

China's *Marbury*: Qi Yuling v. Chen Xiaoqi - The Once and Future Trial of Both Education & Constitutionalization

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Robert J. Morris*

I. INTRODUCTION

"Education," as two comparative scholars of Greater China (PRC, Hong Kong, Taiwan) write, "is the most important factor in the suppression of traditional political orientations."¹

"[E]ducation is a very, if not the most[,] important factor affecting political participation. *Once education is controlled for*, the influence of practically all other variables either disappears or becomes attenuated. This finding attests to the significant impact of socio-economic modernization as represented by education on political participation."²

The importance of *controlling for education* is apparent with the case *Qi Yuling v. Chen et al.*, hereafter the *Qi* case, the 2001 Supreme People's Court (SPC) ruling that recognized the constitutional right of a PRC citizen to education, name, identity, and reputation.³ In a summary announcement in December 2008, the SPC abolished the case, yet interest in the saga of the case persists.

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¹ KUAN HSIN-CHI & LAU SIU-KAI, *Traditional Orientations and Political Participation in Three Chinese Societies*, 11 J. CONTEMP. CHINA 297, 308 (2002) (emphasis added).

² *Id.* at 311.

³ This article views the "education" aspect of the case to be the most important and enduring. It is, of course, entirely possible that in the process of time, the other aspects might come to loom larger than education.

Qi utilized the 1982 PRC Constitution as a source of law but not as a tool of invalidation of another law or action of the government. Although the SPC itself did not refer to the 1803 US Supreme Court case of *Marbury v. Madison*,⁴ PRC and other legal literature has frequently, sometimes uncritically, touted the *Qi* case as “China’s *Marbury*.” During its seven-year life, *Qi* aroused the attention of many constitutional scholars, prompting many to compare it to *Marbury* (and incidentally to the writings of James Madison) for the proposition that this might be the watershed of China’s new judicial review, if not separation of powers, and therefore a major step toward rule of law. Such hopes never materialized, but so frequent was this perception that reference to *Marbury* in discussions of *Qi* became *de rigeur* in virtually any discussion of the latter. By invoking *Marbury*, the discussions have focused attention on the courts themselves, or the perceived quirkiness of *Qi* or the quirkiness of *Marbury*. This article does not disagree with that focus but suggests additional possibilities that have to do with education itself and how it is “controlled for.”

Marbury was a seemingly simple case.⁵ Certain officials who had been promised titles of office under the previous President sued when the new administration did not produce such titles. They wanted the US Supreme Court to issue a writ of mandamus to compel the new administration to provide their titles. Their lawsuit was an original lawsuit in the Supreme Court, not an appeal from a lower court. Chief Justice John Marshall’s opinion held that under both the Constitution and the judiciary statutes, the Supreme Court had only such original and appellate jurisdiction as specifically granted to it in the law, and this was not such a case. The statute under which Plaintiffs sued, Marshall held, granted his Court appellate power in this case, but that statute was unconstitutional

⁴ *Marbury v. Madison*, 5 U.S. 137 (1805). Hence, the *Qi* case does not satisfy Özüçü’s definition of comparative law as the “use of a foreign solution by a domestic judge either in its entirety or as a guide to interpretation.” See ESİN ÖRÜCÜ, *THE ENIGMA OF COMPARATIVE LAW: VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY* 79 (Martinus Nijhoff Publishers, 2004). It is, however within the ambit of the use of comparative law by legal scholars. The case generated interest in US legal circles. See, e.g., Lingyun Gao, *What Makes a Lawyer in China? The Chinese Legal Education System after China’s Entry into the WTO*, 10 WILLAMETTE J. INT’L L. & DISP. RESOL. 197, 207 (2002).

⁵ For some general comparative background theory for the following discussion, see CEDRIC B. COWING, *THE AMERICAN REVOLUTION: ITS MEANING TO ASIANS AND AMERICANS* (1977).

because it contravened the Constitution. The court thus declined to issue the mandamus, but along the way, and this is the key point, it took upon itself the power of review to “say what the law is.” In a masterful stroke, Marshall thus struck down a statute passed by Congress. He invested his court with enormous power but avoided immediate criticism, and perhaps disobedience by the President, by putting his holding in such a way as to deny his own court the power to act *in this particular case* — it could not act under an unconstitutional statute. And perhaps most significantly for its present comparison to *Qi*, Marshall positioned his court *as the principal educator on the law*. “To say what the law is” is to assume the position of the oracle. *Marbury* thus passed instantly into legend as *the* icon of (1) judicial review by an independent judiciary, (2) balance-of-powers, (3) checks-and-balances, and (4) the rule of law. Its name has been cited as shorthand for these principles ever since. Today it carries much more symbolic weight than its seemingly simple text and story would appear to admit.

The comparison to *Marbury* was probably overwrought and inapt. It could be argued that the invocation of *Marbury* in the literature⁶ served merely to create a semblance of legitimacy by a kind of “name-dropping,”⁷ in a situation that was not apposite. In the United States there are no general or constitutional rights to name or reputation. *Qi* was a case of real controversy.⁸ The literature notes the consistency of the PRC Constitution and statutes with the international covenants on the question of “legal personality.”⁹ Even so, the subject of the case drew less attention than the fact of

⁶ *Marbury* is usually written 马伯里诉马迪逊 in Chinese, which sets forth a history from a PRC perspective. See 彭娟 & 饶艾, 司法审查探源, 比较法研究, Peng Juan & Rao Ai, *si fa shen cha tan yuan, bi jiao fa yan jiu* [Inquiry into the Origins of Judicial Review] 12 J. COMP. L. 194, 194-96 (1998).

⁷ 强世功, 宪法司法化的误区, 法治在中国 185 (梁治平 编, 2002), Jiang Shigong, *xian fa si fa hua de wu qu, fa zhi zai zhongguo* [Misleading Discourse of Constitutional Adjudication] RULE OF LAW IN CHINA 185 (2002).

⁸ See, e.g., Georg Vanberg, *Abstract Judicial Review, Legislative Bargaining, and Policy Compromise*, 10 J. THEORETICAL POL. 299, 301 (1998); Robert Clinton, *Game Theory, Legal History, and the Origins of Judicial Review*, 38 AM. J. POL. SCI. 285, 285-302 (1994) (discussing the “game theory” model); 杨子慧, 再论具体法规审查, 辅仁法学, Yang Zi Hui, *zai lun lu ti fa gui shen cha, fu ren fa xue* [Revisiting the Investigation of Concrete Legal Rules Parts] 31 FU JEN L. REV. 218 (2005), 32 FU JEN L. REV. 181 (2006) (regarding the important concrete/abstract dichotomy).

⁹ For the discussion and sources assembled in Fernando Volio, see, e.g., Fernando Volio, *Legal Personality, Privacy, and the Family*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 185-208 (Louis Henkin ed., Columbia University Press, 1981).

the SPC asserting itself institutionally and using the Constitution to do so. Professor Wang Zhen-min argues persuasively that there is no good reason why the PRC Constitution should not be cited and used in litigation.¹⁰ There are at least three possible understandings of the *Qi* case and its (dis)similarity to *Marbury*. They are:

A. There is no true similarity — the invocation of *Marbury* is a sham designed to lend credence and legitimacy to a “showcase” litigation in order to provide the illusion of “judicial review” and the “rule of law” by allusion to a famous case. This perspective accords with the view of those who argue that the SPC is not independent but merely a puppet of the Chinese Communist Party (CCP);

B. *Qi* resembles what some describe as vertical federalism (rather than a horizontal separation-of-powers) set up by *Marbury* in American judicial review. By dealing with “local” or provincial Shandong courts, the “national” SPC undertook no action that threatened any of its co-equal agencies such as the CCP, the National People’s Congress (NPC), or its Standing Committee (NPCSC). In other words, *Qi* verified the power of the central government to deal authoritatively with the provinces; *and/or*

C. *Qi* represents a true step towards the independence of the SPC and other courts on various levels, in terms of negotiation of power and status of these entities. This case evidences the trend toward greater “political diffusion” and a position of “high equilibrium” for the SPC, according to the paradigm outlined by Tom Ginsburg,¹¹ for the expansion of judicial power, the increase of judicial legitimacy, and the gradual deepening of a truly constitutional order.

Is this the kind of idea intended to be compared when *Marbury* and *Qi* are compared? Another possible model is the independent Council of Grand Justices (大法官会议) (CGJ), Taiwan’s constitutional court, several decisions of which are relevant here.

¹⁰ 王振民, 我国宪法可否进入诉讼, 法商研究 28, 30 (1999), Wang Zhen Min, wo guo xian fa ke fou jin ru su song, fa shang yan jiu [*Does Our Constitution Have Access to Litigation?*] 16 STUD. L. & BUS. 28, 30 (1999) (“The Constitution itself contains no clause manifestly prohibiting its application in litigation.” Arguing that this meaning is implied in the 司 of 司法, the “administration of the law”).

¹¹ TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) (U.K.).

Interestingly, some PRC legal scholars have viewed this CGJ model as the one which the PRC should adopt and integrate, including the publishing of dissenting opinions, as its judicial model.¹² Recently, Professor Chen Hung-ye of the University of Hong Kong, after an extensive review of the procedures and powers of the Taiwan Council of Grand Justices, has written: “In my view, we ought to conduct extensive studies on the theory and practice of how the courts of Taiwan, Germany, and other continental law countries apply constitutional provisions, and through such analysis consider future developments which the courts of our country can follow when citing or applying aspects of the constitution (我认为, 我们应该对台湾地区和德国等大陆法系国家的法院适用宪法条文的理论和实践作深入的研究, 从而思考我国法院未来在援引或适用宪法方面应走的道路).¹³ The seeming “adoption” of *Marbury* may be a back-door approach to advocating adoption of the CGJ system, without any explicit acceptance.¹⁴ The resemblance of the Taiwanese system and cases in the US system is commonly remarked on, but does *Qi* really warrant such a comparison? The abolition of the *Qi* case in 2008 may have been a response to these kinds of possibilities. *Qi* remained good law for seven years when it was constantly referred to as “China’s *Marbury*.” Even after its demise, the case continues to generate discussion about the role of the courts and the constitution. The comparative use of *Marbury* forms the theoretical heart of this article.

¹² PRC court rules now allow for the acceptance of certain lower-level Taiwan civil judgments. 最高人民法院关于人民法院认可台湾地区有关法院民事判决的补充规定, *Zui gao ren min fa yuan guan yu ren min fa yuan ren ke Taiwan di qu you guan fa yuan min shi pan jue de bu chong gui ding* [Supreme People’s Court Supplementary Rules on People’s Courts’ Recognition of Civil Decisions Made by Courts of the Taiwan Region] (promulgated by the Judicial Comm. Sup. People’s Ct., Mar. 30, 2009, effective May 14, 2009) 2009 SUP. PEOPLE’S CT. GAZ. 112 (P.R.C.).

¹³ 陈弘毅, 齐案“批复”的废止与“宪法司法化”和法院援引宪法问题, 法学, Chen Hongyi, Qi an ‘pi fu’ de fei zhi yu ‘xian fa si fa hua’ he fa yuan yuan yin xian fa wen ti, *Fa Xue* [Questions Concerning Abolition of *Qi*’s *Pifu*, Judicialization of Constitution and Citation of Constitution by Courts] LEGAL SCI. MONTHLY, Mar. 26, 2009, at 11, 14.

¹⁴ See, e.g., 许章润, 多向度的现代汉语文明法律智慧: 台湾的法学研究对于祖国大陆同行的影响, Xu Zhang Run, *duo xiang du de xian dai han yu wen ming fa lu zhi hui-tai wan de fa xue yan jiu dui yu zu guo da lu tong hang de ying xiang* [The Multi-Dimensional Legal Knowledge of Modern Chinese Culture—The Influence of Taiwan Jurisprudence on the Lawyers in the Mainland] 6 J. COMP. L. 95 (2003).

A. Historical and Theoretical Background

Is the 1982 PRC Constitution justiciable, and does the SPC have the authority to interpret it? Under the PRC system, the courts have, or are supposed to have, no power to adjudicate the Constitution if any interpretation is required.¹⁵ If it were to be interpreted at all, like statutes and administrative rules, such interpretation would be the sole province of the law's creator, the National People's Congress (NPC) and its Standing Committee (NPCSC).¹⁶ Indeed, the word "interpretation" itself is contested and problematic.¹⁷ The advent of the *Qi* case further problematized the matter because the SPC took upon itself the authority to construe *and* apply the PRC Constitution in deciding a case by answering a query from a lower court. It can be argued that the Court's strategy was not necessary to the case itself nor to assisting the Plaintiff in achieving her petition. Full statutory grounds were available in what was essentially nothing more than a personal injury (tort) case, yet the SPC undertook a constitutional analysis that, without saying it in so many words, took to the Court a jurisdiction expressly denied it in the Constitution. Depending upon one's view, this may have lent greater legitimacy or illegitimacy to the SPC in the debates that have ensued.¹⁸

¹⁵ See UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN (C. Stephen Hsu ed., 2003) (courts of the "greater China" area); CONFUCIAN DEMOCRACY, WHY AND HOW: PROCEEDINGS OF THE FIRST INTERNATIONAL CONFERENCE ON LIBERAL, SOCIAL AND CONFUCIAN DEMOCRACY (Hahm Chaibong et al. eds., 2000) (comparing "Asian democracy"); CONFUCIANISM FOR THE MODERN WORLD (Daniel A. Bell & Hahm Chaibong eds., 2003) (comparing "Asian democracy"); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997) (federalism); see generally NANPING LIU, OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA (1997) (background and overview of Chinese legal system); POH-LING TAN, ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA (1997) (comparative overview of legal systems and contexts).

¹⁶ See Kong Xiaohong, *Legal Interpretation in China*, 6 Conn. J. Int'l L. 491 (1991).

¹⁷ 蒲海涛和杨平, "齐玉苓案"涉及的若干问题 (其后果却可能削弱宪法制约国家权力的核心功能, 冲淡基本权利的公法性), Pu Haitao & Yang Ping, "qi yu ling an" she ji de ruo gan wen ti [*Some Questions Regarding the "Qi Yuling Case"*] 23 SCI. & ECON. & SOC'Y 93 (2005). The authors neatly problematize a key idea through a kind of word-play: judicialization (司法化) and privatization/personalization (私法化) of the law—both phrases pronounced exactly the same.

¹⁸ Qianfan Zhang, *The People's Court in Transition: The Prospects of the Chinese Judicial Reform*, 12 J. CONTEMP. CHINA 69 (2003) (providing an overview of the SPC in the present era); see also Liu, *Opinions*, *supra* note 15; Anthony R. Dicks, *The Law-Making Functions of the Chinese Judiciary: Filling Holes in the Civil Law*, in *Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department* (Ian Edge ed., Transnational Publishers, 2000).

All documents and decisions of the SPC are published officially in the *Gazette of the Supreme People's Court of the People's Republic of China* (中华人民共和国最高人民法院公报), which is issued six times a year and cumulated in a single bound volume once a year. They are not intended to carry the weight of precedent (as in common-law *stare decisis*) or the force of command or coercion that decisions of common-law courts do and that Interpretations of Taiwan's CGJ now do.¹⁹ The SPC does not (or is not supposed to) issue constitutional interpretations — to “say what the law is” — the famous dictum of *Marbury*. The 2001 SPC bound volume of the *Gazette* contains the *Qi* decision.²⁰

PRC courts are required to look to the NPC and NPCSC for decisions on the constitutionality of the law, including the adjudication of administrative rules and decisions.²¹ This arises out of several provisions of the 1982 Constitution. Article 62 of the Constitution provides that the NPC has the “power to supervise the enforcement of the Constitution.” Article 67 provides that the NPC's Standing Committee has the “power to interpret the Constitution and supervise its enforcement (解释宪法, 监督宪法的实施), to enact and amend laws (制定和修改...法律....), and to interpret laws (解释法律).” None of the above powers are given to the courts. Therefore, those functions cannot be labelled under “judicial review,” as described in common-law jurisdictions. The courts may conduct some form of “review,” but this activity cannot

¹⁹ See Nanping Liu, ‘Legal Precedents’ with Chinese Characteristics: Published Cases in the *Gazette of the Supreme People's Court*, 1(5) ZHONG GUO FA YAN JIU XUE KAN [Journal of Chinese Law] 107 (1991). Indeed, one of the maneuvers of the SPC in the *Qi* case, as we shall see, was to cite several “precedents” without declaring them to be precedents. See Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 313 (2003); Zhang Zhanyi, *A Discussion of Communicative Culture*, 23 CLTA J. 107 (1988); Series Introduction, *Contract, Guanxi, and Dispute Resolution in China* (Tahirih V. Lee ed., Garland Publishing, 1997); Paul Gewirtz, *Independence and Accountability of Courts*, 24 GLOBAL L. REV. 7 (2002); *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 HK L. J. 200 (2001). The seminal article, with much that is still true and relevant, is Jerome Alan Cohen, *The Chinese Communist Party and 'Judicial Independence': 1949-1959*, 82 HARV. L. REV. 967 (1969).

²⁰ An English translation of the case may be read at Huiping Iler (trans), *Qi Yuling v. Chen Xiaoqi et al.* 39 CHINESE EDUC & SOC'Y 58-74 (2006).

²¹ Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119, 138-39 (2003) (notes 87 through 100 and accompanying text).

be considered as “judicial review.” This is, or has been, perceived as the outer limit of judicial involvement with the Constitution — until the *Qi* case.

II. QIYULING V. CHEN ET AL.—A PRÉCIS

Plaintiff, Qi Yuling (齐玉苓), was a 28 year-old female living in Shandong Province. Defendant, Chen Xiaoqi (陈晓琪), also 28, was of the same province. They graduated the same year. Their facial features were obviously different. In their examinations of 1990, Qi did well but Chen did not and so lost the opportunity for further educational advancement. In order to continue in school at the next level, she fraudulently got hold of Plaintiff Qi's notice of admission. Chen's father, also a defendant, assisted her in falsifying a photograph and helping her make the switch of place and identity. When she presented the document at the school, she did not take along evidence of the examination. Nevertheless, by using Plaintiff's name and identity, she was admitted and began her studies. In 1993, after pretending to be the Plaintiff for three years, Chen graduated and got a job — an expected consequence of her education. Other defendants (the school, school officials, etc.) were complicit, either knowingly or negligently, in this identity fraud. The school in question was a vocational business school.

The lower Shandong court held that under the “general rule of the civil law,” which protects the right of name, another person was prohibited from “interfering with, falsifying, or passing oneself off as” the name or identity of another. It is significant that this reference was to a rule or statute, not the PRC Constitution. The difficulty for the lower court was that the *General Principles of the Civil Law of the People's Republic of China* does not explicitly provide the civil right to receive education. Section 4 of Chapter 5 of the *General Principles* does provide for rights to personal name, reputation, and honor, and this may be part of the “evolving concept of a right to privacy in Chinese law.”²² However, Article 9, Section

²² Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's 'First Constitutional Case'*, 12 PAC. RIM L. & POL'Y J. 199, 216 (2003).

1, of the *Education Law* (教育法), the more specific statute, provides that every citizen “has the duty as well as the right to receive education,” and Article 81 provides for civil liability for anyone who infringes such right²³ — two facts that have gone surprisingly unremarked in much of the literature on *Qi*, including the trial and appellate court documents.²⁴

Despite judgment in her favor, plaintiff was not satisfied. She filed an appeal in the Shandong Higher People’s Court. The primary basis of this appeal was that the mental suffering caused by Defendant Chen was so severe. The appeal also rested on a difference in the regulations and policies regarding the need for a letter of introduction and other matters affecting the identification process for students. The defendants-appellees’ concerted actions, she alleged, had deprived her of her right to education and caused her to forfeit a series of related rights and benefits as a result. The original judgment, she alleged, denied the full damages for her infringed educational rights and was therefore in error. She asked the appellate court to increase the monetary awards, primarily for mental distress. The response of the appellee father was that indeed, he had helped his daughter set up the trickery, and his daughter had gained the advantage of it, but this in fact had not violated plaintiff’s express intent that she “was not prepared” to attend the school. He added that although they may have violated plaintiff’s general right to education, they had nevertheless not violated her right to secondary or higher education, and that therefore she was not entitled to greater damages for mental distress.

The appellee school replied that the damages plaintiff had suffered to her reputation were entirely due to the elaborate scheme, fabrication, and the materials of altered records of the father and daughter. The school alleged that there was no proof of its knowledge or complicity in any actions that may have caused plaintiff’s mental anguish. After reviewing and augmenting the facts of the case, the appellate court noted that the case consisted in a “knotty question of the application of the law” because under Section

²³ 教育法, Jiao yu fa [Education Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 18, 1995, effective Sep. 1, 1995), available at www.nuaa.edu.cn/xcba_web/law_study/jiaoyufa.htm (last visited Sep. 24, 2005) (P.R.C.).

²⁴ This singular omission deserves further study and comment, but is beyond the scope of this article.

33 of the law regarding the organization of the PRC courts,²⁵ it was required that the SPC provide an explanation to the lower court of what law applied, how it was to be applied, the issues or questions of its decrees, and what interpretations it made.²⁶ The matter was therefore referred to the SPC, which for the first time in the case cited Article 46 of the PRC Constitution as the basis for the right of education, as follows: “Citizens of the People’s Republic of China have the duty as well as the right to receive education. The state promotes the all-round moral, intellectual and physical development of children and young people.”

The SPC received the case and rendered an answer and discussion in which the PRC Constitution was cited for the first time as authority for the fundamental rights to name, reputation, identity, and education.

A. Reactions Pro and Con

The *Qi* case caused great debate in PRC legal circles and drew comment from China-watchers around the world.²⁷ A substantial number of scholars and commentators referred to it as a “great usurpation,” i.e., the meddling of the judiciary in the affairs committed by the Constitution to the NPC and the NPCSC — in effect an *ultra vires* action. The central issue that attracted the attention of such commentators was the unnecessary invocation of the Constitution in deciding a civil lawsuit. The case could have been resolved entirely on the basis of statutory law, i.e., the provisions of Sections 99 and 120 of the *Civil Law* regarding the rights of name and reputation. It was not until the appellate court referred the matter to the SPC for an explanation of the civil law that the Constitution’s protection of the right to education was introduced. In discussing the outfall of the case, a judge of the SPC, Huang Songyou said, “Among all the kinds of laws applied in China, the Constitution used to be a source of embarrassment....

²⁵ 人民法院组织法, Ren min fa yuan zu zhi fa [Organic Law of the People’s Courts] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 31, 2006, effective Jan. 1, 2007) available at www.jrb.com/zyw/n449/ca325131.htm (last visited Jan. 25, 2005) (P.R.C.).

²⁶ *Id.* art. 33.

²⁷ See, e.g., Gao, *supra* note 4, at 25, 26 (notes 65 through 68 and accompanying text).

On the one hand, the Constitution is honored as the state's basic law, acting as the 'mother' of various laws and regulations; on the other hand, the majority of its content has been placed, neglected, 'on the shelf' in China's judicial activities, having no practical legal effect."²⁸ But the idea of the Constitution's having no "practical legal effect" could be argued to be an unacceptable American idea. Yanan Peng considers this to be the manifest failure of a system in which constitutional review is "still an illusion, not a solution," and in which constitutional rights "have been watered down to lose their focus and degenerate into private rights." Peng argues that *Qi Yuling* "entrenched this trend and enhanced Chinese misunderstanding of constitutional law's functions and nature."²⁹

It is important to bear in mind what the decision did not ostensibly do. It did not review the actions of any national (i.e., co-equal) government branch or bureau, nor did it hold any statute, rule, or regulation unconstitutional. It presented no challenge to Deng Xiaoping's "Four Cardinal Principles," which collectively are the supreme law of the PRC.³⁰ On the contrary, it added to the legal foundation of the lower courts' decisions in that it provided a constitutional basis on top of the statutory basis. It did not call into question the authority of the CCP. Professor Killion argues:

"Finally, there is the issue of social rights. Contrary to Judge Huang's [Huang Songyou's] enunciation of a more justiciable 1982 Constitution, the July 24, 2001 Reply [the 批复] is the constitutionalization of social rights, rather than individual liberty.

²⁸ 黄松有, 宪法司法化及其意义: 从最高人民法院今天的一个《批复》谈起, 人民法院报, Huang Songyou, Xian fa hua ji qi yi yi: Cong zui gao renmin fa yuan de yi ge "pi fu" tan qi, ren min fa yuan bao [Judicialization of Constitution and its Significance: Discussion on Today's "Answer" of the Supreme People's Court] PEOPLE'S CT. DAILY, Aug. 13, 2001, at B1, available at <http://oldfyb.chinacourt.org/public/detdet.php?id=27083>, translated in *China's Marbury vs. Madison?: Direct Application of the Constitution in Litigation*, 中国法律动向 [CHINA LEGAL CHANGE], Sept. 5, 2001, at 2. Two months before Qi was de-utilized in 2008, Judge Huang was "detained" on charges of corruption.

²⁹ Yanan Peng, *A Sheep in Wolf's Clothing—The PRC Constitution in Qi Yuling v. Chen Xiaoqi et al* (2003), available at <http://uschinanet.org/magazine/8.2002-2/mag5205.htm> (last visited Mar. 4, 2004).

³⁰ Deng Xiaoping formulated the Four Cardinal Principles as follows:

- Keep to the socialist road;
- Uphold the dictatorship of the proletariat;
- Uphold the leadership of the [Chinese] Communist party;
- Uphold Marxism-Leninism and Mao Zedong Thought.

Selected Works of Deng Xiaoping (1975-1982), p. 172. I say the "supreme" law of the land because the Four Principles are "cardinal."

Moreover and most important, the July 24, 2001 Reply is not an express or implied grant of the power of constitutional review.”³¹

“In order for a provision in the 1982 Constitution to be enforceable in a court of law, the provision must first be reduced to an ordinary legal norm through the judicial process of converting fundamental rights into ordinary laws and regulations. Only then does a person’s cognizable legal right vest.”³²

Killion misunderstands both Huang’s statement as well as the *Qi* case. It is not the judicial process that reduces a constitutional provision to an “ordinary legal norm” by “converting fundamental rights into ordinary laws and regulations.” Such laws are made and promulgated by the NPC. The SPC, on the other hand, is given a limited power of applying them. Further, the constitutional importance of the *Qi* case is that, in fact, a statute governing the subject (right to education) did exist, but the Court nevertheless chose to give its Reply based on the Constitution, and it was not just a social right. It *was* individual liberty. As Professor Hualing Fu writes:

“Civil law [as opposed to criminal law, not common law] presents the ‘best face’ of the Chinese legal system today. Judges in the civil division are the most competent at what they do. Why? *Because the law here is less political. Civil cases traditionally involve disputes between people; the economic implications are limited; and the impact on other government departments is minimal.* Absent political pressure, civil-division judges are allowed to reason, to analyze the legal issues. The result: judges in the civil division have seized the opportunity to develop the law. . . . Traditionally, conflicts between people are solved democratically.”³³

Not all commentators have agreed with Huang Songyou, and some have taken different approaches to the *Qi* case and its implications for PRC law. The SPC “applied” the Constitution amongst the civil parties, but it did not construe any statute or rule by

³¹ M. Ulric Killion, *China’s Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUDIES L. REV. 43, 72 (2005). It is difficult to fathom where Killion gets the date of July 24, 2001. The SPC’s 批复 is dated August 13, 2001.

³² See *id.*

³³ Hualing Fu, *Putting China’s Judiciary into Perspective: Is It Independent, Competent, and Fair?*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 173, 190 (Erik G. Jensen & Thomas C. Heller eds., Stanford University Press, 2003) (emphasis added).

comparing it against the Constitution as a measure, least of all strike the latter down for being “unconstitutional.” Hence, *Qi* was above all a “safe” constitutional case for the SPC to flex its muscles and test the political waters. In this regard, and in this alone, it may be said to resemble *Marbury*. The full-blown *constitutional* action in *Qi Yuling* was a first in China’s constitutional law.³⁴ The SPC did not need to rely upon the Constitution in order for Ms. Qi to achieve what she wanted. The Court might have relied solely upon the Education Law.³⁵ Certainly, therefore, the use by the Court of the 1982 Constitution moved that document to the position of a legal document in and of itself, rather than merely a statement of policy. A number of commentators still argue that using a statutory basis was and is the only proper way to enforce the right, and that recourse to the Constitution — what many of them pejoratively term the “judicialization” (司法化) of the Constitution — is therefore improper.³⁶ The mere assertion of a constitutional right by the

³⁴ See 姚辉, 中国的人格权法理论, Yao Hui, *zhong guo de ren ge quan fa li lun* [*Chinese Legal Theory of Personality Right*], 2 CHINESE L. SCI. 115 (1995) (the right to education, as well as legal personality, might also be found in the international covenants, but this basis was not raised in the SPC’s answer).

³⁵ In much of the literature on the *Qi* case, there is no mention of any specific statutory basis for a “right to education.” See Randall Peerenboom, *The X-Files: Past and Present Portrayals of China’s Alien “Legal System,”* 2(1) WASH. U. GLOBAL STUDIES L. REV. 37 (2003). Randall states erroneously at page 92 n.160: “The Supreme Court [SPC] stated that the plaintiff’s basic right to an education as provided in the [PRC] constitution should be protected *even though there was no implementing law regarding the right to education.*” (emphasis added) The SPC’s 批复 does not so state, and Chapter 1, Article 9 of the PRC *Education Law* (1995) guarantees the right thus:

CHAPTER I GENERAL PROVISIONS

Article 9 Citizens of the People’s Republic of China shall have the right and obligation to receive education. All citizens, regardless of ethnic group, race, sex, occupation, property status or religious belief, shall enjoy equal opportunities for education according to law.

中华人民共和国教育法及其配套规定 (北京: 中国法制出版社, 2001), p. 2; 第一章, 第九条 [Education Law of the People’s Republic of China and Relevant Regulations] 2 (China Legal Publishing House, 2001).

³⁶ See e.g., Qiao xinsheng, Ping yi ze gai bian zhong guo xian zheng de si fa jie shi [*A Criticism of a Judicial Interpretation Altering China’s Constitutional Governance*], available at <http://www.civillaw.com.cn/article/default.asp?id=10156> (last visited Nov. 20, 2003) (P.R.C.) (Qiao likewise refers to *Madison and Marbury v. Madison* but to point out the differences between the American and Chinese systems); see generally, Tong zhiwei, ‘Xian fa si fa hua’ yin chu de shi shi fei fei – xian fa si fa shi yong yan jiu zhong de ji ge wen ti [*Pros and Cons of the Expression of ‘Constitutional Judicialization’—Some Questions About the Study of the Use of Constitutional Adjudication*], available at www.gongfa.com/tongzwxianfasifahua.htm (last visited Jan. 21, 2004) (P.R.C.). Tong prefers the term 宪法的司法适用性 [the Constitution’s judicial application or utilization] to “judicialization.” The term 适用 is key here because it is the same term used by the SPC in December 2008 to announced that “application” of Qi has ceased.

highest court is not necessarily tantamount to the assertion of the independence of the court itself. It is both these ideas *in tandem* that inhere in the doctrine of *Marbury* and its progeny.

B. Other Responses to Qi Yuling: Constitutional Judicialization

A colloquy among Jiang Ping, a professor at China Zhengfa University, Jiang Mingan and He Weifang, professors at Beijing University, and Cai Dingjian, a member of the NPCSC, four liberal and progressive scholars of the PRC Constitution, sheds substantial light on the subject of “constitutional judicialization” vis-à-vis *Qi Yuling*.³⁷ The basic questions they discuss are the jurisdiction of the SPC (as opposed to the NPC) to entertain and “interpret” constitutional cases, and whether *Qi* was in fact a true “constitutional” case. This leads them finally to a truly amazing (dare one say *revolutionary*) proposal. It is that what might be fitting for the PRC is precisely the system developed and at present in use in Taiwan: the Council of Grand Justices. He Weifang suggests as follows: “The Grand Justices of the Constitutional Court [proposed for the PRC] should enjoy the highest prestige among the community of legal scholars, and their number should not exceed fifteen,” a number approximating that of Taiwan’s CGJ. In addition, in order to “harmonize” the legal and governmental system, “we can even go so far as to propose that the opinions of the minority of judges be published as dissenting opinions.”

These are precisely the innovations that were made in Taiwan to modernize the CGJ as a true constitutional court and give it power to effect constitutional review, including the power to declare acts of the other branches of government unconstitutional. That *Qi* could spark such insights suggests the forward-pointing and suggestive power of the case, and perhaps explains the abolition of the case in 2008. It further suggests the serious recognition by scholars that a constitutional system developed in Taiwan might befit the entire Chinese culture on the mainland, not necessarily because of political or ideological considerations, but because it works in modernizing

³⁷ For transcript, see <http://www.civillaw.com.cn/research/content.asp?type='百家'&programid=1&id=34> (last visited Oct.29, 2003).

and constitutionalizing the law. Do these references to Taiwan's court structure suggest a veiled reference to the CGJ's cases as well? Or solely to the role and status of the Grand Justices? No specific mention of these things occurs, but the structural references even without more suggest that perhaps a greater borrowing, assimilation, or convergence would not be out of the question in the PRC.³⁸

But if one intends to look into comparative law between the PRC and the United States, why pick *Marbury*? Surely, there are more moderate examples of judicial review and the separation-of-powers that nevertheless exist in democracies and stand for the rule of law. Why not chose the arguably more apt American example of *M'Culloch v. Maryland*,³⁹ like *Marbury* written by Chief Justice John Marshall (1755-1835), which many argue is far more important than *Marbury* because it established the Constitution as the supreme law of the land in the vertical system of state-federal federalism?⁴⁰ Neither *Marbury* nor *M'Culloch* had anything to do with the subject of education, but both stand for the supremacy of the Constitution and the powerful role of the court. According to James Boyd White's definition of the United States constitution,⁴¹ the "mythic origins of the Constitution" are seen in the writing of Marshall:

[T]he "people" are defined by their one great collective act of self-construction. They existed once in time only, when the Constitution was made, and have since resolved themselves into their constituent units and groupings. . . . The "people" thus no longer exist among us, and never can again. They have left behind them this instrument, the Constitution. . . . The "people" of whom Marshall speaks existed only in their act of constitution, in a kind of momentary incarnation. . . .

³⁸ The relationships among the party, the NPC, and the courts are discussed in Mark Findlay, *Review of Judicial Decision-Making in the People's Republic of China—An Overview of Unique Developments*, 1 ASIA PAC. L. REV. 75 (1992); see also his update, 'Independence' and Judiciary in the PRC: Expectations for Constitutional Legality in China, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 281-99 (Kanishka Jayasuriya ed., Routledge, 1999).

³⁹ 17 US 316 (1819).

⁴⁰ MARK R. KILLENBECK & M'CULLOCH V. MARYLAND, SECURING A NATION (2006).

⁴¹ JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 255, 262 (University of Chicago Press 1984) (1984); See Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984) (regarding the idea of a "sacred text").

The people thus left behind them a testamentary trust that has something of the character of a sacred text.

C. Abolition of the Qi Case

In late December 2008, the SPC officially withdrew the *Qi* case in a terse statement saying only that it was “no longer in use.”⁴² Usage, or application (适用), is the key. The reasons for the withdrawal, as well as the meaning and implications for the SPC and constitutional litigation, have already been widely debated — although the official withdrawal states no reason for the action.⁴³ The withdrawal is, however, preceded by the following tantalizing statement:

为进一步加强民事审判工作，依法保护当事人的合法权益，根据有关法律规定和审判实际需要，决定废止2007年底以前发布的27件司法解释（第七批）。废止的司法解释从公布之日起不再适用，但过去适用下列司法解释对有关案件作出的判决，裁定仍然有效。

In order to improve and strengthen the work of civil litigation, and to protect the lawful interests of litigant parties, in reliance upon the legal rules and the necessities of actual cases, the SPC decided to abolish judicial decisions prior to the end of 2007 (7th series). The

⁴² See, 最高人民法院关于废止2007年底以前发布的有关司法解释（第七批）的决定, *Zui gao ren min fa yuan guan yu fei zhi 2007 nian di yi qian fa bu de you guan si fa jie shi (di qi pi) de jue ding* [Supreme People's Court Decision on Abolishing Some Judicial Interpretations (the Seventh Batch) issued before the End of 2007] (promulgated by Sup. People's Ct., Dec. 18, 2008, effective Dec. 24, 2008) (“yi ting zhi shi yong” [has already ceased being applied]), 2009 SUP. PEOPLE'S CT. GAZ. 7-9; see also, A commentary with links on the withdrawal, *available at*, <http://lawprofessors.typepad.com/chinalawprofblog/2009/01/supreme-peoples.html> (last visited July 24, 2009); Thomas E. Kellogg, *The Death of Constitutional Litigation in China?*, IX, CHINA BRIEF: J. ANALYSIS AND INFO., 4, 4-7, (2009), *available at* <http://www.jamestown.org/uploads/media/cb009702.pdf> (last visited July 24, 2009) (reiterating reservations about any significant “constitutional reform” signaled by Qi).

⁴³ The case is not named by its title in the official withdrawal but by a description of its issues: 最高人民法院关于以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利是否应承担民事责任的批复 [an official Answer of the SPC regarding the means of infringement of the right to name, infringement of the basic right of constitutional protection of public education, and whether or not civil responsibility should be assumed]. See *id.*

abolished judicial decisions will have no further application after the public promulgation of this announcement, but decisions already applied in litigations of the following cases will continue to have effect.

In all, the list in which this item #26 occurs has twenty-seven abolitions. In the column for “reasons for being abolished (废止理由)” by far the majority of them state that “the situation has already changed *and* it will no longer applicable (情况已变化, 不再适用)” or “the law has already been amended (e.g., 民事诉讼法已经修改)” as the reason for the abolition — it is therefore not to be applied *again* (再). Item #26 is unique because it is the only one on the list to state that it is already discontinued (已停止适用) *without giving a reason* — it is simply a *fait accompli* (已). In other words, “being discontinued” is not a *reason* (理由) for “being discontinued”; it is a mere fiat by tautology. This one-size-fits-all fiat states that somehow these actions will “improve” and “protect” certain aspects of the legal system without stating how that work is to be accomplished and without teaching any principle. It is important to note that the English word “abolition” or “abolish” here is the official translation of 废止 published in bilingual table of contents of the SPC *Gazette*. It is a strong term that can also be translated as “annul” or “put an absolute end to.” Hence, the full title of the item, “Supreme People’s Court Decision on Abolishing Some Judicial Interpretations (the Seventh Batch) issued before the End of 2007 [年底],” indicates not only that the items (including #26) are utterly abolished, but that they are abolished retroactively to “the End of 2007” and before, a full year earlier. As already shown, the text also distinguishes between “abolish” and “discontinue.” Whether this is an intentional conflation or an intentional disambiguation is difficult to tell. In any case, the presence of the *Qi* abolition in the same “batch” (批) as the others is a striking anomaly.

Nevertheless, despite this action, this article focuses on the *Qi* and *Marbury* connection because it assumes that the abolition of *Qi* will itself continue to foster debate about that connection and the significance of *Qi*. Indeed the *abolition* of *Qi* will become a new

locus of attention and debate.⁴⁴ The scholars pro and con of *Marbury* have variously treated *this case* as a benchmark — but a benchmark of what? This is not merely a theoretical question even with the official demise of *Qi* because, as Thomas Kellogg points out, “the SPC’s intervention in the *Qi Yuling* case was flawed in a number of ways. Yet what the Court was trying to accomplish was absolutely fundamental.”⁴⁵ It is that “fundamentality” that makes the comparison with *Marbury* — and the legacy of *Qi* — enduring. *Qi* survived for seven years from 2001 to the end of 2008 and generated a great deal of discussion that remains for consideration. Within that discussion may lie the seeds of understanding why it was finally necessary for *Qi* to be abolished in 2008 after seven years of viability, and two months after the abolition, Huang Songyou was “detained” for “corruption.” Exactly how does this action against *Qi* “advance the work of strengthening civil trials, and to protect the lawful interests of parties litigant according to law, in reliance upon the legal rules and the necessities of actual cases”? It may turn out that the abolition of *Qi* under these circumstances will be of greater ultimate significance than the case itself.

III. *MARBURY V. MADISON*: SOME UNSEEN PARALLELS

Any discussion of *Marbury* and/or *Qi* ought to admit at the outset that one case does not make a national jurisprudence. There is only so much mileage in any one case, whether produced by the US Supreme Court or the SPC. Even *Marbury* did not quickly become *the* full-fledged *Marbury* that it has become until scholars and court-watchers began to see where the Supreme Court would take it over time — indeed, two centuries. And this is not even remotely the background or history of *Qi Yu* in the SPC. No substantial constitutional case or body of law has followed it. Hence, *Qi* is (or

⁴⁴ See 陈弘毅, 齐案“批复”的废止与“宪法司法化”和法院援引宪法问题, 2009(3) 法学 11, [Chen Yihong, *The Repeal of the Supreme People’s Court’s Reply of the Qi Case and “Constitutional Adjudication” and the Question of Courts Applying the Constitution*], 3 LEGAL SCI. MONTHLY 11 (2009) (The article criticized the action as being unique and lacking transparency).

⁴⁵ See Kellogg, *supra* note 42, at 5. See also Thomas E. Kellogg, “Courageous Explorers?” *Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141(2007) (discussing *Marbury* at note 193 and accompanying text).

was) so far a triumph of hope and optimism over actual constitutional jurisprudence. It may still occupy the status of a slogan. As Ronald Dworkin has stated:

In adjudication, unlike chess, the argument *for* a particular rule may be more important than the argument *from* that rule to the particular case; and while the chess referee who decides a case by appeal to a rule no one has ever heard of before is likely to be dismissed or certified [as insane], the judge who does so is likely to be celebrated in law school lectures.⁴⁶

When SPC Judge Huang Songyou discussed his Court's decision in *Qi* and compared it to *Marbury* for the idea of the "justiciability of the Constitution," he quoted *Marbury*'s famous dictum that "an act of the legislature repugnant to the Constitution is void."⁴⁷ Yet he notably omitted any reference to the much more famous, and inflammatory, sentence in *Marbury*, that follows hard on the heels of the first: "It is emphatically the province and duty of the judicial department *to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule.*"⁴⁸ The first quotation has no bearing on the *Qi* case because the SPC found no PRC statute to violate the PRC Constitution, and hence did not find any statute void, nor did the SPC, ala Marshall, deny itself the power to act in the case. The second, omitted, portion is arguably just as equally irrelevant because the SPC was merely *applying* a provision of the Constitution as if it were a civil statute, rather than "interpreting" it. "Applying" versus "interpreting" the law has become a parsing of words that carries huge consequences in the PRC. It could be argued that both are ways of declaring "what the law means," and indeed *Marbury* stands for the proposition that these activities are all part of the same process. But the underlying message in Huang's statement is unmistakable. *Marbury*, at least in the United States, stands for the power of the judiciary *and the*

⁴⁶ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 112 (Duckworth, 2002) (1977) (U.K.).

⁴⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 180.

⁴⁸ *Id.* at 177 (emphasis added).

judiciary alone to “expound *and* interpret” both the Constitution and statutes, and to declare statutes “void” if the judiciary finds that they run afoul of the Constitution, and thus “to say what the law is.” One must wonder whether that statement is misread to be “what the law *means*.”

In *Qi* the SPC merely undertook to say what the *law of the case* was, i.e., the PRC Constitution, and that the PRC Constitution would apply instead of, or along with, the statute *if the SPC said so*. Under this view, there was no “interpretation” of the constitutional language itself. In *Marbury*, Marshall found that Congress had drafted a law that contravened the Constitution. In *Qi*, the SPC made no such finding about any statute. Nevertheless, it was seen as a threat to legislative (NPC) and CCP supremacy.⁴⁹ Judge Robert H. Bork, the failed nominee to the US Supreme Court, described *Marbury* as an “intellectually dishonest opinion” full of “multiple misbehaviors” because, instead of dismissing Mr. Marbury’s case outright as he should have done, Chief Justice John Marshall took the occasion to write a lengthy opinion that ended with the Supreme Court’s assumption of powers in the name of “judicial review” and that gave the Court uncheckable supremacy.⁵⁰ Bork writes:

There can be no doubt that Marshall and the other members of the Court understood what they were doing. Marshall, an ardent Federalist, managed in one opinion to issue a ruling in a case without having jurisdiction, charge [President] Thomas Jefferson’s Republican administration with illegal conduct, misrepresent a statute as well as the common law, strike down as unconstitutional the distorted version of the statute he misrepresented for the occasion, and, finally, articulate a basis for a broad power of judicial review. Having accomplished all this, Marshall said he could not order relief, thus saving himself and the Court from the

⁴⁹ 陈端洪, 立法的民主合法性与立法至上, *Chen Duanhong, li fa de min zhu he fa xing yu li fa zhi shang* [Democracy and Legality of Legislation and Legislative Supremacy] 6 PEKING U. L.J. 59 (1998).

⁵⁰ ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 54-55 (AEI Press 2002).

embarrassment of being defied by the Defendant, (Jefferson's Secretary of State) James Madison.

Much of Bork's criticism of *Marbury* resembles the criticism that has been aimed at the *Qi* case in the sense that the SPC, like the Supreme Court, it is said, arrogated to itself a jurisdiction, power, and status that it did not have under any statute or the Constitution. This, indeed, may be the intentional strategy of invoking *Marbury*. In the frequent references to *Marbury* in the PRC discussions about the *Qi* case, there is little legal analysis in the Borkean sense. The SPC itself cited no precedent or foreign case in its response to the Shandong court. All such "citations" have come extra-judicially in the explanations of legal scholars, commentators, and members of the SPC itself. It is in these extrajudicial statements that the various authors have attempted to "say what the law is" using *Marbury*, as well as what the *Qi* case means: It means *Marbury*. But what does that mean? One wants to ask, *Marbury* then or now? Nineteenth-century *Marbury* or Twenty-first century? In its long, hoary history, *Marbury* has come to stand not only for "mere" constitutional judicial review *per se* but also for the rule of law itself. *Marbury* itself, like Marshall and his reified Supreme Court, have all become institutions in their own right, and they continue to reify and substantiate each other. Yet despite its handiness as a shorthand icon, *Marbury* was not the invention of judicial review in the United States.⁵¹ *Marbury* had existed against a backdrop of common-law. In any case, the legitimation of history and reputation are brought in, hopefully, perhaps, to bear fruit at a later time. Later we will attempt a brief look at such a deployment of the 1819 case of *M'Culloch v. Maryland* — sixteen years after *Marbury* — yet still another product of John Marshall.

One senses something additional in *Qi*'s references to *Marbury*, it seems to address either a hoped for or feared institutional embeddedness of the SPC. According to Sarah K. Harding, a "comparative perspective in decision-making must have some impact on the *decision-making body itself* and the *system* within which it

⁵¹ Rakove, *supra* note 17, at 1031.

operates, not simply on the outcome it reaches.”⁵² She notes correctly that in the two centuries since *Marbury* was announced, the US Supreme Court “has actively, and in some cases aggressively, participated in defining and redefining both the scope of its authority and the expectations of its audience.”⁵³ If this is the vein in which the extra-judicial pronouncements of the PRC judges and scholars are made, perhaps these pronouncements are made in an attempt to set up the *next* SPC case to be a true *Marbury*. If the SPC had not moved to abrogate or alter its own holding in *Qi*, one outfall of the case as a civil lawsuit would have been a seemingly expanded space for PRC civil society as represented in the symbol of Ms. Qi’s refusal to allow her name and education to be stolen, and her refusal to settle for a lesser judgment. This is now in doubt.

Tony Smith has pointed out that Leninist power is “rule unrestricted by law,”⁵⁴ a party-centered power that permits “no other gods before me.” The *Qi* case threatened none of this. During its seven-year life it created greater equilibrium for the SPC and added incrementally to the political and legal diffusion of the participating lawmakers in PRC civil society. It is sometimes said in PRC criminal law that the principle of 杀一儆百, ‘execute one as a warning to a hundred’, is an effective tool of social control. In other words, prosecute one high-profile, highly publicized criminal case to keep the masses in line through draconian example. The *Qi* case may have represented the reverse idea: adjudicate favorably a single, high-profile constitutional tort case with a sympathetic plaintiff, announce lofty constitutional principle but offer no serious challenge to the powers-that-be, in order to create the illusion of “constitutionalization” and the rule of law. If a closer metaphor of 以儆效尤, ‘to warn others against following a bad example’, is the more apt, then Yun-han Chu’s observation is apt:

An important distinction should be made between political defiances designed to bring about changes in political regime

⁵² Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 412 (2003) (emphasis added).

⁵³ *Id.* at 460.

⁵⁴ TONY SMITH, THINKING LIKE A COMMUNIST: STATE AND LEGITIMACY IN THE SOVIET UNION, CHINA, AND CUBA 78 (1987).

and those directed at political issues in the sphere of local governance. Struggles that focus explicitly on the legitimacy of the political regime and on human rights and political justice constitute the most startling form of challenge to the authoritarian rule and are thus least tolerated by the authoritarian state. They tend to become more intense and more broadly based. Political protests that are both geographically and administratively confined, that deal with existing political arrangements or the way political power is exercised in the local spheres, pose no imminent threat to the political security of the incumbent state elite, and thus can be accommodated at low cost.⁵⁵

Qi clearly fits within the latter category of “geographically and administratively confined” matters, whereas *Marbury* came much closer to the former category. The declaration of *Marbury* that the judiciary has the power to “say what the law is” was, in fact, a radical declaration of “change in the political regime.” Simon Wong documents that even in the formative period of the CCP “legal system” of the 1930s, trials were used for their possible educative effect on the masses: the “symbolic involvement of the masses in the judicial process” functioned as both a control mechanism and as an accommodation of class struggle.⁵⁶ We must consider the possibility that the *Qi* case was intended merely to have this kind of symbolic effect. In other words, all of the extra-judicial *Marbury*-making might be a *ploy to undermine the rule of law* by lending a seeming legitimacy or veneer of legality through appeal to a famous theory of governmental organization, while in reality having nothing at all to do with operative PRC law in reality. It would thus create an illusion of legal rightness without creating the substance.

On a more optimistic note, *Qi* may indeed be the first “China’s *Marbury*”, not because it established *Marbury*-like judicial review,

⁵⁵ YUN-HAN CHU, CRAFTING DEMOCRACY IN TAIWAN 101-02 (1992).

⁵⁶ Simon Hing Yan Wong, *Reconstructing the Origins of Contemporary Chinese Law: The History of the Legal System of the Chinese Communists during the Revolutionary Period, 1921-1949* (2000) (unpublished Ph.D. dissertation, Hong Kong University) (on file with the Hong Kong University Library).

federalism, or separation of powers, but because it started the SPC's long march toward institution-building, political and legal diffusion, and high equilibrium (to use Tom Ginsburg's terms cited earlier) for the SPC itself. As in the real *Marbury*, the SPC created some powerful tools but did not deploy them, yet. Indeed, the SPC may have even been as shrewd as John Marshall, but in a different way. In tackling the local Shandong school and its officials, the SPC struck at local administrative action; it challenged a particular agency or bureau with a limited legal pedigree and in doing so positioned itself to be seen as working on behalf of the sovereign (the NPC and CCP) to protect its (their) commands from the subtle subversion by its (their) appointed agents. In leaving *Marbury* out of the official *Pifu* but laboring it heavily in the subsequent public commentary, the SPC, in the *persona* of its judges and sympathetic commentators, assimilated a Western (non-Marxist-Leninist) paradigm without appearing to do so officially. This maneuver would not only set up the correct framework for the next constitutional case, but it would increase the court's legitimacy in both local and international eyes.

All of the above analysis may possess a colorable believability if one accepts the underlying premise that the SPC and its judges operated independently and in good faith both in deciding the *Qi* case and in declaring extra-judicially the importance of *Marbury*. However, that believability may be interrogated in two different perspectives, as contributed by the insights of two other scholars who have written about the SPC and *Marbury*, respectively, in somewhat subversive ways. Nanping Liu suggested in 1997, four years before *Qi* was decided, that the SPC was still the "aggressive handmaiden to the policy of the Chinese Communist Party," even in "supervising enforcement of the (PRC) Constitution."⁵⁷ And Rakove, writing also in 1997, has made a compelling argument for the thesis that the "judicial review" established in *Marbury* was much less about the horizontal separation-of-powers within the national government (executive-judicial-legislative) than about the preservation of vertical

⁵⁷ Nanping Liu, *Opinions*, *supra* note 15, at 5-6. See also Louise do Rosario, *The Misrule of Law: Judicial Organs Join in the Party's Political Repression*, FAR E. ECON. REV., July 6, 1989, at 12 (H.K.).

American *federalism* (national government-states).⁵⁸ If both Liu and Rakove are correct, and it cannot be demonstrated that *Qi* substantially changed any of the perceptions they discuss, then the conclusion appears to be that the references to *Marbury* in the post-*Qi* discourse may in fact amount to nothing more than a “play to the grandstands” to create a public-relations belief that the rule of law has arrived in China, when in fact it has not. We will consider Liu and Rakove in order.

Writing as of 1997, the year of Hong Kong’s reversion to China, Liu held that the SPC was not independent but continued to serve as the instrument of CCP policy. “The court may do whatever it wants, as long as its law is not inconsistent with the Chinese Communist Party policy.”⁵⁹ His careful reading of the SPC *Gazette* led him to state that the “Court is independent of nothing, except the NPC, the one body that the Court should be dependent upon according to the . . . Constitution.”⁶⁰ This may explain in part why the Court felt justified in its extra-constitutional action in the *Qi* case. “The main reason the Court is able to ignore constitutional limitations is that it never considers itself to have a different institutional function from that of any other state organ. The Court treats itself as a unit or subordinate branch of the Communist Party, involved like any other in implementing Party policy.”⁶¹ This image of confused “institutional differentiation” is, according to Liu, the polar opposite of what Western constitutional law calls the “separation of powers” and leads to what Liu even calls the

⁵⁸ Rakove, *supra* note 17. “Vertical” and “horizontal” are employed here in preference to the more usual “federalism” and “separation of powers,” respectively, because the latter two, while semantically more familiar, are analytically deficient. Federalism is a component of the total separation-of-powers paradigm in the US system. The total idea expressed in *The Federalist* is that you pull the powers apart in both directions. Hence, federalism is separation-of-powers, and vice versa. The two inhere in each other. The semantics may be the symptom of a distinction with little or no difference. See 汤德宗, 司法院大法官有关权力分立原则解释案之研析, 政大法学评论, Tang Dezong, Si fa yuan da fa guan you guan quan li fen li yuan ze jie shi an zhi yan xi, zheng da fa xue ping lun [*A Critical Review of the Council of Grand Justices’ Interpretations on the Separation-of-Powers Doctrine in the Constitution of the Republic of China on Taiwan*] CHENGCHI L. REV., Dec. 1995, at 19, CHENGCHI L. REV., June 1996, at 1 (discussing the “vertical” versus “horizontal” aspect of federalism and separation-of-powers vis-à-vis Taiwan) (Taiwan).

⁵⁹ Liu, *supra* note 57, at 87.

⁶⁰ *Id.* at 185; see also *id.* at 220, 223.

⁶¹ *Id.* at 59.

mislabeling of these institutions as “courts” in the Western sense.⁶² This leads him to the following statement:

The above analysis also illustrates the fact that whether the Court makes new laws or changes them is not based mainly on the role that the Constitution has authorized it to play, or on its own understanding of the provisions interpreted by the Court, but rather on the Communist Party policy, which changes according to the changing economic and political situation in China. Therefore, an overt contradiction between Party policy and law is rarely created.⁶³

Liu argues that there is a “presumption of consensus” on power and law that is unquestioned and unquestionable:

“The relationship between Party power and state law or state institutions (including the judiciary) can also be deduced from this theoretical basis: consensus exists in that the Party’s power originates from the will of the people and the law represents the will of the people. Therefore, there is consensus between them in nature.”⁶⁴

Such a “presumption of consensus” is antithetical to the Western notion of the separation of powers, which presumes a lack of consensus and diversity of opinions that can be channeled and reconciled. Nothing in the Chinese political system approximates the separation of powers of Western-style constitutions, for such a separation includes, *inter alia*, the notion of federalism. Even in the context of economics, there are substantial differences, as Gabriella Montinola and others point out in their article on Chinese economic or “market-preserving” federalism.⁶⁵ These authors state:

The decentralization in China differs from Western federalism in several important respects. First, the latter

⁶² *Id.* at 67, 72.

⁶³ *Id.* at 116

⁶⁴ *Id.* at 205, 208; SMITH, *supra* note 54, at 20, 26, 61, 182 (noting that communist systems of thought and doctrine are hermetic and closed—“watertight”, which would contribute to the illusion of such a consensus).

⁶⁵ Gabriella Montinola et al., *Federalism, Chinese Style: The Political Basis for Economic Success in China*, WORLD POL., Oct. 1995, at 50 (U.K.).

virtually always roots federalism in an explicit system for protecting individual rights. Second, Western federalism typically has strong, explicit constitutional foundations. Third, it is almost always associated with political freedom, representation, and democratization. None of these factors are present in China.⁶⁶

But even this analysis needs more fine tuning because the separation of powers and federalism under the American system (the system addressed by references to *Marbury* and to an even greater extent in *M'Culloch*) exists simultaneously in two directions: Rakove's horizontal and vertical. The horizontal aspect sees three co-equal "branches" of government (the executive, the judicial, and the legislative) existing side-by-side and checking and balancing each other. This is the paradigm addressed by Liu. But the system is also vertical because under both the American "Articles of Confederation" and the Constitution which replaced them, the federal or national government was separated from the states. This separation had always been implied, even from the earliest days of the British colonies, as well as in the language of the Declaration of Independence, which declared that the colonies ought to be "free and independent States." The states always referred to themselves as "sovereign states," as they still do, and the question of "states rights" was always part of the debate about what powers, if any, would be *delegated* to the national government under the new Constitution.⁶⁷

No province of China would ever use, or be allowed to use, the word "sovereign" to describe itself as the American states do. The PRC Constitution and the "one China policy" consistently refer to China as a politically unified (i.e., not federal) country. This is explicitly referenced in the Hong Kong *Basic Law*.⁶⁸ There may in

⁶⁶ *Id.* at 60.

⁶⁷ See, e.g., PHILLIP E. HAMMOND ET AL., RELIGION ON TRIAL: HOW SUPREME COURT TRENDS THREATEN THE FREEDOM OF CONSCIENCE IN AMERICA (2004); see also U.S. CONST. amend. X; U.S. CONST. amend. XI.

⁶⁸ For the same reasons: It is a Marxist dialectic. Robert J. Morris, *Forcing the Dance: Interpreting the Hong Kong Basic Law Dialectically*, in INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE 97, 97-111 (Hualing Fu et al. eds., 2007); Robert J. Morris, Book Review, 38 H.K.L.J. 309 (2008) (reviewing FUNCTIONAL CONSTITUENCIES: A UNIQUE FEATURE OF THE HONG KONG LEGISLATIVE COUNCIL (Christine Loh & Civic Exchange eds., 2006)) (H.K.); Robert J. Morris, *Constitutioning Hong Kong: 'One Country, Two Systems' in the Dock*, 11 CHINA REV. INT'L, 248-63

reality be tensions between “the center and the periphery,” but there are not *supposed* to be. Yet it is possible for a commentator on the *Qi* case to use *Marbury* to talk about the horizontal while meaning the vertical — or vice versa — all the while providing deniability of one’s meaning if challenged. It is the *vertical* concept of federalism that threatens the notion of “centralism” and Deng’s Four Cardinal Principles; the horizontal that threatens the “dictatorship of the proletariat” under the “vanguard leadership” of the CCP. It is the vertical — with its implications of independent/sovereign states (provinces), “renegade” or “rogue” provinces like Taiwan, and “chaos” in colonial Hong Kong and Macau, that poses the more imminent and emotional threat. This kind of federalism is the parent and quintessence of “chaos.” A truly independent judiciary most threatens this notion of vertical centralism.

Rakove argues that it is precisely the vertical sort of “separation-of-powers” federalism that *Marbury* does *not* truly stand for but that its successors do — i.e., judicial supremacy over *state* (i.e., provincial) legislative acts and judicial decisions.⁶⁹ He notes that this vertical federalism requires two levels of government to rule over society, and conversely “express preferences as to which level will, over time, prove more competent to provide the services and perform the duties they desire.”⁷⁰ It was this vertical dimension of judicial review that was the most important and original understanding of the American Constitution.⁷¹ In addition, it was felt that the other components of the federal system should operate as checks and balances upon the existing judiciary *and* as necessary to establish an independent judiciary because the early American (and before that British) political culture “had long regarded judges as potential lackeys of the Crown.”⁷² In colonial America, judicial appointments remained the prerogative of the Crown in a system of

(2004) (reviewing HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION (Johannes M. M. Chan et al. eds., 2001)).

⁶⁹ Rakove, *supra* note 17, at 1034 & n.11.

⁷⁰ *Id.* at 1042.

⁷¹ *Id.* at 1047 (arguing that horizontal review by courts of their co-equal branches by means of co-equal separation-of-powers was not a new idea and had been expressed and enshrined in law long before *Marbury*).

⁷² *Id.* at 1060.

royal patronage.⁷³ It was, instead, juries and representative assemblies that were seen as the most potent “popular checks upon the twin legates of executive power: royal governors and royal judges.”⁷⁴

In the PRC, with no juries or truly representative assemblies to worry about, the ruling CCP has little worry about from the twin legates of executive power: CCP governors and CCP judges. Worries over the decentralization of power stems from below: the provinces — precisely where the *Qi* case began — and from Taiwan and Hong Kong. The essential fact is that the SPC’s *Pifu* in the *Qi* case regarded actions in Shandong — a *province* and not the NPC, the CCP, or any other *national* organ on a co-equal level with SPC. *Qi* could have been intended to stand as a federal-like warning that the SPC/CCP intended to keep the *provinces* in line. Rakove would likely argue that US Supreme Court cases other than *Marbury* more accurately represent what vertical American federalism and judicial review are all about.⁷⁵ And if that were the intended meaning of the Chinese references to *Marbury* for the purposes of judicial review, separation of powers, *and* judicial independence, one might have expected the scholars to cite other cases and situations “closer to home” in both geography and subject matter — the Taiwan CGJ, for example. Yet in all of the commentaries, there is no attempt to assimilate *Marbury* to “Chinese characteristics.”⁷⁶ It simply stands as the symbol(s) of whatever one’s semiotics takes it to mean. *Marbury* was about official identity. *Qi* was about personal identity. How do the rights to name, identity, and education interact and potentiate each other? *Qi* began to answer those questions. How much of what Ginsburg and Rakove argue might be known to the PRC judges and scholars writing under their own or others’ rubrics? Does the *Qi* case reveal that the SPC is “merging” more

⁷³ *Id.* at 1062.

⁷⁴ *Id.* at 1062.

⁷⁵ See, e.g., THE U.S. CONSTITUTION AND THE DEVELOPMENT OF CONSTITUTIONALISM IN CHINA, at 13, 21, 26, 68, 79, 98, 110 (Ray S. Cline et al. eds., 1987).

⁷⁶ See 李龙, 邓小平民主与法制思想的基本特征, Li Long, deng xiaoping min zhu yu fa zhi si xiang de ji ben te zheng [Basic Characteristics of Deng Xiaoping’s Ideology in Respect to Democracy and Legal System] CHINESE L. SCI., June 9, 1995, at 3 (dealing with “national quintessence”). For an example of the circularity of the “characteristics” model: We are the “special characteristics” so we must preserve ourselves in order to preserve the “special characteristics.”

closely to a model or common Chinese legal fabric based on the Taiwan CGJ? Was *Qi* in fact a new legal reality on the order of the federalist (vertical) *Marbury*, or was it just the old reality with a new cover story on the order of the separation-of-powers *Marbury*? It is difficult to say. At present, the answer appears to be a mixture of both. Hence, the several possibilities and options which these analyses leave open must await further resolution.

A. *Taiwan Counterparts*

On July 7, 2000, only a year before *Qi*, Taiwan's CGJ rendered its Interpretation 509, applying the Taiwan Constitution's guarantee of freedom of speech as well as the criminal code's provisions against defamation.⁷⁷ Applying the "principle of proportionality" in order to balance the two contending rights, the Court affirmed, among other things, the citizens' rights of self-expression and self-realization, in terms of the "fundamental" right of personal identity and reputation (个人名誉) — the same result as in *Qi Yuling*.⁷⁸

But it is CGJ Interpretation No. 626 (June 8, 2007) (education of color-blind persons) that is truly the watershed in Taiwan law. It held that the Taiwan Constitution guarantees not only "civil education" but also the "people's right to other [i.e., non-civil] education" (受国民教育之权利及受国民教育以外教育之权利) in which the right to equality inheres.⁷⁹ The court noted that when a

⁷⁷ See Jud. Yuan Interpretations No. 510 (July 20, 2000) (stating on the concomitant "people's right of work"); see also Jud. Yuan Interpretations No. 547 (June 28, 2002) (Taiwan), available at http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=510 and http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=547

(assimilating the right to the Taiwan Constitution's guarantee of the "equal protection principle").

⁷⁸ See 许宗力, 谈言论自由的几个问题, 台湾宪法之纵剖横切 369-70, 384, 392-93, 509, 653 (李鸿禧等编, 2002), Xu Zongli, Tan yan lun zi you de ji ge wen ti, Tai wan xian fa zhi zhong pou heng qie [Several Questions Concerning Freedom of Speech, in SUM AND SUBSTANCE OF TAIWAN CONSTITUTIONAL LAW] 369-70, 384, 392-93, 509, 653 (Li Hungxi et al eds., 2002) (identity and reputation).

⁷⁹ See, Jud. Yuan Interpretations No. 382 (June 23, 1995) (Taiwan), available at http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=626 (presenting right to education of expelled student as precedent—twelve years earlier and therefore an interval of five years longer than the total life-span of Qi). In respect of the people's right to education, it may be further divided into the 'right to receive a civil education' and the 'right to receive education other than a civil education'. The former right is expressly provided for under Article 21 of the Constitution, which is intended to enable the people to demand that the State provide civil education benefits and to obligate the State to so

citizen has exhausted all other legal remedies for infringement of a constitutional right such as education, the *individual citizen* likewise has the right to petition the CGJ for an interpretation of the Constitution under a statute that specifically authorizes such a petition.⁸⁰ The right to education means that the state (国家)⁸¹ does not arbitrarily deprive a citizen of getting an education because education plays a profound role in an individual's choice of jobs, career planning, and sound development of personality, "and is even closely related to a person's social status and the distribution of the State's resources" on the basis of equal protection.⁸² Civil

perform. As for the people's right to receive education other than a civil education, Article 22 of the Constitution also guarantees it. *See id.* Nevertheless, in light of the limited educational resources, it is the student's right to ensure that the State does not arbitrarily restrict or deprive him or her of the right to receive education at school that is guaranteed, but not the right to demand the grant of admission to school or provision of any particular education benefits. Therefore, if a school other than a civil-education school sets forth specific admission qualifications to preclude unqualified examinees from admission (e.g., the CPU's general regulation for admission's preclusion of a color-blind examinee from being admitted to said university), it does not necessarily infringe upon such examinees' constitutionally guaranteed right to education. Except where any relevant qualification or requirement for admission violates Article 7 of the Constitution, which provides that all citizens of the Republic of China shall be equal before the law, and Article 159 thereof, which provides that all citizens shall have an equal opportunity to receive education, thus unjustifiably restricting or depriving the people of a fair opportunity to receive education, there is no conflict with the Constitution. *See also*, Jud. Yuan Interpretations No. 373 (Feb. 24, 1995) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=373 (mentioning labor unions, technicians, and journeymen in educational enterprises, which appears to be the CGJ's earliest construction of the Constitutional right to education).

⁸⁰ "When a citizen, whose constitutional right was infringed upon and for whom remedies provided by law for such infringement had been exhausted, has questions on the constitutionality of the statute or regulation relied thereupon by the court of last resort in its final judgment, he or she may petition for interpretation of the Constitution. The foregoing is expressly provided under Article 5-I (ii) of the Constitutional Interpretation Procedure Act." Jud. Yuan Interpretations No. 626 (June 8, 2007) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=626. This important point stands in contradistinction to the Qi situation where the petitioner for an Answer from the SPC was not an individual but a lower court.

⁸¹ Another important point in contradistinction to the CCP.

⁸² The full text which is summarized here is as follows:

As for the issue of whether the discriminatory standards for classification based on color blindness as provided for in the General Regulation in question infringes upon the fair opportunity of all people to receive education and hence violates the principle of equal protection by precluding color-blind examinees from being admitted to the school, said General Regulation should be subject to strict scrutiny because color blindness is a biological defect beyond human control, the discrimination concerns the constitutionally guaranteed equal opportunity to receive education, and education plays a profound role in an individual's choice of jobs, career planning and sound development of personality, and is even closely related to a person's social status and the distribution of the State's resources. Therefore, in order to judge whether the General Regulation at issue is contrary to the principle of equal protection, one should

education and non-civil education are two different matters, the former being that of the state-funded and designed curriculum and the latter being where educational individuation mostly takes place. This matter of “other” education may provide a key to understanding the recent developments in *Qi*. The CGJ, of course, made no mention of the *Qi* case, and one can only guess whether the PRC authorities were aware of Interpretation No. 626 and its powerful implications when they abolished *Qi* the following year.⁸³ One can surmise that the abolition of *Qi* in the PRC signals a rejection of a Taiwan-style (i.e. *Marbury* and *M'Culloch* style) constitutional court itself.

In point of fact, Interpretation No. 626 is much more like *Marbury* than is *Qi*. Like Marshall in *Marbury*, the Grand Justices in *Qi* raised constitutional issues, which affirmed the individual petitioner's right to bring these issues to the court, the court's absolute authority to decide these issues, and then ruled against the petitioner, holding that the infringement complained of was no infringement because of the presence, on balance, of an overriding and relevant requirement (the need for police officers not to be color-blind). Indeed, the court said, a color-percipient police force was essential to the overriding public interests of social order and peace, the protection of human rights, and the rule of law. *Qi* was not per se about democratization, but more so about the “process of controlling balance” (制衡的作用) that creates the interstitial spaces between powers and institutions that sets the stage for democratization and keeps them in equilibrium.⁸⁴ Its ultimate importance, I suggest, is not in its similarities (or not) to *Marbury*, but in its championing of education, which is the “most important factor affecting political participation.”⁸⁵ In other words, the SPC

determine whether the purposes to be achieved are important public interests, and whether the standards for classification and discriminatory treatment are substantially related to such purposes.

See, Jud. Yuan Interpretations No. 626 (June 8, 2007) (Taiwan), available at http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=626.

⁸³ Robert J. Morris, *Summoning Democracy, Justice, and Pluralism: Taiwan's Council of Grand Justices*, 4 J. COMP. ASIAN DEV. 337 (2005) (collects other relevant Taiwan sources and discusses their implications).

⁸⁴ Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003) (takes a very different tack from the received tradition of what the case stands for).

⁸⁵ Kuan & Lau, *supra* note 1, at 311.

was merely trying to uphold what it said it was upholding — a person's right to education and identity — and nothing more. If this is true, the demise of the case may have more to do with other factors, such as Judge Huang Songyou, than either the facts surrounding the case itself or the SPC as an institution.

B. A Parallax View: M'Culloch v. Maryland

In 1819 the US Supreme Court, again per Chief Justice John Marshall, decided the crucial case of *M'Culloch v. Maryland*.⁸⁶ The question before the Court was whether the U.S. Congress had the authority to establish a national bank and whether the state of Maryland's tax on the bank was barred by the Constitution. In other words, it was a conflict between federal and state jurisdiction. As H. W. Brands points out in *The Money Men*, both the first and second Banks of the United States were established amid great conflict and upheaval over money policy.⁸⁷ The "bank war" as Brands calls it "marked the beginning of the end of the fondest dream of the Founders: that the country they created might be spared the rancor of partisan politics." Indeed, the fault line of partisanism ran along the divide between capitalism and democracy during a period of wild speculation in land and economic depression.⁸⁸ When James M'Culloch, the cashier of the Baltimore, Maryland, branch of the Bank refused to pay the Maryland state tax on the Bank, Maryland sued and M'Culloch countersued. Marshall, turning on its head the original understanding of the Constitution as creating a government of limited and delegated powers, held that the Constitution allowed whatever it did not expressly forbid.

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."⁸⁹

⁸⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, (1819).

⁸⁷ H. W. BRANDS, *THE MONEY MEN: CAPITALISM, DEMOCRACY, AND THE HUNDRED YEARS' WAR OVER THE AMERICAN DOLLAR* (2007).

⁸⁸ *Id.* at 66-67.

⁸⁹ *McCulloch v. Maryland*, *supra* note 86, at 421.

Thus Marshall upheld the constitutionality of the Bank. The American people, Marshall wrote, “did not design to make their government dependent upon the states.”⁹⁰ A new federal power was at hand. But Marshall’s key statement for present purposes was this: “We must never forget that it is a *constitution* we are expounding.”⁹¹ It is the parochial concept of *a constitution itself* that makes comparisons with *Qi* both possible and fruitful. What is a constitution? What can be done with a constitution? Those questions have different answers in different places. For Marshall and his fellow-Americans, certain assumptions about what a constitution is and what it does surrounds his statement. But those assumptions and definitions do not necessarily cross over borders or cultures.⁹² Comparative studies do not homogenize, and translations, like translators, are liars.⁹³ Only the naïve would assume that the terms “constitution” and “宪法” exactly translate each other. The authorities who promulgated the 2008 abolition of cases can as well be thought of as legitimately saying, “We must never forget that it is a constitution we are expounding — and that constitution contains no such nature, rights, or authority as the SPC said it contained in the *Qi* case. *This constitution gives the SPC no right to ‘say what the law is.’*”

Marshall’s work did not immediately make the Supreme Court the final and accepted arbiter of the U.S. Constitution, any more than *Marbury* had done in 1803. Such a status was still decades in the future. In fact, presidents continued to defy the Court and its chief justices in many ways. President Andrew Jackson, in his “Bank Veto Message” of July 10, 1832, stated:

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, *of education*, or of wealth cannot be produced by human institutions. In the full

⁹⁰ *Id.* at 432.

⁹¹ *Id.* at 407 (original emphasis).

⁹² Pu & Yang, *supra* note, at 92.

⁹³ Robert J. Morris, *Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation*, 51 J. HOMOSEXUALITY 225 (2006).

enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; *but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful*, the humble members of society the farmers, mechanics, and laborers who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to *equal protection*, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.⁹⁴

This understanding might be apropos of the *Qi* case and might suggest a rationale for understanding the SPC's decision. What the SPC found wrong in the situation in Shandong was that both individuals and the law, in the form of official complicity, had "added to" or tried to interfere with the natural "distinctions in society", i.e., Qi Yuling's talent and intellect — for "selfish purposes." In language similar to Jackson's "equal protection," Article 33 of the PRC Constitution states:

All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China. All citizens of the People's Republic of China are equal before the law....

Marbury and *M'Culloch* are never mentioned apart from the name of Chief Justice John Marshall. Indeed, the cases and the history surrounding, like Marshall and his Supreme Court, are each at once a synecdoche for the other two. When it is said that Marshall did this or that in constitutional law, it is the same as saying that the cases did this or that, or that the Court did this or that. It may be this notion that makes the power of *Marbury*, and its silent partner *M'Culloch*, appealing to the ongoing discussion of the *Qi*

⁹⁴ Andrew Jackson, Bank Veto Message (July 10, 1832), available at <http://odur.let.rug.nl/~usa/P/aj7/writings/veto.htm> (emphasis added). Any competent history of Jackson or compilation of his official documents contains the message. The phrase "equal protection" would become a part of the US Constitution in 1868 in section one of the Fourteenth Amendment.

case and vice versa. Marshall is the presence and the persona in the entire jurisprudence of his two most crucial cases, and his court is the facilitator. His personage looms everywhere.

Marshall (September 24, 1755 – July 6, 1835) was the quintessential type of first-generation American founder. As a young man, he fought alongside George Washington as an officer at Valley Forge, and it was at Valley Forge that he first came to understand the essential connection between full-fledged, united nationhood and American independence.⁹⁵ The country could no longer be based on a loose confederation of states. Under Marshall, the Supreme Court decided many cases that solidified the power and unity of the national government, which included his own court, and upheld the application of the Bill of Rights to the federal government.⁹⁶ Marshall looms large in the struggle for the separation of powers (and its concomitant checks and balances) if only for his powerful critics in the legislative and executive branches who insisted that the Supreme Court had no authority to tell them what to do. These included Presidents Andrew Jackson⁹⁷ and Thomas Jefferson himself,⁹⁸ who was a key figure in *Marbury*. The essential separation of powers meant the supremacy of the Constitution itself to every person and institution of government. No party was above it, and it was subservient to no party.⁹⁹ For decades, Marshall was the pivotal figure, and often the lightning rod, around which these incipient issues and doctrines began to solidify into the forms we recognize today. And of course what makes possible any comparative work using *Marbury* or *M'Culloch* is that fact that they remain good precedents after 200 years.

Though many considered him dangerous, Marshall was never impeached, but Huang Songyou (黄松有), the vice-president of the SPC when *Qi* was decided and a major commentator on the case, was removed from office. On or about October 16, 2008, Huang

⁹⁵ JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 64, 70-72 (2007).

⁹⁶ RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS, 258-59 (2006).

⁹⁷ JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 209-11 (2008).

⁹⁸ SOMETHING THAT WILL SURPRISE THE WORLD: THE ESSENTIAL WRITINGS OF THE FOUNDING FATHERS 340-42 (Susan Dunn ed., 2006).

⁹⁹ Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533 (2007) (discusses some of these ideas).

was reportedly detained by Communist Party discipline officials in connection with a corruption scandal. The NPCSC removed him from the office of the SPC vice presidency on October 28, 2008, without stating a reason for the removal.¹⁰⁰ As we noted earlier, Huang was one of the chief movers of the *Marbury* connection to *Qi* and of the “justiciability” of the PRC Constitution, and this leads us back to education. The dates of his detention and removal from office, just two months before *Qi* was officially abolished, are significant. It is not unreasonable to suggest that to the extent Huang identified himself, and was identified by others, with his case, he became a dangerous figure in the Marshall sense.

The Preamble and Chapter 1 of the 1982 PRC Constitution place the entire governmental structure “under the leadership of the Chinese Communist Party” in connection with the Marxist principles of “the people’s democratic dictatorship” and “democratic centralism,” and “politics in command,”¹⁰¹ all Maoist and Dengist doctrines. The operative word is *under*. Nothing in *Qi* ostensibly challenged these arrangements, but it can be argued that the activism of the SPC, in the persona of Huang Songyou, did pose as a challenge as the subject of the case was *education*. It could be argued that Huang purported to place the Constitution above everything else, and everything else under it. As James Boyd White said of Marshall, the people left behind them, and above them, their Constitution by their singular act of ordaining that Constitution. According to the notions of separation-of-powers and checks-and-balances, all institutions of governmental power are under the Constitution, but none is under the authority of any other.¹⁰² Education teaches people that, and that reality may be the key to understanding the sudden disappearance of *Qi*. There may also be an emerging practical political explanation.

¹⁰⁰ *High Court Judge Placed Under Party Investigation*, S. CHINA MORNING POST, Oct. 16, 2008, at A6 (H.K.).

¹⁰¹ See, Thomas E. Kellogg, *supra* note 42, at fn. 93. The official English text of the 1982 PRC Constitution as amended may be read online at

<http://english.peopledaily.com.cn/constitution/constitution.html> (last visited Aug. 1, 2008).

¹⁰² Robert J. Morris, *Court Bashing in the Legislature: A Modern Lesson In Civics From the ‘Federalist’*, 9 HTLA Law Reporter 5 (1994).

C. Closing the Floodgates?

In summer 2009 the Western news media reported the story of “education theft in China.” According to the *New York Times*, corrupt communist party officials are taking bribes to steal the files of *bona fide* students and graduates and sell them to nonqualified persons who can then go to school and get good jobs.¹⁰³ The original transcript of each student’s file is unique and is therefore irreplaceable. Potential employers do not accept copies or duplicates; hence, the files are worth a lot of money. The rich and powerful are willing and able to pay the money, and corrupt state/party officials are well positioned to accept such bribes and steal the files. Petitions by the abused students and their parents for official help have gone unsatisfied, and the petitioners have been placed under police surveillance or arrest. The government’s position is to “reject any inquiry.”¹⁰⁴

Obviously, this “theft of education” here also includes, as in *Qi*, the theft of the *bona fide* student’s identity and name, but now there is a crucial additional factor: the bribe-taking of state/party officials. As noted earlier, *Qi* was primarily an interpersonal tort case, the “education theft” cases reported here are the results of actions by state and party officials, and have been reported and discussed for at least the past three years.¹⁰⁵ If the corruption is as widespread as reported, there are potentially thousands of such instances throughout the country. And if such a dangerous example as *Qi* were left on the books for all to see, that could result in a deluge of constitutional cases against the government, the corrupt state/party officials, and the party itself. Regardless of whatever limitations on such suits

¹⁰³ Sharon LaFraniere, *Files Vanished, Young Chinese Lose the Future*, N. Y. TIMES, July 27, 2009, available at <http://www.nytimes.com/2009/07/27/world/asia/27china.html?r=1> (last visited August 25, 2009). The story was also reported by BBC News as “Stolen education in China,” available at <http://www.bbc.co.uk/programmes/p003vdcp> (last visited Aug. 13, 2009).

¹⁰⁴ The story is also reported on a Chinese blog. See, 档案失踪, 把年青人的前程断送, available at http://bbs.creaders.net/education/bbsviewer.php?trd_id=387934&language=big5 (last visited Aug. 22, 2009).

¹⁰⁵ 何勇, 买卖高考分数背后有漏洞, 人民日报, He Yong, Mai mai gao kao fen shu bei hou you lou dong, Ren min ri bao [Op-Ed., *Leaks Behind Trade of Advanced Level Exam Marks*] PEOPLE’S DAILY, July 20, 2006, at 11, available at <http://edu.people.com.cn/GB/4609415.html>; 张晓涛, “买卖高考分数”新闻的可怕卖点, 新华网, Zhang Xiaotao, “Mai mai Gao kao fen shu” xin wei de ke pa mai dian, Xin hua wang [Op-Ed., *Terrible Features of Trade of Advanced Level Exam Marks*] XINHUA NEWS, <http://news.xinhuanet.com/edu/2006-07/08/content4808396.htm> (last visited Aug. 29, 2009).

that might appear in various civil or criminal statutes, such cases could, like *Qi*, be brought solely under the 1982 Constitution, which is said to apply to “all the people.” Such an opening of the floodgates of political participation would signal a substantial failure of the state’s ability to “control for education” and could become a referendum on anti-corruption. As the *Times* article notes, “China’s one-party system breeds graft that only democratic reforms can check.” A true *Marbury*-style court system, with a case like *Qi* intact, would be part of such a democratic reform.

IV. CONCLUSION

Many legal scholars who have considered the *Qi* case both inside and outside the PRC have supported the ruling and have drawn hope from it. Professor Wang Lei (王磊) states in the strongest terms:

法院不可能也无法适用宪法。齐玉苓案件的一个很重要的意义，在于打破了这一传统观点，告诉了人们在中国现有体制下如何将宪法司法化，以实际案例告诉人们法院如何适用宪法。

Courts have no way but to (不可能也无法) apply the Constitution. One of the most important meanings of the *Qi Yuling* case is that it has smashed this traditional concept and tells people how to judicialize (司法化) the Constitution under China’s current legal system, and by means of a concrete example tells people how the courts should utilize the Constitution.¹⁰⁶

The double-negative construction (不...也...无) in Wang’s statement makes a powerful imperative, ‘cannot but, cannot not’ (不可能也无法), in other words, absolutely must — is a formula as old as the Confucian texts. Intentionally or not, it evokes the authority of those texts. According to the fifteenth chapter of the *Book of Filial Piety* (孝经), whenever someone — a minister, a ruler, a son — is confronted with improper conduct in a superior, it is his

¹⁰⁶ 王磊, 选择宪法 47 (2003), WANG LEI, TO CHOOSE CONSTITUTIONAL LAW 47 (2003).

imperative duty to remonstrate with (爭) that superior, and in doing so he will in no way lose his position. He absolutely must. He “cannot not” (不可以不) do so.¹⁰⁷ Indeed, this seemingly counterintuitive mandate is, according to the Master, the essence of acting filially (又焉得为孝乎). This tradition of remonstrance — as moderns would say of “speaking truth to power” — remains a powerful source of Chinese thought, and as Wang has correctly seen, is the essence of *Qi* and *Marbury*. In 1954, nearly 150 years after *Marbury*, the US Supreme Court exercised its power to “say what the law is” on the subject of education in its watershed case:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his

¹⁰⁷ Robert J. Morris, Book Review Essay, 13(1) *China Review International* 221, 228 (2006), reviewing THOMAS A. METZGER, *A CLOUD ACROSS THE PACIFIC: ESSAYS ON THE CLASH BETWEEN CHINESE AND WESTERN POLITICAL THEORIES TODAY* (Hong Kong: Chinese University Press, 2005) (considers these ideas in greater detail). The full text of *XiaoJing* (孝经) Chapter 15:

Master Zeng said, “Parental love (ai), reverence and respect (jing), seeing to the well-being of one’s parents, and raising one’s name (ming) high for posterity—on these topics I have received your instructions. I would presume to ask whether children can be deemed filial simply by obeying every command of their father.” “What on earth are you saying?” said the Master. “Of old, an Emperor had seven ministers who would remonstrate with him, so even if he had no vision of the proper way (dao), he still did not lose the empire. The high nobles had five ministers who would remonstrate with them, so even if they had no vision of the proper way (dao), they still did not lose their states. The high officials had three ministers who would remonstrate with them, so even if they had no vision of the proper way (dao), they still did not lose their clans. If the lower officials had just one friend who would remonstrate with them, they were still able to preserve their good names (ming); if a father has a son who will remonstrate with him, he will not behave reprehensively (buyi). “Thus, if confronted by reprehensible behavior on his father’s part, a son has no choice but to remonstrate with his father, and if confronted by reprehensible behavior on his ruler’s part, a minister has no choice but to remonstrate with his ruler. Hence, remonstrance is the only response to immorality. How could simply obeying the commands of one’s father be deemed filial?”

environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁰⁸

The assimilation here of education to both equality and democracy must surely be obvious and frightening to the totalitarian mind. Yet it is the logical extension of what the Council of Grand Justices achieved in 2007, what Marshall started in 1805, and what by implication, *Qi* started in 2001. If the subject matter of *Qi* had been anything other than, or less than, education itself — say, Ms. Qi's name, identity, and reputation *alone* — it can be argued that *Qi* would still be standing. But education is the “most important factor in the suppression of traditional political orientations,” and it must be “controlled for.”¹⁰⁹ The right to education is more than merely the right to go to school. Education necessarily implies and includes the means to education — the freedoms of speech, press, thought, association, political participation, and the Internet, plus all that is included in academic freedom. It can be defined to mean the right to become and be educated, to attain the state of *educatedness* along with the ongoing right constantly to augment that condition, and then to find suitable employment by which to use that education. It implies all the necessary consequences of education and of a democracy's education project. Such *educatedness*¹¹⁰ would include not only being learned, but also (the thing that breeds curiaphobia) the ability to think critically — in sum, the expansive view of education espoused in Interpretation No. 626 in Taiwan. This kind and level of education was not at issue in the vocational

¹⁰⁸ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (stating racial discrimination in public education is unconstitutional. Today, of course, many cases have followed on *Brown*, and “education law” in the United States is a discipline in itself. See, e.g., <http://www.megalaw.com/top/education.php> (last visited Aug. 1, 2009).

¹⁰⁹ Kuan Hsin-chi & Lau Siu-kai, *Traditional Orientations and Political Participation in Three Chinese Societies*, 11 J. CONTEMP. CHINA 297, 308 (2002).

¹¹⁰ The term is, I believe, the original coinage of the Centre for Development of Teaching & Learning. Robert J. Morris, *Improving Curriculum Theory and Design for Teaching Law to Non-Lawyers in Built Environment Education*, 25 STRUCTURAL SURV.(3/4) 279, 279-80, 288-91 (2007), available at <http://www.cdtl.nus.edu.sg/publications/educated/ingred.htm> (last visited July 23, 2008) (discussing the term *vis-à-vis* legal education).

business school of *Qi*, but if the case law that has developed in Taiwan is an indication of where things may lead, constitutionalizing any “right to education” by the SPC could be an action rife with too much possible autonomy for both courts and citizens in a post-Olympics PRC that has witnessed ever tightening restrictions on all rights and freedoms despite its promises to the contrary only four years earlier.¹¹¹ Indeed, *Qi* was never “merely” about Ms. Qi or Ms. Chen getting a simple diploma at a business school. As with *Marbury*, much more lay incipient in the case.

Yet the SPC’s official notice of abolition alleged that this action against *Qi* was taken in order to “advance the work of strengthening civil trials, and to protect the lawful interests of parties litigant according to law, in reliance upon the legal rules and the necessities of actual cases.” How so? It is easy to understand how all the other discontinuances of cases on the list might facilitate these ends inasmuch as their undergirding statutes or circumstances had changed. But neither of those grounds was alleged for *Qi*, and surely neither ground could be true even if it were alleged. The only plausible answer that presents itself is that education is the “most important factor in the suppression of traditional political orientations,” and therefore it must be “controlled for” by the interests that have an investment in the perpetuation of such traditional political orientations.¹¹² The control thus achieved is the advancement of legal work and the law itself — in the words of historical and dialectical materialism (辩证唯物主义和历史唯物主义) — by “forcing the dance.”¹¹³ As Orwell dramatizes in his novel *1984*, it is the power to rewrite the past and to abolish (废止), if necessary, what once was. All else is irrelevant.

Education is both subversive and dangerous. When a court assays to “say what the law is,” it becomes the instructor in the law. As the teacher or master, it requires others, its patrons, to be the

¹¹¹ See, e.g., Amnesty International (USA), *People’s Republic of China: The Olympics Countdown—Broken Promises*, available at <http://www.amnesty.org/en/library/asset/ASA17/089/2008/en/8249b304-5724-11dd-90eb-ff4596860802/asa170892008eng.pdf> (last visited July 31, 2009) (citing the political use of education at notes 31-33 and accompanying text).

¹¹² See Kuan, *supra* note 109.

¹¹³ Robert J. Morris, *Forcing the Dance: Interpreting the Hong Kong Basic Law Dialectically*, in *INTERPRETING HONG KONG’S BASIC LAW: THE STRUGGLE FOR COHERENCE* 97, 97-111 (Hualing Fu et al. eds., 2007).

pupils — to sit at its feet. There can only be one master on the stage at a time. When his pupil Zengzi (曾子) became agitated and jumped up from his mat in a rush of as yet uninformed enthusiasm, the Master (Confucius) remonstrated with him saying, “Sit down again. I will teach you (复坐. 吾语汝).”¹¹⁴ It was a pattern that repeated itself. *The Master says* (子曰) is the power of a *Marbury* court. “I will teach you” — I will do the telling and the talking (吾语汝); the court has the prerogative to explain, interpret, say what is and what it means. In ancient times, if you did attempt to speak the truth to authorities, there was the chance that such remonstrance would fail — with disastrous consequences. Therefore, Hai Rui (海瑞) who went on to remonstrate with the emperor, brought on his own death.¹¹⁵ The role of a master is to be stern (严) — “Education without severity: the teacher’s indolence.”¹¹⁶ The demise of *Qi* is not only anti-court and anti-intellectual; it is also anti-educational. All true *Marbury* courts are remonstrators, and the remonstrance of SPC’s *Qi* case should always be celebrated for that fact if now only historically.

¹¹⁴ See, 孝经, 开宗明义章第一, Xiao jing [Book of Filial Piety], Chapter one of the Classic of Family Reverence (“Master Zeng rose from his mat to respond, and said, ‘I am not clever enough to understand such things.’ ‘It is family reverence (xiao),’ said the Master, ‘that is the root of excellence, and whence education (jiao) itself is born.’”).

¹¹⁵ A thumbnail sketch of the story may be read online. See, 清官海瑞, Hai Rui, [An Upright and Incorruptible Official], available at http://big5.hwjyw.com/zhwh/Common_Knowledge/China_history/200902/t20090223_27060.shtml (last visited Aug. 1, 2008).

¹¹⁶ See, 三字经, San zi jing, [Three-Character Classic], Line 10 (“教不严, 师之惰.”), available at http://www.geocities.com/walter_hung/chn/sanzijing.htm (last visited July 31, 2009), translated in <http://www.yellowbridge.com/onlinelit/sanzijing.php> (last visited July 31, 2009). See also, Robert J. Morris, *Globalizing and De-Hermeticizing Legal Education*, BYU EDUC. & L. J. 53, 53 n.2 and accompanying text for the epigram (2005).