

# Ideology and Historiographic License in Chinese Legal Scholarship

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*Chinese legal historians and Chinese Communist Party ideologues engage with historical materials in order to advance various ideological projects, including subversive ideological perspectives. At the same time, historical scholarship appeals to many Chinese legal scholars because it is not seen and experienced as being as ideologically sensitive a field as other branches of Chinese legal scholarship. Chinese legal historians themselves have acknowledged their ability to discuss controversial topics—their “historiographic license”—through legal historical research. This article describes Chinese legal scholars’ historiographic license through the tools of rhetorical theory. The subversive elements of Chinese legal historiography can be attributed to the use of figurative language, which conveys forbidden meanings through innocuous surface text. Figurative language allows Chinese legal scholars to subtly question ideological doctrines—which they may support in other social contexts—without having to negate these doctrines explicitly. Historiography arguably even offers Chinese legal scholars a means to question their own ideological beliefs.*

## INTRODUCTION

This article describes various uses of historiography in Chinese legal scholarship.<sup>1</sup> Historiography not only supports different ideological projects, but it also promises to transcend them, allowing legal scholars to depart from China’s ideological orthodoxy and to question ideological doctrines, which they may adhere to in other social contexts. The Chinese Communist Party (CCP or Party) assigns history an important role in the construction of Party cadres’ ideological awareness (Dirlik 1978, 11; Lü 2020, 195; Xi 2021). Indeed, Marxism itself can be defined as historical consciousness about the material conditions of society (Shi 2021, 76–76). Examples of ideological uses of history can be seen throughout CCP-sanctioned “orthodox” ideology (Xi 2014; Chen 2020; Xi 2021). At the apex of Party hierarchy, the CCP Central Committee (1945, 1981, 2021) has marked key junctures of the Party’s development through resolutions

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1. Following Hayden White (1975, 49), the term “historiography” can be used to refer to the body of scholarship on history and to theories about this scholarship. “Legal historical research” refers to historiography in the legal field.

on history.<sup>2</sup> The third and most recent CCP resolution on history, adopted in November 2021, presents “Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era” as the culmination of the CCP’s ideological development and the evolution of global Marxism (CCP Central Committee 2021). As was the case with the earlier CCP Central Committee resolutions on history (Weigelin-Schwiedrzik 1987, 86), the most recent resolution seeks to solidify power relations within the Party. The resolution describes Xi Jinping as the principal founder and developer of the most advanced version of Marxism, thereby establishing him as the absolute authority on all Party ideology as well as truth itself (CCP Central Committee 2021).

Ideological uses of history in China are not limited to CCP historiography. Liberal-minded and politically centrist reformers of China’s state-sanctioned ideology also make use of history in order to advance politically heterodox ideological projects (L. Lin 2009; W. He 2010; Z. Xu 2021). This is possible because historiography is not seen as being as ideologically sensitive a field as other branches of Chinese legal scholarship, despite its obvious ideological significance for CCP leaders. In particular, the genre of legal historical research accommodates a wider variety of heterodox and subversive ideological performances than other genres of Chinese legal scholarship, such as jurisprudence and doctrinal constitutional law. Chinese legal historians themselves acknowledge their ability to discuss controversial topics through the historiographic genre (R. Lin 1999, 159–60; Y. Guo 2018, 123; Zhao and Liu 2019, 12).

Chinese legal scholars’ ability to speak and write more freely in the historical genre than in other branches of legal scholarship can be described as their “historiographic license.” The CCP enforces strict ideological controls in Chinese universities (Taber 2018; Minzner 2019; Wong and Kwong 2019, 288; Hao and Guo 2020, 86), and it has banned discussion on topics such as the universality of human rights, judicial independence, and constitutionalism (Farrar 2013; Gan 2017; Yang 2021, 17). Historiography offers a fig leaf for discussing prohibited topics. In the beginning of the Reform and Opening Up era in the 1970s, market-orientated legal reforms were first discussed through legal historical research (R. Lin 1980, 283). Some of the most politically daring cultural products in the reform era were historiographic.<sup>3</sup> More recently, Chinese legal scholars have discussed the limits of Marxist political thought in outspoken terms through legal historical research (S. Jiang 2014, 208; L. Lin 2009, 48; Zheng 2014). The historiographic license extends from the field of specialized legal historical research to contemporary applications of Chinese historical materials (Q. Jiang 2013, 65).

The historiographic license may be usefully described through the tools of rhetorical theory. In particular, the unorthodox and subversive elements of Chinese legal historical research may be classified as “Aesopian language.” This genre of speech uses figurative language to convey forbidden thoughts, and it is typical of politically

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2. For the status of the Chinese Communist Party (CCP) Central Committee in the Party’s organization, see *Zhongguo Gongchandang zhangcheng* (中国共产党章程) [CCP Constitution], October 24, 2017, Arts. 10, 20.

3. Perhaps the most notable example of the Chinese historiographic license in the past decades is the *He Shang* (河殇) [River Elegy] television series, which aired on China’s national television in 1988 and supported the reformist atmosphere leading to Tiananmen protests in the following year (S. Ma 1996, 38). Excerpts from the television series with English language subtitles can be viewed at <https://tinyurl.com/k52bk58>.

heterodox speech in authoritarian societies (Savinitch 2005, 108). Aesopian rhetorical devices, such as metaphors and metonymies, introduce various degrees of ambiguity to ideologically subversive texts (White 1975, 53; Savinitch 2005, 108). Such ambiguity may succeed in disguising subversive messages entirely from the uninitiated, or it may merely establish a flimsy façade of deniability, which nevertheless signals sufficient deference to the authorities (Perelman 1969, 467). Whatever its degree, ambiguity reduces the chances that Aesopian speech is interpreted as an explicit challenge against the ideological orthodoxy of an authoritarian state.

“Aesopian language” is not unique to historiography. Aesopian uses of language can be seen in many forms of politically subversive speech, such as journalistic writing and literary fiction (Savinitch 2005, 107).<sup>4</sup> Many fields of Chinese legal scholarship deploy Aesopian language, for instance, using euphemisms for politically sensitive or forbidden concepts. Nevertheless, this article argues that the figurative nature of historiography makes historiography a particularly well-suited field for Aesopian language in legal research (White 1975, 53; Kellner 1989, 285). In contrast to other fields of law, which have to adhere closely to CCP-sanctioned ideological speech, historiography can more easily distance itself from contemporary ideological language. A historiographic text does not have to make use of the political terms of the day, while still being able to present highly meaningful commentary on the Chinese party-state.

Moreover, historiography enjoys a distinct social role in the Chinese political discourse. Chinese historians have traditionally assumed and, in some cases, been afforded, a wider berth of ideological views than scholars writing in other genres of political speech. Historiographic arguments have played a role in some of the most momentous political debates in China, such as the beginning of the Cultural Revolution (W. Yao 1968; Fang 2022, 104–5) and the initiation of legal reforms in the 1970s and 1980s (R. Lin 1980). In fact, the entire genre of classical Chinese historiography can be described as metaphorical since it was predominantly intended as moral guidance to the government (Dirlik 1978, 7–8; Hartman 2019, 40). Chinese historians presented historical allegories to the emperor to support or oppose government policies (Hartman 2019, 45–46).

To be sure, CCP censors’ tolerance for Aesopian rhetoric has its limits. While Aesopian uses of historiography have been common throughout Chinese history, the specific boundaries of tolerance for such uses have fluctuated (Goldman 1985, 715; Cheek, Ownby, and Fogel 2018, 109–10). In the 1950s and 1960s, historiography was a closely scrutinized field, and suspected Aesopian uses were forcefully suppressed (Kahn and Feuerwerker 1968; W. Yao 1968; Fang 2022, 108–9). During the reform era and up until the early 2000s, even mainstream Chinese legal historians criticized Marxist ideology in historiographic texts (Zhongguo Zhengfa daxue falü shixue yanjiuyuan 2008, 593, 596; Fang 2022, 109). In the past few years, China’s ideological space has again been tightening. In the lead up to the 2021 CCP Central Committee resolution on Party history, the CCP leadership and pro-establishment scholars stressed the importance of ensuring that the Party “acts and thinks unanimously” (Xi 2021) and that

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4. CCP cadres also make use of figurative language, for instance, through so-called “control parables,” which seek to illustrate “rules designed to prevent future clashes with authority” (Stern and Hassid 2012, 1241). Such uses of language are not politically subversive.

historiographic research supports Party legitimacy (Ge 2021). Historiographic texts are nowadays censored when they violate the Party's taboos, such as the memory of the Party's "heroes and martyrs."<sup>5</sup> Party cadres also routinely censor historically "nihilistic" texts, which delve too deeply into the negative aspects of the Party's past.<sup>6</sup> Generally, the more explicitly a contemporary historiographic text criticizes China's present leadership and the more ahistorical its argumentative mode is, the more likely it is that it will be censored.

Nevertheless, the existence of diverging historical narratives demonstrates that prominent members of the Chinese legal academy do not adhere (at least wholeheartedly) to the party-state's orthodox ideology. The historiographic genre has allowed Chinese scholars to express their sense of alienation from both Chinese traditional thought and more recent ideological inputs, including Marxism and liberalism. It can even be said that historiography offers Chinese legal scholars a license to question their own ideological beliefs. While some establishment legal scholars may be reluctant to openly oppose Marxist ideology through ahistorical theoretical statements, they nevertheless end up doing so through diachronic historical narratives (Han 2003, 132; Zhongguo Zhengfa daxue falü shixue yanjiuyuan 2008, 573, 593; *Falixue* 2020, 214–15).<sup>7</sup> Historical research may be particularly appealing to those scholars who are skeptical of existing ideological doctrines but who have no clearly articulated alternatives for them. While the motives of CCP censors are difficult to ascertain, their uneven policing of ahistorical and historical legal scholarship suggests that even they accept the historiographic license.

## IDEOLOGICAL USES OF HISTORIOGRAPHY

Many uses of legal historiography may be understood through individual legal scholars' ideological projects. Surveys of Chinese legal scholarship have identified a number of competing, "ideological" positions on politically meaningful questions in Chinese legal academy (A. Chen 1999–2000; Seppänen 2020). For instance, Chinese legal scholars have adopted different ideological positions regarding the expansion of the Party's internal discipline supervision and intraparty regulations to Chinese state organs (Seppänen 2020, 203). Conservatively minded scholars generally support such reforms, arguing that they enhance the government's anti-graft work and increase the Party's power (W. Zhang 2019). Liberal-minded scholars oppose the expansion of the Party's power into Chinese state organs, arguing that the Party's extralegal uses of power dilute the rule of law (Tong 2014). Politically centrist "mainstream" scholars refrain

5. See Zhonghua renmin gongheguo yingxiong lieshi bao hu fa (中华人民共和国英雄烈士保护法) [Law of the People's Republic of China on the Protection of Heroes and Martyrs], adopted April 27, 2018, <http://en.pkulaw.cn.easyaccess2.lib.cuhk.edu.hk/display.aspx?cgid=b200a491de7b5551bdfb&lib=law>.

6. Chinese censors deleted more than two million "historically nihilistic" Internet posts in the lead up to the Party's centenary festivities in July 2021 (see Mai 2021). Similarly, the above-mentioned *He Shang* television series was denounced "as an outcome of bourgeois liberalization" after the Tiananmen crackdown (S. Ma 1996, 46).

7. The distinction made in this article between ahistorical historiography and diachronic historiography tracks Ferdinand de Saussure's (1959, 88–89) distinction between synchronic and diachronic linguistics.

from explicitly opposing the expansion of Party organs into the state and instead seek to limit the effects of such expansion by insisting on the importance of legality and rule-based governance within the Party's disciplinary process (Qin 2016, 53). Finally, "neo-conservative" scholars support the Party's political status through theoretically heterodox arguments and express doubts about the increased bureaucratization of the Party organization (S. Jiang 2016, 38).

To be sure, describing hundreds of scholars through a small number of ideological positions is a radically reductionist exercise, which intentionally leaves out *sui generis* viewpoints and ignores nuances between individual scholars. Moreover, ideological positions should be regarded as being similar to religious beliefs, which can coexist with common-sense observations about the world and which consequently do not constitute the totality of a person's belief system (Geertz 1993, 119).<sup>8</sup> Nevertheless, ideological reductionism can be informative for anybody seeking to understand a particular discourse (White 1973, 24). Ideological positions, for instance, may render Chinese debates on comparative law more easily accessible to foreign scholars. Specific arguments about comparative law (regarding, say, the possibility of legal transplantation) may support larger ideological projects (such as the advocacy of liberal legal reforms) and constitute veiled criticism of one's ideological opponents (Seppänen 2020, 190–91, 220).

In a similar way, the reductionist mapping of ideological positions helps one understand Chinese legal scholars' uses of historiography. From a reductionist perspective, it can be noted that the conservative, pro-establishment agenda presents Chinese legal history as a progress story, where an ever-strengthening judicial system has steadily enhanced its internal rationality, external enforcement capabilities, and rights protections (Zhongguo Zhengfa daxue falü shixue yanjiuyuan 2008, 585).<sup>9</sup> The textbook version of this narrative describes the organically harmonious beginnings of Chinese law, the tragic fall of traditional Chinese law at the hands of foreign invaders, and the triumphant emergence of the socialist rule of law under CCP leadership (608–10). In the past few years, CCP ideologues have presented "Xi Jinping Thought on the Rule of Law" as the culmination of this historical development process (Y. Chen 2020). Pro-establishment historiography has also supported the personification of CCP leadership by writing President Xi Jinping into crucial junctures of Chinese legal history. Zhang Wenxian (2021, 5), a prominent Chinese legal scholar, has credited Xi for "courageously proposing" the establishment of a new socialist legal system in the early 1980s when he was still a

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8. In contrast to this definition of ideology, ideology has also been described as "the total structure of the mind" of a particular epoch or a class (Mannheim 1985, 56). From this perspective, everything that a person does—including their approach to historiographic research—is determined by their ideological position. The definition of ideology used in this article also differs from the Marxist tradition, which views ideology as a mask for political oppression (Marx 1978, 172–73). A self-consciously Marxist approach to historiography would seek to reveal the "real" material conditions of historical development, which stand in contrast to their ideological descriptions (Ge 2021; Xi 2021).

9. This article conflates ideological texts endorsed by the CCP with conservative socialist legal scholarship, since both genres of speech support establishment politics and are promoted by the same Party publications and websites. See, for example, Y. Chen 2020. More refined distinctions, however, could be drawn between individual texts. For instance, some Party documents are less liberal about universalist human rights language than Party-endorsed textbooks on jurisprudence. Compare *Chinafile* 2013 and *Falixue* 2020.

deputy secretary of a county-level CCP committee. Zhang's reinterpretation of China's modern history may be seen as an example of a pro-establishment legal scholar's response to the ideological demands in Xi Jinping's China. Zhang is deeply embedded in the Chinese party-state. During his tenure at Jilin University, Zhang held a high leadership role at the university's Party administration and in the Jilin judiciary, and he presided over national projects to review Chinese legal and political concepts (He et al. 2009). Whereas Zhang Wenxian (2006) promoted individual rights protections in the early 2000s, in his more recent writings, he has argued for the strengthening of the CCP and Xi Jinping's leadership (W. Zhang 2021). The above-mentioned CCP Central Committee's (2021) resolution on Party history, adopted in November 2021, solidifies the new narrative on Chinese history and the development of global Marxism. In contrast to the two previous CCP Central Committee (1945, 1981) resolutions on history, adopted in 1945 and 1981, the focus of the 2021 resolution is not on rectifying the "leftist" and "rightist" errors of past Party leaders. Whereas the rectification of errors suggests that Party leaders are fallible, the 2021 resolution seeks to portray an image of the historical inevitability of CCP rule and Xi's leadership. The 2021 resolution briefly acknowledges leftist and rightist errors in Party history, as well as the "catastrophic Cultural Revolution," but these errors are given less space compared to the two previous resolutions. Instead of focusing on the infighting and political disagreements within the Party, the 2021 resolution celebrates the Party's achievements and describes the substantive content of CCP ideology in ahistorical terms.

In addition to presenting modern Chinese history as a progress narrative, pro-establishment historiography emphasizes and endorses the uniqueness of Chinese culture. In *The Governance of China*, a seminal work in the study of "Xi Jinping Thought," Xi Jinping (2014) discusses the relationship between China and other civilizations through historical anecdotes. Citing Mencius, Xi explains that "[a]s early as over 2,000 years ago, the Chinese people came to recognize that 'it is natural for things to be different'" (284). While Xi accepts that "exchanges and mutual learning among civilizations can further enrich the colours of various civilizations," he also stresses that all "civilizations are equal" (284). For Xi, the lessons from history ultimately boil down to the need to reject radical foreign influences in China: "Having gone through over 5,000 years of vicissitudes, the Chinese civilization has always kept to its original root" (285).

In contrast to establishment historiography, liberal-minded Chinese scholars have sought to reform China's legal and political system in accordance with foreign liberal democratic models. Chinese liberals operate in a public sphere that has existed, to a greater or lesser extent, throughout the People's Republic. The space to criticize the party-state expanded considerably in 1990s and early 2000s with the loosening of ideological controls, the introduction of online publication platforms, and the globalization of the Chinese academy (Cheek, Ownby, and Fogel 2018, 108–9). As part of the liberal project, liberal intellectuals describe China's modern history more as a tragedy than a triumph (Tang and McConaghy 2018, 123–24). For instance, He Weifang (2012, 134), a professor at Peking University and a devotional liberal, contends that "China's premodern society ... failed to produce a legitimate and professionalized class of lawyers." The late Qing legal reforms "had ... key shortcomings" and "[w]ith the raise of Marxism ... law lost its autonomy ... and degenerated into legal anarchy" (137–38). At the same time, He Weifang insists that

liberal political thought has analogies in Chinese traditional thought. Reading the same text by Mencius as Xi Jinping (2014, 285), He Weifang (2012, 56) contends that Mencius “put human rights above sovereign rights, rejecting today’s popular principle of ‘noninterference in international affairs.’”<sup>10</sup>

He Weifang’s reading of Mencius conforms to his ideological leanings and intellectual background. He developed an appreciation for the rule of law and human rights through the study of the Chinese Cultural Revolution and its comparison to Western Enlightenment ideology in the 1980s (W. He 2012, xxv–xxvi)]. He’s respect for Western legal and political institutions was further strengthened through research visits to the University of Michigan and the East Asian Legal Studies program at Harvard Law School in the 1990s (xxvi–xxvii). He assumed a role of a liberal public intellectual during the early 2000s, once even contending that the extralegal nature of the Chinese party-state was a “violation of the [PRC] Constitution and law” (xxviii). Scholars believe that this and other acts of activism caused He Weifang a number of difficulties. He famously spent two years teaching in a remote town in China’s northwest (xxxi).

Other liberal-minded Chinese legal scholars highlight the historically contingent nature of Chinese legal institutions. From this perspective, Party leaders’ illiberal understanding of constitutionalism can be attributed to the need to enforce strong political leadership during the civil war with Kuomintang, the Chinese Nationalist Party (Lin 2009, 45–46). Since China is no longer in a state of emergency, the argument goes, it can now move toward liberal constitutionalism and strengthen the protection of individual rights and checks on government power (48). Historiography, therefore, demonstrates that existing political and legal institutions are not timeless and inevitable but that they can be changed (Gordon 1981, 1023–24). To be sure, the argument about the historically contingent nature of legal institutions also supports pro-establishment historiography. The most recent CCP Central Committee (2021) resolution on Party history argues that “[the] Party has always stayed grounded in China’s conditions and felt out a right path consistent with China’s realities.” From the conservative socialist perspective, China’s present political and legal institutions reflect its historical conditions better than any Western alternative.

The more politically explicit and ahistorical a liberal-minded historiographic critique of China’s leadership becomes, the more likely it is that it will be censored and its author sanctioned. Xu Zhangrun’s (2021) widely circulated essays on modern Chinese history offer a recent example of such censorship.<sup>11</sup> As is the case with He Weifang (2010, 2012), the liberal-minded Xu Zhangrun (2021) views modern China in tragic terms, characterizing the country’s recent turn toward increased political control as a potentially fatal setback for China’s modernization efforts. However, in contrast to He Weifang (2012), Xu (2021) presents his critique explicitly against Xi’s regime, without making use of ambiguous figurative language. Xu was dismissed from his chair at Tsinghua University Law School in 2020 after publishing his critical views (R. Guo

10. He Weifang’s (2012, 40) text was widely circulated on Chinese websites in the early 2010s. The text can still be found on the Internet (W. He 2010), but it has been removed from most Chinese websites.

11. Xu Zhangrun’s (2021) essays are also available as Geremie R. Barmé’s English language translations. Geremie R. Barmé, “Xu Zhangrun 許章潤 Archive,” *China Heritage*, <https://chinaheritage.net>.

2021). The more elusive He Weifang has not been dismissed from his position at Peking University, but he is less publicly active today than in the early 2000s (Minzner 2019). The circumstances of these two notable liberals reflects the turning tide of Chinese liberalism. Liberal critiques have been marginalized in China due to the economic and political crises in the West and the rise of Chinese nationalism (Tang and McConaghy 2018, 122) as well as the tightening of ideological controls in the Chinese public sphere (Hao and Guo 2020, 88).

The politically centrist mainstream of Chinese legal scholarship balances between the above-described liberal and conservative positions. The mainstream historiographic narrative proceeds from struggle to triumph, but it may also include a tragic element, which describes China's current political reality as much as a historical necessity as the people's choice. In Hayden White's (1973, 231) terms, a mode of emplotment for mainstream Chinese legal historiography can be described as romance. The tragic elements in this narrative refer to "destiny . . . apprehended as 'blind fate'" (85). This narrative structure follows a common developmentalist narrative, which holds that China's transformation, while impressive, "has been blocked by the actors that benefited from early growth" (World Bank 2017, 42).

With respect to their political views, centrist scholars seek nuanced positions between conservative and liberal agendas. For instance, Xia Yong (2014), a former director of the Institute of Law of the Chinese Academy of Social Sciences and a high-ranking official, has advanced a middle-of-the-road interpretation of Mencius's above-discussed writings. In Xia's view, Chinese "civil rights" are not the same as Western civil rights, but neither is the notion of popular sovereignty completely alien to Chinese culture. Xia (2014, 37) notes that "[i]n Mencius, the people are accorded to a far greater degree the subjective status to exercise judgment and make decisions themselves," and that "the key mission of benevolent government [is] the nurturing and education of the people." While Xia (2014, 83) acknowledges that "we will not find in the Chinese canon the words 'rights' or 'human rights' or the technical language of Western natural law and rights," he also argues that "we cannot deny that the Chinese tradition had its own concepts of natural law and natural rights." Xia's reading of Mencius is reformist but not radically so. Nevertheless, as conservative voices insisting on ideological orthodoxy grow stronger in Chinese legal academy, the mainstream balancing act has become increasingly difficult to maintain.<sup>12</sup> Xia Yong himself was purged in Xi Jinping's anti-graft campaign in 2016.<sup>13</sup>

In the view of some Chinese scholars, the tragedy of Chinese history lies in its unwitting acceptance of Western ideologies and, in particular, "neoliberalism." The late Deng Zhenglai (2014, 65), a forebearer of such critique, argued in the early 2000s that Chinese scholars had lost their ability for critical thought through the idealization of Western modernization theories. Deng's personal development turned him from a Hayekian defender of civil society to a critic of Western liberalism and an advocate of the localization of Chinese legal and political thought (ix–x, xxviii–xxix; see also

12. For an example of a conservative voice insisting on ideological orthodoxy, see Zhang Wenxian's (2021) recent text on "Xi Jinping Thought on the Rule of Law." As mentioned above, Zhang's (2006) writings in the early 2000s emphasized rights protections in moderately reformist terms.

13. Xia Yong (2014) was the head of the Chinese government agency responsible for the protection of state secrets. He was dismissed in 2016 for a "serious violation of discipline." See Liu 2016.

McCormick and Kelly 1994, 813). Similarly, Wang Hui (2009, xi), a prominent social historian and public intellectual (albeit not a legal scholar), maintained in the early 2000s that the enemy of China's development was Western "neoliberalism," which had ended China's "revolutionary century [and] ... self-reform." In his recent writings, Wang Hui (2020) has adopted a more triumphant narrative. In an essay on Lenin's legacy, he attacks the defeatist narrative on Chinese history (which he himself used to produce), arguing now that the Marxist revolution should be seen as continuous struggle, which has not yet come to its conclusion. Wang's newly found optimism supports the Party's attempt to narrate China's modern history as a national rejuvenation (CCP Central Committee 2021). Finally, a small number of Chinese "New Confucian" scholars have attempted to reform Chinese political thought on the basis of classical literary sources.<sup>14</sup> This branch of scholarship is discussed in the following section.

To conclude, ideological explanations are helpful for accounting for Chinese legal historians' motives, as is true of historiography elsewhere (White 1973, 24). Of course, legal historians themselves may not always agree with such explanations. Marxist historiography is committed to studying material historical relations, not their ideological representations (Marx 1978, 149). Similarly, the historical school of jurisprudence, which flourished in nineteenth- and early twentieth-century Europe, defined its project as the factual understanding of historical developments, including the formation of ideological viewpoints (Tamanaha 2015, 2240, 2258; Eldridge 2021, 203, 212).<sup>15</sup> Mainstream Chinese historiography has likewise attempted to take the form of a professionalized, non-ideological discourse (Zhongguo Zhengfa daxue falü shixue yanjiuyuan 2008, 591–96). Nevertheless, even those historiographic studies, which lack an obvious ideological project—say, a study on marriage and inheritance in China during the Qing dynasty—may be interpreted against the background of ideological explanations.<sup>16</sup>

## HISTORIOGRAPHIC LICENSE

The previous section sought to demonstrate that Chinese legal historians engage with historical materials in order to advance various ideological projects. This may be an unsurprising finding in a political regime, which defines its governance ideology based on a historiographic method (that is, historical materialism) (CCP Central Committee 2021; Xi 2021). What may be more unexpected about the uses of historiography is the relative freedom that the historiographic genre affords to Chinese legal scholars. This space was particularly obvious in the early reform era (R. Lin 1999, 160; Lü 2020, 181). It still has not disappeared entirely, although ideological space has become more constrained in Chinese universities in the past few years (Wong and Kwong 2019, 288; Hao and Guo 2020, 86–87; Yang 2021, 6).

14. See Q. Jiang 2013; Z. Yao 2016.

15. Scholars have noted that the European historical school was of little importance in China in the early twentieth century, and it was eclipsed by Marxist historiography in the latter part of that century. See D. Li 2017, 119.

16. See, for example, J. Zhang 1998.

Up until the late 1970s, CCP leaders and establishment scholars considered the borrowing of legal institutions from ancient Chinese and contemporary Western law a taboo (or a “forbidden zone” [*jinqu*, 禁区]) (Zhao and Liu 2019, 12). In the 1960s, Chinese historians were denounced for the mere suggestion that Confucian concepts could have been relevant to socialist China (Kahn and Feuerwerker 1968, 3). Such taboos were broken in historiographic research. Encouraged by a free-spirited discussion in a legal history seminar in 1979, Lin Rongnian (1980), a professor at Renmin University, published an article on the relevance of pre-revolutionary legal concepts to the socialist project. Lin’s substantive argument was akin to the Marxist legal historian E. P. Thompson’s (1975, 266) characterization of “the rule of law” as an “an unqualified human good.” In Lin’s view, the flourishing of exploitative classes depended on a legal system, which was characterized by objectivity and reasonableness rather than mere exploitation. Lin Rongnian (1980, 283) believed that elements of the pre-revolutionary bourgeois law could “be considered by the proletariat as a precious cultural heritage and . . . inherited critically.” Chinese legal scholars have later noted that Lin’s scholarship played a positive role in “invigorating the academic atmosphere” of the early reform era (Y. Guo 2018, 123).<sup>17</sup> Lin stood out among Chinese legal scholars as a promoter of socialist human rights (Svensson 2002, 248–49). In the 1970s and the 1980s, similar historiographic studies allowed Chinese legal scholars to “break through the constraints of political leadership, historical nihilism, and dogmatic and formulaic Marxism” (Lü 2020, 181).

Chinese legal historiography still accommodates a wider range of ideological arguments than other forms of legal scholarship, such as jurisprudence and doctrinal constitutional law. The historical perspective allows scholars to examine ideological doctrines in their socially contingent, historicized form. A striking example of this praxis is provided by Jiang Shigong (2014), a constitutional law scholar at the prestigious Peking University, who engages in theoretically iconoclastic, albeit politically conservative, constitutional, and historiographic research. In China, Jiang is a relatively prominent, but controversial, figure, whose staunch nationalism has been criticized by liberal-minded scholars (A. Li 2013; Zhu, Qu, and Zhai 2022, 136). Abroad, Jiang is one of the few contemporary Chinese legal scholars, whose views are closely studied and debated (Zhu, Qu, and Zhai 2022, 136).<sup>18</sup>

Jiang Shigong advances politically meaningful interpretations of history, not all of which conform to Party ideology (Davies 2019, 46–47). Jiang (2014, 208) has argued that “communism represents an idiosyncratic episode in China’s history, when the Chinese people were under existential threat and became desperate for a gospel of salvation.” In his view, “communism remains grounded in Judeo-Christian linear temporality,” where “it merely replaced redemption theology with historical determinism to fulfil the internal spiritual needs of the individual” (207). Building on these observations, Jiang (2014, 207; emphasis in original) argues that “communism is merely the counterpart of liberalism” and, consequently, “perhaps intrinsically

17. Chen Jianfu (1999, 50–51) points out that the historiographic debate was a consequence of reformist political slogans at the time.

18. For foreign studies on Jiang Shigong’s constitutional views, see Backer 2014; Brang 2020. Foreign interest in Jiang’s scholarship has been partly provoked by Jiang’s engagement with Carl Schmitt. See Brang 2019; Mitchell 2020; Xie and Patapan 2020. As is the case with Schmitt (Lievens 2017), and many other scholars, including Hayden White (1973), Jiang portrays historiography as a field of struggle.

incompatible with the *spirit* of the Chinese people.” Jiang further maintains that “traditional Confucianism, not Marxist ideology, is the substantive spiritual pillar for the CCP” (208).

Jiang Shigong’s heterodox statements (described above and which, it must be noted, were intended for a foreign journal) illustrate how Chinese legal scholars use historiography to demonstrate the historical contingency and contemporary malleability of ideological arrangements. To be sure, Jiang may enjoy a more extensive ideological license than many other Chinese scholars because of his staunch conservatism, government connections, and appointment at the elite Peking University. Nevertheless, the historiographic genre has enabled various Chinese legal scholars to offer frank assessments about the nature of the Chinese party-state. As mentioned above, the historiographic genre has allowed Chinese legal scholars to criticize Chinese-style constitutionalism, which conflates constitutionalism with “democratic governance,” instead of promoting Western-style checks and balances on government power. According to Lin Laifan (2009, 46–48) from Tsinghua University, the Chinese approach to constitutionalism originated in the “political propaganda” of the civil war era, which now needs to be rethought. In a similar vein, Zheng Chengliang (2014, 70) from Shanghai’s Jiao Tong University has argued that “the rule of law” (*fazhi*, 法治) cannot be meaningfully realized through China’s ideologically outdated Marxist-Leninist dictatorship. He believes that a Roman-style transitional dictatorship may be plausibly used to safeguard the rule of law in a state of emergency (66–69). A Marxist-Leninist dictatorial government, in contrast, is intended to stand above the law permanently and is therefore necessarily incompatible with the rule of law.

It is possible to find a number of similar examples of the historiographic license. A study on the autonomy of Chinese universities highlights the historical wisdom of Republican era universities, which protected academic staff against political interventions, suggesting that Party leadership of contemporary Chinese universities should be reconsidered (Bao and Xue 2019, 202). An article on the CCP’s internal rules calls China’s experience with Marxism tortuous and describes its one-party system as having both negative and positive aspects (Ye 2021, 18). A study on Confucian “rites” (*li*, 礼) and late Qing, early Republican constitutionalism describes China’s present constitution as unsatisfactory and argues that it cannot bring about a value consensus in contemporary China (X. Ma 2021).

Criticizing Party leadership through concepts such as “constitutionalism” and “the rule of law” violates the Party’s explicit ideological guidelines (*Chinafile* 2013). Nevertheless, whereas direct criticism of the Chinese party-state and its guiding ideology may have serious consequences for a scholar’s career, CCP censors have tolerated even radically reformist ideas when they have been made through historical scholarship and historical materials. This is the case even though “historical nihilism,” or the rejection of “the accepted conclusions on historical events and figures,” is formally prohibited (*Chinafile* 2013). The most far-reaching proposals have been made within the so-called New Confucian movement, which aims to revitalize political Confucianism in China (Angle 2018, 86). Jiang Qing (2013), a prominent mainland New Confucian scholar, advocated the establishment of a tricameral legislature in China in the early 2000s. The houses of this new legislature would have represented the

general public, the Confucian elite, and the descendants of Confucius himself (67). Jiang presented his proposal as explicit critique of Sinicized Marxism (65), and his audience understood his message as a rejection of the CCP's revolutionary heritage (Angle 2018, 90; Deng and Smith 2018, 305).

The reception of Jiang Qing's (2013) version of political Confucianism in China has been largely critical, and his scholarship poses no realistic political risk to the CCP (Angle 2018, 87; Deng and Smith 2018, 301–2). Nevertheless, Jiang's proposals might have been perceived as a serious ideological transgression had they not been anchored in quintessentially Chinese historical sources.<sup>19</sup> Jiang's scholarship has been discussed even in the tightened political climate of Xi Jinping's China (Tang 2018, 131).<sup>20</sup> Rather than repressing New Confucianism, the Chinese party-state has assimilated aspects of it, such as the cultural critiques of Western liberalism and the emphasis on social harmony (Deng and Smith 2018, 304–6).

The differences between the various genres of Chinese legal scholarship are most obvious when ahistorical statements and historical narratives clash within a single text. Chinese legal historians commonly attest to the importance of Marxist historical materialism in their ahistorical theoretical statements about historiography, which are typically found in the methodological parts of research outputs (Han 2003, 128; Zhongguo Zhengfa daxue falü shixue yanjiuyuan 2008, 573). However, when these texts move on to describing the actual development of Chinese legal historiography, they sometimes end up casting doubt on the validity of Marxist historical materialism. For instance, when narrating the development of Chinese legal historiography in the past few decades, some Chinese legal historians contrast historical materialism unfavorably with the more recent methods of legal historiography, such as historical jurisprudence, sociology, and cultural studies (Han 2003, 132; Zhongguo Zhengfa daxue falü shixue yanjiuyuan 2008, 593, 596).

Even thoroughly vetted university-level textbooks contain slippage about Marxist historical materialism. *Falixue* (2020, 56), a university-level textbook on jurisprudence endorsed by the Chinese Ministry of Education as part of the Marxist textbook series, asserts that “the basic content and nature of the legal system are always compatible with the relations of production of the society in which it is located.” The textbook also asserts, in the same theoretical register, that “in the history of legal development there have been four successive historical categories of legal systems: the legal systems of slave societies, the legal system of feudalism, the capitalist legal system and the socialist legal system” (56). However, when the textbook moves on to describing the historical development of Chinese legal thought, it argues that China should “absorb and carry forward reasonable ideas from traditional legal thought” (215). According to the textbook, such ideas include: (1) “people-oriented thinking and democracy,” which “can well become a traditional ideological basis for modern civil rights and democracy”; (2) “the ancient rule of law conception”; and (3) “the idea of governing by virtue,” which “has still positive significance for moral education in a rule of law society as

19. For instance, Carl Minzner (2019) notes that a scholar in Hubei was suspended for merely commenting on the removal of Xi Jinping's term limits as state president.

20. Other New Confucian Chinese scholars, such as Yao Zhongqiu (2016, 201), have sought to Confucianize Chinese socialism, albeit in less radical terms than Jiang Qing (2013).

regards promoting law-abiding behavior and preventing crimes” (214–15). In the legal theoretical mode, the textbook emphasizes historical discontinuities through Marxist historical materialism; in the historical mode, the textbook makes a case for historical continuities without references to Marxism.

In the 2000s, prominent Chinese legal historians were critical of even superficial references to Marxist historical stages in legal history textbooks, noting that a majority of Chinese historians at the time rejected such categories (*Zhongguo Zhengfa daxue falü shixue yanjiuyuan* 2008, 596). More recently, conservatively orientated Chinese legal scholars have observed, and criticized, the failure of mainstream Chinese legal scholars to conform historiographic narratives with Marxism. Professor He Zhipeng (2021, 25) of Jilin University has noted that, while many Chinese scholars acknowledge dialectical and historical materialism in their theoretical and methodological statements, “they can easily get lost in traditional Western theories” when they start describing specific historical events. The discrepancy between ahistorical theoretical statements about Marxism and historical narratives suggests that Marxism has not been as thoroughly adopted throughout the Chinese legal academy as Party ideologues may wish or insist. In some instances, the discrepancy between the two registers may be intentional. Paraphrasing Joseph Levenson (1965, 85–86), it can be noted that, for many Chinese legal historians, Marxism has become a “(merely) historically significant” ideological strand. Even when a Chinese legal scholar is not motivated by a self-conscious agenda to undermine conventional ideology, the ability to produce non-orthodox historiography establishes alternative historical narratives, which may ultimately cast doubt on central aspects of Party ideology.<sup>21</sup>

## RHETORICAL TECHNIQUES OF LEGAL HISTORIOGRAPHY

Politically subversive legal historical research can be seen as a subset of Aesopian language, which creates prohibited meanings through ostensibly innocuous surface speech (Savinitch 2005, 109). The term “Aesopian language” has been used to describe dissident rhetoric in nineteenth-century Tsarist Russia (108). Liberal and Marxist political dissidents in Tsarist Russia evaded censorship through figurative language, concealing their political messages, for instance, through suggestive synonyms and indirect speech (111, 114). In contemporary China, liberal-minded and centrist legal scholars make use of similar rhetorical strategies as nineteenth-century Russian political dissidents. Chinese academic discourse has been marked by conceptual obliqueness, which makes use of seemingly inoffensive academic jargon in order to deliver (moderately) critical messages (Cheek, Ownby, and Fogel 2018, 111). Chinese constitutional lawyers speak of “the independent exercise of judicial and prosecutory power” (*duli xingshi shenpanquan, jianchaquan*, 独立行使审判权, 检察权) instead of the taboo topic “judicial independence” (*sifa duli*, 司法独立) (Bandurski 2015). They also refer to “governing in accordance with the constitution” (*yixian zhizheng*, 依宪执政) instead of the taboo term “constitutional governance” (*xianzheng*, 宪政) (Bandurski

21. As the following section demonstrates, Zheng Chengliang’s (2014) scholarship does not appear to be motivated by subversive politics, and yet it problematizes key aspects of CCP ideology.

2015). Such strategies keep reformist aspirations alive in a politically non-confrontational manner. Nevertheless, the subversive uses of these terms and other euphemisms are limited. In order to be politically acceptable—and publishable—euphemisms have to rely on language, which is tolerated by ideological censors (Perelman 1969, 467). The above-described Chinese language terms were launched and promoted by Party ideologues as alternatives to “Western” ideological concepts (Bandurski 2015), and their use can be seen to signal submission to the Party’s project to indigenize Chinese legal thought.

While all fields of legal scholarship can accommodate some amount of Aesopian language, historiography is particularly conducive for subversive rhetorical techniques. This is because a central feature of Aesopian language—figurative speech—plays a more prominent role in historiography than in other fields of law, such as jurisprudence and doctrinal constitutional law. Linguistic historians have argued that figurative speech forms “the basic structure of historical explanations” (White 1975, 53; Kellner 1989, 285). In order for historical narratives to be meaningful at all, historical concepts and events must stand figuratively for something that their present-day readers recognize (White 1975, 49; Kellner 1989, 10–11). As is the case with Aesopian language, the figurative nature of historical narratives is seldom made explicit in historiography, which instead strives to give its audience an impression of objectivity (White 1975, 64). Both Aesopian language and historiography, therefore, create hidden levels of meaning under ostensibly innocuous surface texts using metaphors, metonyms, and other tropes of figurative speech (White 1975, 34, 58; Savinitch 2005, 109, 118).<sup>22</sup>

To be sure, metaphors can be part of literary expression in all forms of legal discourse (Goodrich 1987, 87, 180). For instance, Zhang Wenxian’s (2021, 5) text on Xi Jinping Thought on the Rule of Law identifies practice as “the mother” (*mu*, 母) of theory. This metaphor symbolizes the foundational position of practice—and China’s national realities—in the formulation of Xi Jinping Thought on the Rule of Law. At the same time, this metaphor is not Aesopian. Zhang Wenxian’s text promotes and celebrates Xi Jinping Thought on the Rule of Law through figurative language instead of seeking to subvert it through Aesopian speech. The Party pays close attention to the uses of ideological language in public discourse, censoring subversive uses of language through a variety of institutionalized controls (Link 2013, 274, 317, 332). Scholarship on sensitive aspects of Chinese law and legal ideology invites heightened scrutiny from Chinese sensors (Hao and Guo 2020, 90–92). Consequently, Chinese legal scholars working within ideologically sensitive fields of law, such as jurisprudence and doctrinal constitutional law, face constant pressure to reproduce and advocate the ideological apparatus of the Chinese party-state (Hao and Guo 2020, 90–92). This makes it difficult

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22. The classification of rhetorical tropes is a controversial topic in rhetorical theory. Hans Kellner (1989, 232) points out that since the renaissance it has been conventional to distinguish between four “master tropes”: the metaphor, the metonymy (a figure of speech that reduces something to its part), the synecdoche (a figure of speech that substitutes something for something else), and irony (a figure of speech that negates its literal meaning on the figurative level). For White (1973, 34), the metonymy, synecdoche, and irony are kinds of metaphor. These figures of speech implicitly compare something with something else, although they differ from one another in the types of reductions and integrations, which they cause on literal meanings.

to use Aesopian devices (such as irony) to criticize and subvert contemporary Party ideology in ideologically sensitive fields of law. Chinese legal scholars have tellingly observed that Chinese jurisprudence constitutes little more than “political lessons in law schools” (Zhu, Qu, and Zhai 2022, 131).

Legal historical narratives can distance themselves more easily from political sensitivities than texts that explicitly refer to contemporary Party ideology. This distance provides legal scholars various opportunities for Aesopian figurative speech. Aesopian speech is apparent, for instance, in He Weifang’s (2012) text on Mencius, which spins various historical narratives into a highly suggestive, but ultimately ambiguous, account of the legitimacy of the Chinese party-state. Among other things, He Weifang describes Mencius’s “predicament about how to restrict monarchical power,” stating that “this problem . . . has remained almost unchanged in modern time” (43). According to He, the Chinese “simply do not have a means to restrict the power of the top leader” (43). He also introduces Mencius’s views on the Mandate of Heaven—the ruler’s divine right to govern—and states that, for two millennia, China did not develop a means for resolving challenges against a ruler (46–49). While He’s text does not directly challenge the CCP’s monopoly of power, its historical analogies appear to be intended as liberal-minded critique of Party ideology. This impression is strengthened by the humorous and irreverent tone of He Weifang’s text, which creates an emotional distance between the author and Party ideology.

In addition to suggestive metaphors, Chinese legal historiography makes use of an Aesopian device, which can be called “an open list.” An open list exhibits facts or thoughts leading to a certain conclusion, which is left open in the text (Savinitch 2005, 116–17). For example, Lin Laifan (2009) sets out a suggestive sequence of historical events and arguments in his above-mentioned history of Chinese constitutionalism. Lin first describes the gradual disassociation of Chinese “constitutionalism” with liberal democratic checks on government power and the subsequent association of “constitutionalism” with the Marxist-Leninist concept of people’s democracy (44–45). Lin explains these developments as the consequence of political mobilization efforts during the Chinese civil war. He then argues that the political needs in contemporary China have changed from the needs during the Chinese civil war (48). Today, it must be determined how constitutionalism can be used to restrict public power and to protect basic rights. Lin concludes his article by noting that that this is “a historical topic that China cannot avoid” (48). Lin’s article takes its audience to the brink of adopting a liberal democratic view of constitutionalism without, however, taking the last step into political dissidence.

As described in the previous section, Aesopian language has enabled Chinese legal historians to “draw lessons” from history, suggesting, for instance, a greater scope for political rights and Western-style constitutionalism in contemporary China and calling to question specific modes of Party leadership. It is unclear from these texts what exactly is being proposed and how closely analogous their authors see historical precedents and contemporary China. What kind of checks should be imposed on the Party’s uses of power (L. Lin 2009; Zheng 2014)? Should the Party step out of universities altogether, or should its role there just be slightly adjusted (Bao and Xue 2019, 202)? Is Party leadership justified on the basis of Chinese traditional notions of popular sovereignty, or does the Party risk losing its “Mandate of Heaven” (Xia 2014, 83)? No clear answers to

such questions are available. Aesopian language is ambiguous by design (Savinitch 2005, 114).

The effectiveness of Aesopian figurative speech in Chinese legal historiography is enforced by a rhetorical trope, which is common in Chinese historical texts: the use of historical parables to speak truth to power. Chinese court historians engaged with historiography not only, or even primarily, to record historical events but also in order to derive moral lessons from historical precedents (Dirlik 1978, 7–8; Hartman 2019, 40). Historical parables criticizing the present were so common in pre-modern China that they formed a recognizable literary genre (Hartman 2019, 46). The themes of these parables still appear relevant: “[T]he sovereign should control the palace’s irregular exercise of imperial authority, delegate power only to carefully chosen civil officials, accept remonstrance, limit foreign entanglements, and generally exercise benevolent government” (45). A modern example of this praxis is provided by Professor Zhang Jinfan’s lectures to the Chinese leadership in the 1980s and 1990s, which are recalled in retrospectives on Chinese legal historiography (*Zhongguo Zhengfa daxue falü shixue yanjiuyuan* 2008, 591; see also Xu 2018).<sup>23</sup> In a 1986 lecture to the CCP Central Secretariat, Zhang told Party leaders an anecdote about a virtuous judge in Tang dynasty. The Tang emperor had ordered all officials who had polished their resumes to be executed. A dishonest official was caught and tried. In the trial, a judge sentenced the official to be exiled rather than executed. The displeased emperor summoned the disobedient judge to be heard. The judge spoke: “The law is referred to as the publicized regulations of the state, and it is made to win the trust of people. What Your Majesty has said is out of your personal joy or anger; therefore, it is not right if people are killed because Your Majesty is angry” (J. Zhang 2015, 183). In the 1986 lecture, the Communist Party leaders were supposedly intrigued by Zhang’s anecdote, asking him whether the judge had been executed (Xu 2018). “No,” said the legal historian, the emperor had not only spared the virtuous judge the death penalty but also made the judge his confidant (Xu 2018). Zhang later summarized the lesson of this anecdote as follows: “[E]ven if the emperor had the power of killing and enforcing punishments at will, as long as the cases were brought into the judicial processes and were dealt with by the impartial and fair-minded judges, restraints could be imposed upon the imperial powers by the application of the law” (J. Zhang 2015, 184).

The anecdote is potentially figurative on various levels. First, the anecdote presents an analogy between the historical context of China’s absolutist rulers and the contemporary Chinese party-state. Second, the retelling of the anecdote casts Zhang Jinfan as a virtuous court historian in his own right. Third, the anecdote uses Zhang Jinfan as a stand-in for all Chinese legal historians, suggesting that Chinese legal historiography, in general, ought to make use of historical analogies to influence Chinese politics (*Zhongguo Zhengfa daxue falü shixue yanjiuyuan* 2008, 591). Fourth, the anecdote suggests that CCP leaders should embrace critical-minded, but ultimately loyal, historians. Audiences of the anecdote will know that Zhang was an early advocate of the view that the People’s Republic of China should engage with human rights

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23. One of China’s predominant legal historians, Zhang Jinfan, taught at the China University of Political Science and Law in Beijing and, among other things, served as the editor-in-chief of a ten-volume work on Chinese legal history (He et al. 2009, 77).

(Svensson 2002, 248–49). To be sure, figurative uses of historiography are not unique to China and other illiberal regimes. Legal historiography in liberal democratic countries commonly seeks to demonstrate the historical contingency of present legal and political arrangements through historical analogies (Gordon 1981, 1019; Barzun and Priel 2015, 854). Moreover, as pointed out above, Chinese historiography can be conducted without an obvious ideological take-home (although, as also mentioned above, all texts can be read against ideological narratives). There is also the argument that all historiography is ultimately figurative, regardless of its political context (White 1975, 53; Kellner 1989, 285). From the perspective of rhetorical theory, neither the figurative use of language nor historiography are intrinsically critical. Historical metaphors can be, and often are, used as apologies for power (White 1973, 25).

Nevertheless, it is also true that politically heterodox Chinese intellectuals rely more on Aesopian language than their colleagues in liberal democratic countries. The difference between the liberal democratic and Chinese settings becomes obvious when Chinese legal historians overstep their historiographic license.<sup>24</sup> As pointed out above, one of the most prominent recent instances of ideological censorship in China concerns Xu Zhangrun's (2021) essays on modern Chinese history. Xu's essays are historiographic—in fact, they are written in anachronistic traditional Chinese—but their arguments are poignantly ahistorical. While Xu (2021) makes use of figurative language (for instance, using a pun to compare Xi Jinping to Mao Zedong), his essays do not present historical events as past incidents, which are only metaphorically relevant to present-day China. Instead of cloaking his critical views in suggestive figurative language, Xu spells out the contemporary relevance of historical concepts and events. For instance, he argues that the privileges of CCP cadres are not merely reminiscent of the emoluments permitted to the ruling Manchu families during the Qing dynasty but also that they actually “replicate” (*chengji*, 承继) them. Similarly, Xu contends that President Xi Jinping's prominent role in Chinese media is not merely analogous to Mao's personality cult but also a personality cult in its own right. Xu could have made use of the historiographic fig leaf and given the impression that he attempted to conceal his political messages. His transgression was to openly defy such acts of modesty.

Finally, besides its various ideological uses, historiography seems to appeal to Chinese legal scholars because it provides a means to rise above partisan politics (Lin 1999, 160; Y. Guo 2018, 123). Figurative speech not only helps legal historians conceal their true political intentions, but it also enables legal scholars to subtly question ideological doctrines—which they may support in other social contexts—without having to negate these doctrines explicitly. Importantly, ideological questioning need not be informed by a self-consciously held reformist agenda. For instance, it seems unlikely that Zheng Chengliang's (2014, 70) above-described commentary on the outdated nature of China's one-party dictatorship was motivated by radical politics. Zheng is an establishment figure, who served as the dean of the Shanghai Jiao Tong

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24. The difference between the political settings of historiography can also be observed from a historical perspective. Arif Dirlik (1978, 16) notes that “the study of Marxist historiography in the thirties, when history was free of official direction if not oppression, reveals considerable diversity in the understanding of the materialist conception of history and its application to Chinese history.”

University Law School and as Jiao Tong University's deputy Party secretary.<sup>25</sup> In his doctrinal scholarship, Zheng Chengliang (2009, 2015) has consistently sought to strengthen Party leadership under the principle of constitutionalism. Instead of advocating a radical reform agenda, Zheng may have been genuinely puzzled about whether and how CCP governance could be made non-dictatorial. As a consequence, Zheng (2014, 70) concluded his conceptual history with the observation that creating a new, practically workable constitutional order would “require hard work from the entire Party and society”.

In conclusion, the historiographic genre of Chinese legal scholarship appears to offer Chinese legal scholars (and even some CCP ideologues) a license to establish distance to their own ideological beliefs. This conclusion conforms to earlier studies on Chinese historiography. As Joseph Levenson (1965, 85–86) and Arif Dirlik (1978, 17) observed in their seminal works on modern Chinese history, Marxist historiography provided Chinese intellectuals the means to abandon the basic concepts and values of their traditional culture. The same can now be said of Marxism, whose theoretical premises have been ignored in the diachronic parts of much recent Chinese legal historiography (if not in theoretical statements about history). The CCP Central Committee's (2021) recent resolution on Party history, therefore, can be seen as an effort to stop and reverse this trend. Nevertheless, it is notable that Marxism can be turned into (mere) history even without a clear alternative ideological agenda. Historiography thus supports Chinese legal scholars' efforts to rise above received ideological doctrines without compelling them to profess, or even articulate, alternative ideologies. The project to transcend existing ideological paradigms may also explain why legal historiography has not become a major point of ideological contestation in contemporary China.<sup>26</sup>

## CONCLUSION

This article has sought to demonstrate that legal historiography facilitates a wide array of ideologically meaningful acts in contemporary Chinese legal scholarship, including attempts to rise above received ideological doctrines. CCP leaders, Party ideologues, and establishment scholars defend the Chinese party-state through historiography, whereas heterodox scholars engage with historical materials in order to reform or undermine the Party's ideological orthodoxy. In many instances, the appeal of historiography can be attributed to its figurative nature. On the one hand, the figurative nature of historiography allows scholars to convey forbidden meanings through innocuous surface texts. On the other hand, figurative language enables scholars to question ideological doctrines without having to explicitly oppose these doctrines. The latter aspect of historiography is particularly useful for those Party ideologues and legal scholars who harbor doubts about the applicability of Marxist-

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25. “Zheng Chengliang” (郑成良), *SJTU Koguan School of Law*, <https://law.sjtu.edu.cn/flfs/20210226/193.html>. Party secretary is the highest political office in a Chinese university. A deputy Party secretary assists the Party secretary. See Jiang and Li 2016.

26. For points of contestation in contemporary Chinese legal studies, see Zhu, Qu, and Zhai 2022. For an example of earlier ideological contestation in the historiographic genre, see W. Yao 1968.

Leninist ideological doctrines to contemporary China, but who are unwilling to articulate these doubts clearly or to promote alternative ideological doctrines. Such ideologues and scholars are also no doubt more willing to tolerate criticism of Marxism-Leninism when this is presented through Chinese historical sources than through foreign political ideologies.

To be sure, there is nothing inevitable about the extent of Chinese legal scholars' historiographic license. This license exists by the grace of CCP censors. In the pre-reform era, even the most innocuous-seeming historical analogies were forcefully condemned by the political establishment. In recent years, the license has been shrinking again due to the repression of ideologically heterodox voices in China. The need for such repression reflects Chinese intellectuals' skepticism toward orthodox Party ideology. At the same time, the fact that the Party has not eliminated ideological critiques entirely from legal historical scholarship—at least for now—suggests that some members of the Party leadership tolerate, and perhaps even appreciate, efforts to turn the CCP's current ideological project into history.

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