original).

¹⁸⁶ CHÜ, *supra* note 75, at 280-81.

civilizational differences that encourage international conflict, while the second underpins ethno-nationalist authoritarianism. Both results are to be feared, and there is no need for scholars to support either.

What can we do to put an end to these discourses? The easiest step is simply to stop using terms like "Confucian" in ways that imply continuities over distances of time and space too vast to allow for them. A greater sensitivity to the complexity of the objects described is a necessary first corrective to the plaque of stereotype currently clogging the arteries of much American scholarship touching on Chinese law. If we can resist the pull of such thinking, we will be able to see more clearly the excellent work that many of the most respected scholars are currently doing on the Chinese legal experience. For example, many American legal scholars—committed to the "Confucian" view of Chinese legal culture—repeat the truisms that imperial Chinese law had no (or almost no) civil component and that Chinese courts operate either according to harsh and rigid rules ("Legalism") or morality-driven informal mediation ("Confucianism"). The first point takes no account of work on premodern Chinese law that demonstrates its numerous civil features,¹⁸⁷ and the second obfuscates the findings of work detailing the flexible, problem-solving dispute resolution efforts of Chinese courts (in traffic accident cases, for example) without any reference to ancient philosophies.¹⁸⁸ By clearing away this commitment to "Confucian" law, we will be better able to see China, both past and present.

Abandoning this commitment would have somewhat different implications for each of the three types of law review articles I have identified. For those authors who merely evoke the "Confucian" legal tradition, they could instead note the references of *others* in the situations they describe. For example, instead of gilding an exposition of CCP activities in the South China Sea with the claim that Chinese rulers have operated according to the same strategic principles for thousands of years, a scholar might instead note President Xi Jinping's own frequent invocation of classical Chinese texts and figures and explain what he might mean by them. Such explanations require doing the kind of work attempted in this

¹⁸⁷ See, e.g., Zhang Zhaoyang, *Civil Laws and Civil Justice in Early China* (2010) (Ph.D. dissertation, University of California, Berkeley).

¹⁸⁸ See, e.g., Benjamin L. Liebman, *Ordinary Tort Litigation in China: Law Versus Practical Justice?*, 13 J. TORT L. 197, 197-228 (2020).

article: providing some insight into the significance of the people and ideas so invoked in both their own times *and* in the modern world.¹⁸⁹ If Chinese leaders are going to continue thinking of and describing their actions through allusions to classical Chinese images, it is crucial that American scholars understand and explicate those images as free of the warping influences of historical and contemporary political imperatives as possible.

For those authors who are already engaging more substantively with issues of Chinese history, they must apply a critical eye to the apparently stable elements of Chinese legal culture as manifested in the periods they examine. Anyone writing about Tang-era “Confucianized” law, for example, should specifically demonstrate the ideology’s content and significance to the legal theory and practice of the time. Such authors must also keep in mind that the Tang-era rulers were highly incentivized to characterize their actions as continuations of ancient practices, thus obscuring the differences between the legal culture of the Tang and of earlier eras, and thereby rendering any legal scholar’s job much harder. There is no way to rescue the reliance mode – which stitches translations of ancient texts directly to contemporary ideas as if no time or space had intervened – and it must simply be stopped.

The consequences of failing to make these kinds of changes, of continuing to tell the same stories, are large and ugly: the “Confucianization” hypothesis, when paired with the theory of Sinicization described above, supports some of the current Chinese government’s most appalling actions in Xinjiang. In November 2019, the *New York Times* published some pages from a cache of documents related to the CCP’s policies on ethnic Uyghurs and the region of Xinjiang.¹⁹⁰ The documents, now referred to as the

¹⁸⁹ See John Sullivan, *Shackled by Doctrines: Why Western Strategists Need to Start Taking Ancient Chinese Texts Seriously*, STRATEGY BRIDGE (May 31, 2022), <https://thestrategybridge.org/the-bridge/2022/5/31/shackled-by-doctrines-why-western-strategists-need-to-start-taking-ancient-chinese-texts-seriously> [https://perma.cc/E6A8-TVCX].

¹⁹⁰ Austin Ramzy & Chris Buckley, ‘Absolutely No Mercy’: Leaked Files Expose How China Organized Mass Detentions of Muslims, N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html> [https://perma.cc/L5MJ-FP2V]. The paper never released most of the material, which it received from an anonymous Chinese official. In September 2021, the same documents were also transmitted anonymously to the London-based Uyghur Tribunal. See Adrian Zenz, *The Xinjiang Papers: An Introduction*, UYGHUR TRIBUNAL (Nov. 27, 2021), <https://uyghurtribunal.com/wp-content/uploads/2021/11/The-Xinjiang-Papers-An-Introduction-1.pdf> [https://perma.cc/S4SX-HG3S]. This tribunal is an “independent tribunal” (i.e.,

"Xinjiang Papers," include speeches by Xi Jinping marked "top secret," "denoting material that if leaked 'will cause particularly serious damage to the security and interests of the country.'"¹⁹¹ "This appears to be the first-ever instance that material with 'top secret' statements made by a Chinese head of state have leaked into the public domain."¹⁹² One such speech is reminiscent of the mainstream Chinese views of Chinese legal history this article has explained: that China's greatness lies in its ability to absorb foreign cultures over millennia while retaining its core Han identity. "The formation of the big family . . . is based on plurality and unity" and its "multi-ethnic unification" . . . was consolidated during the Qin-Han period (221-206 BCE) through "historical processes of contact, communication, and fusion," with "Central Plains Han" as the primary "formative ethnic group."¹⁹³ In other words (according to this view), China's culture, defined by the practices and ideas of its ethnically Han majority, has for at least several thousand years constituted the core civilization in the territory now governed by the CCP, sometimes absorbing minor elements from outside groups but never losing its central virtues. By far the most common result, it is claimed, was that those outside groups naturally became somewhat or entirely Chinese, attracted by the manifest superiority of Han ways of living and thinking.

The Xinjiang Papers make dramatically clear the consequences of this view of the past, as the CCP attempts to replicate as a matter of contemporary policy what it describes as a nearly automatic historical process. In an effort to control the lives and attitudes of China's large northwestern population, it has detained at least a million Uyghurs in camps and "subjected [them] to invasive surveillance, sexual violence, child-separation, and psychological

not associated with the government) chaired by the lawyer who prosecuted Slobodan Milosevic. *UK Tribunal to Hear Witnesses on China Genocide Accusations*, ASSOC. PRESS (Feb. 4, 2021), <https://apnews.com/article/race-and-ethnicity-london-china-slobodan-milosevic-dce87ecaa1500434bbc098725dfc5f1b> [<https://perma.cc/CCU7-VQ5L>].

¹⁹¹ Zenz, *supra* note 190, at 2; see also DAVID TOBIN, U. SHEFFIELD SCH. ASIAN STUD., THE "XINJIANG PAPERS": HOW XI JINPING COMMANDS POLICY IN THE PEOPLE'S REPUBLIC OF CHINA 7-8 (2022) ("It is standard practice in PRC state-media (*e.g.*, Xinhua, CCTV, etc.) to report on key speeches by referencing documents and key quotes without releasing the documents . . . [even though] . . . [t]hese types of materials are widely disseminated and studied by cadres at all levels of the PRC government.").

¹⁹² Zenz, *supra* note 190, at 2.

¹⁹³ TOBIN, *supra* note 191, at 21-22.

trauma.”¹⁹⁴ Today, “nearly 10 million Uyghurs and Kazakhs outside the camps navigate networks of checkpoints, interpersonal monitoring, hi-tech surveillance, and forced labour.”¹⁹⁵

The result of all this control is a fundamental shift in the nature of the contemporary Chinese state, made possible by new surveillance technologies: “Xi has shifted the PRC’s institutional framework from what was considered a bureaucratic-authoritarian state, tolerating no alternative sources of political authority or organisation, to a more personalised totalitarian state, with alternative identities and thought on history and culture treated as existential national security threats.”¹⁹⁶ This change has major implications both for China and for other governments seeking to maintain relations with a country whose leader is increasingly bent on leveraging his authority to carry out programs incompatible with most contemporary notions of human rights. “Xi Jinping personally commands state terror that intends to commit genocide and uses diplomacy and economic interpenetration to achieve that goal, as well as preventing any opposition at home and abroad.”¹⁹⁷ The first step in understanding how to engage with such a regime is to understand how it sees the world, a view into which this project aims to provide some insight.

These stories are also not just a Chinese problem. The views of Chinese law with which we are still living today have a huge impact on American policy toward China and Chinese nationals. For example, recent work by Margaret Lewis explains that the DOJ’s China Initiative—a program designed to “counter national security threats emanating from the People’s Republic of China”¹⁹⁸—casts its net of suspicion far too widely, targeting for investigation innocent people who merely happen to appear associated with the PRC.

Under the banner of the China Initiative, not only has “China” taken on a criminal taint, but people—both natural and legal—who are viewed as possessing some level of China-ness are likewise stigmatized. The United States’

¹⁹⁴ *Id.* at 5.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 62.

¹⁹⁷ *Id.* at 63.

¹⁹⁸ Lewis, *supra* note 24, at 145.

criminal justice system does not allow guilt by association. But the China Initiative has created *threat* by association.¹⁹⁹

Lewis' work demonstrates that these associations are in part driven by the kinds of stories about ancient history and its continuities that have been my focus here. She quotes former Attorney General William Barr on China's "bold historical and current ambition:" "[c]enturies before communism, China regarded itself as the central kingdom, *Zhongguo*. And it wasn't central to the region. It was central to the world. And its ambition today is not to be a regional power, but a global one."²⁰⁰ The name *zhongguo* 中國 (a quite recent name for China) does not mean "central kingdom" and did not historically indicate any view about the global centrality or expansionist ambitions of the people who used it, but the *story* that it did evokes a China long defined by the Han ethnic majority and its "Confucian" culture.²⁰¹ Yet again, erroneous claims about premodern Chinese civilization are being employed by American lawyers to justify their hostile acts against those they perceive as its present-day inheritors. Moreover, their view of who those inheritors are is made "overinclusive" (Lewis' term) by their mistaken understanding of Han ethnic identity as the core of Chinese culture, as Lewis demonstrates through her discussion of a Taiwanese-born American citizen targeted for DOJ investigation partially because of his supposedly "Han" sympathies.

Barr is hardly alone in fixating on the continuing importance of ancient Chinese ideas for today's world. For example, Senator Marco Rubio characterized the Chinese position in 2018 this way: "[o]ur greatness comes from strong leaders. And they took that Confucian heritage, combined it with the strong Communist party, and what they've argued is we need a strong government to govern our society . . ." ²⁰² Jing Tsu, a professor of modern Chinese literature and culture at Yale, "complains that she is often asked by people in Washington to explain ancient Chinese ideas such as Sun

¹⁹⁹ *Id.* at 152.

²⁰⁰ *Id.* at 199.

²⁰¹ See Yang Shao-Yun, *Becoming Zhongguo, Becoming Han: Tracing and Reconceptualizing Ethnicity in Ancient North China, 770 BC-AD 581* (2007) (MA Thesis, National University of Singapore) (on file with National University of Singapore Libraries).

²⁰² Lexington, *Transcript: An Interview with Marco Rubio*, *ECONOMIST* (May 14, 2018), <https://www.economist.com/democracy-in-america/2018/05/14/transcript-an-interview-with-marco-rubio>. [https://perma.cc/GCD5-UC3A].

Tzu's *The Art of War*." ²⁰³ She asks, "Would you explain American politics with reference to Socrates? Of course not. So why would you think of China as being frozen in time?" ²⁰⁴

As in China, there are immense dangers to these poorly understood histories, though of a different kind: the CCP relies on its idea of Chinese "Confucian" law to bolster its oppressive policies in place like Xinjiang, while American lawmakers use the same view to partly justify their hostility towards China. In an interview with the podcast *On the Media*, Les Gelb (the compiler of the Pentagon Papers) argued that ignorance of Asian culture generally was a major factor in the bloodshed of the 1970s:

You know, we get involved in these wars and we don't know a damn thing about those countries, the culture, the history, the politics, people on top and even down below. And, my heavens, these are not wars like World War II and World War I, where you have battalions fighting battalions. These are wars that depend on knowledge of who the people are, what the culture is like. And we jumped into them without knowing. That's the damned essential message of the Pentagon Papers. ²⁰⁵

Gelb observed that the damage of this kind of ignorance continued long after the end of the Vietnam War: "[b]ecause we'd never learned that darn lesson about believing our way into these wars, we went into Afghanistan and we went into Iraq." ²⁰⁶ This is a lesson we still refuse to learn. As Mae Ngai wrote recently in the *New York Times* about the Biden administration's efforts to deescalate tensions with China, "[w]hile lowering the temperature is welcome, it is not enough. The administration should stop seeing trade with China solely through the prism of national security. As long as that linkage persists, Chinese and other Asian Americans will continue to be on the receiving end of racist harassment, violence and

²⁰³ Yuan Yang, *Jing Tsu: "The Days of Armchair Scholarship Are Over If You're Studying China"*, FIN. TIMES (Feb. 10, 2023), <https://www.ft.com/content/a71c1744-00ef-4cd2-ad6d-d42d28399e31> [https://perma.cc/Y6QN-CA87].

²⁰⁴ *Id.*

²⁰⁵ On the Media, *What the Press and "The Post" Missed*, WNYC STUDIOS (Jan. 12, 2018), <https://www.wnycstudios.org/podcasts/otm/segments/what-post-missed-episode> [https://perma.cc/JAN5-74LR].

²⁰⁶ *See id.*

discrimination."²⁰⁷ A story about Chinese legal history that ignores its ethnic complexities and its changes over time enables crude stereotypes today,²⁰⁸ stereotypes that will lead to further instability, conflict, and violence.

²⁰⁷ Mae Ngai, Ron DeSantis "Banned China From Buying Land in the State of Florida." *How Did We Get Here?*, N.Y. TIMES (Dec. 11, 2023), <https://www.nytimes.com/2023/12/11/opinion/chinese-people-property-sale.html>. [<https://perma.cc/MF86-H8JW>].

²⁰⁸ See Lewis, *supra* note 24, at 191.