

TOWARDS CONSTITUTIONAL RE-ENLIGHTENMENT:
TEACHING AMERICAN CONSTITUTIONAL LAW IN CHINA

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Contemporary students of constitutional law basically know two things. First, China's Constitution is inactive and (or because) China has no judicial review. Second, the U.S. Constitution is active and (or because) judicial review operates robustly in America. Then what is the point of teaching American constitutional law in China?

In this essay, I will try to answer the question by sharing my experience of teaching American constitutional law at Tsinghua Law School during the past few years. My experience may be of interest to constitutional teachers in the English-speaking world or anyone interested in the international transference of constitutional ideas. I will first explain the reasons for teaching American constitutional law in China. Then I will account for the methods of teaching I employed in the courses. After that, I will talk about the content I teach and the reactions of the students. A conclusion follows.

I. WHY TEACH AMERICAN CONSTITUTIONAL LAW?

To be sure, American constitutional law is hardly relevant to Chinese constitutional practice. In terms of political principle, China remains a socialist country, at least in a political, constitutional sense. In terms of institutions, Chinese courts cannot apply the Constitution in litigations. China is also greatly different from America in terms of culture.

At most, American constitutional law only has direct influence in the academic domain. In China, studies on the U.S. Constitution belong to the subject of comparative constitutional law, a subdivision of comparative law. Historically, comparative law initially aimed at the integration of legal systems, particularly private laws. The rise of comparative constitutional law was part of the post-Cold War trend of constitutional convergence. Before that, a nation's constitution was closely integrated to the politics, history, and culture of the land; it was difficult to effect constitutional graft or borrowing. While trade law became internationalized, constitutional law remained a national heritage.

The rise of comparative constitutional law resulted from two main reasons. First, after the Cold War, multiple countries started to make new, liberal-democratic constitutions, especially in Eastern Europe and the former-Soviet regions. The U.S. Constitution became

the main reference, and American constitutional scholars actively took part in “constitutional engineering”. Second, the internationalization of judicial review went along with economic globalization. Deciding constitutional cases, higher courts judges referred to the interpretation of similar provisions by their international colleagues. Cross-border communication among judges increased. American constitutional law became the focal point in both constitution-making and constitutional interpretation.

In both aspects, however, China did not swim with the tide. On the one hand, China’s last constitution-making was more than thirty years ago—the making of the 1982 Constitution.¹ Afterwards, the Constitution has been only amended, but not remade. On the other hand, China has not adopted judicial review. The Chinese Supreme People’s Court attempted to introduce it at the beginning of the 21st century,² and many legal scholars advocated for it. For both the bar and academia, the American model loomed large. After the attempt failed in 2008, however, the gate to judicial review was closed in China.³ The U.S. Constitution, then, is “useless” from a practical point of view in Chinese law.

The fact that the U.S. Constitution cannot influence Chinese legal practice does not mean that it has no social impact in China. Quite the contrary, it is influential because, as a political-social discourse, it impacts people’s constitutional imagination which can shape social reality. It has been so and perhaps will continue to be so. Three points can be made to illustrate this.

First, the U.S. Constitution has had significant influences on Chinese constitutional history. In the early Republic of China, the founder Sun Yat-sen was a fan of American constitutionalism. His

¹ According to conventional Chinese constitutional discourse, the government claims that the enactment of 1982 Constitution of the PRC should be regarded as a constitutional amendment.

² See Guanyu yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shou Jiaoyu de Jiben Quanli Shifou Ying Chengdan Minshi Zeren de Pifu (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) [Official Reply on Whether the Civil Liabilities Shall Be Borne for Infringement on a Citizen’s Constitutionally-Protected Basic Right of Receiving Education by Means of Infringing on Her Right of Name], the Sup. People’s Ct., July 24, 2001, SUP. PEOPLE’S CT. GAZ., May 1, 2001. The reply is often dubbed as China’s “*Marbury v. Madison*”, for it empowered Chinese courts to interpret the Constitution in civil litigations.

³ See Guanyu Feizhi 2007 Nian Di Yiqian Fabu de Youguan Sifa Jieshi (Di Qi Pi) de Jueding (关于废止 2007 年底以前发布的有关司法解释[第七批]的决定) [The Decision Concerning the Abolishment of Judicial Interpretations Issued Before the End of 2007 (7th Batch)], the Sup. People’s Ct., Dec. 8, 2008, §26, SUP. PEOPLE’S CT. GAZ., Feb. 1, 2009, at 7. For analysis, see Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People’s Court’s Reply to Qi Yuling’s Case*, 43 SUFFOLK U. L. REV. 669 (2010).

idea of “Five-Power Constitution” was modelled upon the tripartite separation of powers as operated in the United States. After each province separated from the Qing Empire during the Republican Revolution in 1911, the idea of establishing a federal union like the United States attracted many politicians and intellectuals.⁴

Second, American constitutionalism has greatly influenced the contemporary Chinese elite’s way of constitutional thinking. When Chinese judges, lawyers and scholars think about—or even just mention—constitutional law, the U.S. Constitution would first come into their mind.⁵ Even in the official polemics against Western constitutional system, one will first criticize American constitutionalism, because the United States remains the best representative of the “capitalist camp”. British constitutionalism was once the exemplar to the Chinese elite in late Qing dynasty; the French constitutional system attracted politicians and intellectuals in the early Republic of China. Today, it seems American constitutionalism becomes the only myth.⁶ Multiple bestsellers on American constitutionalism have come out; there is even a professor of Chinese literature who writes about the U.S. Constitution.⁷

Third, the United States Constitution impacts China’s future elites by assuming an enlightening role for students at top Chinese law schools. Just as a freshman wrote in her homework in one of my courses: “Constitutionalism is the ‘good thing’ that we should pursue, because the United States has it while we don’t. This is my first thought when I came to law school.” As far as I know, some even have already been impressed by the U.S. Constitution before college. A student has even read the Chinese translation of *The Nine: Inside the Secret World of the Supreme Court*⁸ during high school. In China, Constitutional Law as a compulsory course for first-year law students is supposed to teach the Chinese Constitution. Yet the shadow of the U.S. Constitution is everywhere. Almost everybody

⁴ At the time, the U.S. judicial review system had not been universally recognized in the world, and few in China advocated for introducing it.

⁵ I used to talk to a local judge in a Chinese county. When I told him I came back from the U.S., he directly said that the separation of powers cannot take root in China.

⁶ To be sure, with many returned students from Germany or other European countries, constitutional systems of other western countries begin to affect Chinese constitutional discourse. Yet the U.S. Constitution still holds the distinctive impression in the eyes of legal scholars as a whole.

⁷ Yi Zhongtian (易中天), *Meiguo Xianfa de Dansheng yu Women de Fansi* (美国宪法的诞生与我们的反思) [The Birth of the U.S. Constitution and Our Reflection] (2005).

⁸ JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2008, Chinese translation 2010).

would know *Marbury v. Madison*⁹ in the first year of college studies. In contrast, perhaps none has read the full text of *The Communist Manifesto*. In topics of politics and law, America is of the most interest to them.

All in all, American constitutional law has become a symbol or a legalese, flowing from university classrooms and law journals, to television shows and online forums. It becomes a vision, a dreamland; there, as a bestseller's title goes, "the justices have the final say".¹⁰ Whenever the Chinese constitutional system is talked about, American counterpart emerges in people's minds—just like girls often complain about their own boyfriends by comparing them with others. Explicitly or implicitly, American constitutional law points out the direction of constitutional reform for the Chinese legal circle. For the past two decades or so, it has been a reference for Chinese constitutional reform in its progress towards establishing some form of judicial review.

America's Constitution is definitely a classic in the Chinese constitutional discourse. Teaching American constitutional law in China becomes an important issue. This issue concerns not only with constitutional reform; it also affects the Chinese people's daily lives. It not only forms the basis of constitutional theory; it is also connected to legal education. It applies not only to academic studies; it is also linked to the public opinion.

II. HOW TO TEACH?

While constitutional law is a compulsory course for Chinese law students, comparative constitutional law, including American constitutional law, is an elective. I have been teaching American constitutional law for three years in several elective courses with different, given titles: sometimes I compared it with other jurisdictions in Comparative Constitutional Law in the spring semesters from 2013 to 2015; each time, there was about 20 students from the International Class, a program at Tsinghua Law School training internationalized lawyers. In addition, I taught solely American constitutional law in Selected Literature on Constitutional Law in the spring semesters of 2015 (40 students) and 2016 (49 students). I also taught a special topic—Substantive Due Process in American Constitutional Law—in Constitutional Law and Human Rights (Fall 2015). My account in this essay will be mainly based on

⁹ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁰ He Fan(何帆), *Dafaguan Shuo le Suan* (大法官说了算) [The Justices Have the Final Say] (2010).

the Selected Literature on Constitutional Law course, supplemented with experience from other courses.

Most of the students are undergraduates who will receive the LL.B. degree.¹¹ Students from other majors also attended: technologies (Tsinghua is very strong in technologies), the humanities, and social sciences. A semester at Tsinghua lasts for sixteen weeks, so the course (especially under the title of Selected Literature on Constitutional Law) can cover a variety of topics with in-depth discussions. The form of the course is largely lecturing. In some classes, I will have students make presentations on a case or a topic. Generally speaking, I teach Chinese, undergraduate, law students. These attributes make my teaching slightly complicated: teaching American constitutional law in the ways of both legal education and general education.

In the first place, my students are mostly law students. To some extent, the pedagogy in these courses resembles constitutional law courses in a top U.S. law school. They have a constitutional law casebook which includes excerpts and compilations of judicial opinions. Teachers guide students to discuss constitutional issues in cases through seminars, on the basis of pre-class reading and case briefing. This is mostly for law students. The textbooks I use are *Processes of Constitutional Decision-Making* and *the Court and the Constitution*.¹² I have two considerations. First, it has already been translated into Chinese and the students can easily obtain copies. Second, it can help to both deepen the court-centered perspective and also to transcend. *Processes of Constitutional Decision-Making* emphasizes the political processes that involve all the three branches.

Second, my students are undergraduates. As a course for undergraduate students, the course differs from its American counterpart. I teach it as a course of general education, too. Apart from analyzing judicial opinions, I introduce the social background that brings about the issue. For example, I spend an hour talking about the sixties to my students to explain how substantive due process was transposed to the body: privacy, abortion, and gay rights. Discussing post-sixties cases, I also introduce basic knowledge of American politics, especially the ideological war between liberalism and conservatism, and how the war affects the judicial department. To make it vivid, I frequently use *Forest Gump* to show social backgrounds and historical events, since most students have watched that movie. Besides, I assign some readings like

¹¹ In the Chinese legal education system, students can enter law at any level of university education: undergraduate, master (LL.M., J.M.) or doctoral (Ph.D.).

¹² PAUL BREST ET AL, *PROCESSES OF CONSTITUTIONAL DECISION-MAKING* (4th ed. 2001, Chinese translation 2002).

professor Eric Foner's *Give Me Liberty!*¹³ for the students to know basic American political and cultural history. As for the content of American constitutionalism, apart from what American law school usually teach, I add two set of things. First, how the Constitution constructs the American polity, by comparing it with English and French model. Second, I highlight the constitutional culture that sustains American constitutional institutions.

One thing I want to convey to the undergraduate students is engaging in critical thinking towards the ideas in American constitutionalism. I encourage the students to do three things: perusing the original text to see whether it matches prior impressions or popular sayings; thinking about judicial opinions critically to avoid blind worship; and questioning the seemingly unquestionable to see whether a popular saying stands. As for judicial review, I assign many commentaries like Alexander Bickel's *The Least Dangerous Branch*¹⁴, among others, to force the student to think about the legitimacy of judicial review. I push students to think critically by asking why. In the final exam, one of the questions I asked my students is: Do you think the Supreme Court should have the final say in constitutional issues? Another question is: Is American constitutional law more like science or literature and art? Most students analogized American constitutional law to literature and art. For them, there is no objective truth in the Constitution; concepts like "liberty" or "equality" are too vague to become scientific formula. Judicial interpretation of these concepts is not simply deductive work, but rather creative craft that produces a Dworkinian "chain novel". Constitutional arguments usually resort to sentiments, rather than logic. Landmark cases often involve moving stories or names: The name of Loving in *Loving v. Virginia*¹⁵ which allowed interracial marriage; the love story of a dying gay in *Obergefell v. Hodges*¹⁶ which allowed same-sex marriage.

Third, my students are generally Chinese.¹⁷ There are difficulties in teaching American constitutional law in Chinese law schools. Several points follow from this simple fact. For one thing, Chinese students are used to listening to lectures and taking notes. This is a manifestation of Chinese culture of teaching and learning: students take the teacher as authority, write down what the teacher says as

¹³ ERIC FONER, *GIVE ME LIBERTY: AN AMERICAN HISTORY* (4th ed. 2013, Chinese translation 2010).

¹⁴ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962, Chinese translation 2007).

¹⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁷ There were only a few foreign students (mostly Korean) in my class.

authoritative answers, and give them back to the teacher in the final exam. I highly encourage the students to raise questions and question what the teacher says. They generally don't read materials before class; they don't raise questions or join the discussion, either. Students at a top U.S. law school can read 100-200 pages per week for Constitutional Law, yet students at Tsinghua cannot do that. For one thing, most American law students have received liberal education during college, thus most are already accustomed to large amount of readings and in-class discussion. Liberal education, by contrast, is just beginning at Chinese top universities.

Moreover, Chinese students are unfamiliar with the language and structure of the decisions of American courts. There is no introductory course to American law at Tsinghua Law School. The vocabularies, writing style, and reasoning structure of the opinions pose great challenges to them. There is also the problem of translation: students always find the translated opinions difficult to read, partly because of mistranslation, and partly because the inherent untranslatability of some American concepts. They have to read—and I have to assign—the original opinions in English. That greatly slows down their reading speed and amount. The intricacies and technicalities of American political and judicial system also impede the comprehension of Chinese students. Therefore, I must spend a lot of time explaining concepts or conceptions at issue.

Lastly, students naturally think of Chinese problems while reading cases from the United States. I lay down a general rule: forget about China while reading American cases. The point is to get into the internal logic of American constitutional law. But during discussion, I will make analogies between the two countries regarding their deep structures. I don't just teach how to make arguments, but also encourage active thinking about why America chose a particular rule. Few constitutional law courses would push the students to think about whether we should have nine justices decide on constitutional questions. Yet, this question is the central question in our course. I always tell my students: "Don't take anything for granted".

III. WHAT TO TEACH?

Influenced by popular discourses before taking the course, my students tended to idolize the Constitution (and the Philadelphia Convention of 1787) and the United States Supreme Court (and its power of judicial review). For them, the Constitution mystically settles down the fundamental law of the United States and lasts for more than two hundred years—a political miracle; the Supreme Court enforces the Constitution effectively against political

encroachment and guarantees the rule of law—a legal myth. Both contribute to the domestic order and global power of the United States.¹⁸

Idolization, however, can impede comprehension. American constitutionalism serves as the single most important example for constitutional enlightenment, that is, teaching the basic knowledge and ideas of constitutionalism. Yet sometimes the enlightenment produces a new myth; it elicits the cult of the U.S. Constitution without proper understanding. My teaching aims to change that situation by deepening students' understanding.

Teaching constitutional law, American professors usually divide the course into two parts: powers and rights. By case method, they teach judicial doctrines related to the two topics to train future lawyers. I generally followed the format, but altered the content a little bit. Generally speaking, I taught three things of American constitutionalism: its regime, law, and culture.

Before the class started, I asked the students to peruse the Constitution to find something different from their prior impression or imagination. Students reported their findings in the first class. Many were surprised to find that the two-party system is not written in the text. Some found the words of the Constitution are too dull: except for the big words like “liberty” and “welfare” in the Preamble, formal provisions are full of procedural technicalities. Many found the Constitution much shorter than they expected. All found the words in the Bill of Rights too broad to be applied: “equal protection”, “liberty”, or “due process”. Generally speaking, their findings pertained to the regime founded by the Constitution, the law that applies the Constitution in particular cases, and the social imagination that sustains both.

In the first part of the course, we discussed how the Constitution formed the American unified polity, the powers of which are separated, as well as what forces keep the polity unified. We went through the Declaration of Independence, the Articles of Confederation, the Constitution, the *Federalist Papers* (selections), as well as President Lincoln's First Inaugural Address to see how the Constitution created a fledgling united republic, how Lincoln saved the Union from a disunion crisis, and how the Fourteenth Amendment restructured the Union. Students were also required to

¹⁸ In the popular discourse, the Constitution has been labeled as “universal” in terms of constitutional law and constitutionalism in contemporary China. Here, the term “universal” should be understood in the Hegelian sense: it does not mean that American constitutionalism applies everywhere; it means that American constitutionalism represents the highest level in constitutions.

read Dicey's account of the English constitution¹⁹ and the French Constitution of 1958 to make comparisons: both England and France achieved national unity before establishing constitutionalism. We conducted a counterfactual thought-experiment: if America achieved unity before constitution-making, the Constitution might be very different from the 1787 document. Perhaps, like England, it might not have chosen the separation-of-power system. To separate powers at the federal level was to limit the federal power and to protect the states—that's because of the logic of polity formation, *e pluribus unum*.

Discussing judicial power and judicial review, students were required to read the entire opinion of *Marbury*, not just the excerpt. And I spent more than an hour to introduce the political background of the landmark case: The Federalists lost the 1800 presidential election to the Jeffersonians; the lame-duck Congress controlled by the Federalists passed laws to create positions of federal judges and appointed their men to fill the position, aiming to fight against the Jeffersonians. Through reading *Marbury*, students came to see what was unforeseen by the framers. And students came to appreciate the problematics, rather than the merits, of judicial review. The Court was not an island insulated from the landmass of politics. Rather, it was originally entangled in political struggles. It has always been so since 1803. Students learnt to appreciate both what the Court says and what it does.

After perusing the opinion, students found that Justice Marshall's legal reasoning is found to be flawed; the logic of *Marbury* is political, not legal. He could have just dismissed the case for procedural reasons and did not need to write such a long opinion. In 1803, when he declared that "it is emphatically the duty and province of the judicial department to say what the law is", the proposition was more a hope than a fact. The fledgling republic was tottering on the brink. Students began to change their impression that judicial review stands outside of politics and regulates political actors. They came to see that the origin of judicial review is political in nature and establishing judicial review is not a legal task. The question is not that an unconstitutional law should be revoked, but who is to judge a law's constitutionality. The choice needs a fundamental political decision. While students generally believed that the court should do constitutional review in China, after reading *Marbury*, many began to change their minds. They no longer took for granted that the court should have the final say.

¹⁹ ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed., 1915).

Regarding federalism, we discussed the commerce power of the Congress. Students are startled to see how the commerce clause has been interpreted by the Supreme Court to do everything. The point is that the Constitution grants the federal government few regulatory powers, and the Supreme Court tried to expand the powers of the federal government through interpreting the commerce clause: the “interstate” includes the “intrastate”; “commerce” includes production. The class was full of laughter when we discussed *Wickard v. Filburn*, in which the Supreme Court ruled that homegrown wheat exceeding the production quota set by the Congress affects interstate commerce!²⁰

On presidential powers, students were a bit astonished to know the President enjoys many privileges and prerogatives, for example, the pardon power. I assigned *United States v. Nixon*.²¹ Before, they had been told that the President is just a public servant whose powers are totally controlled by law. They came to know that these privileges and prerogatives began to be highly restricted only after Watergate. On presidential elections, we read and discussed *Bush v. Gore*.²² They were shocked to know that the President’s power to authorize a nuclear attack is beyond any legal procedures or judicial restraints. Students were surprised to find that one of the most important decision-making in the United States was not majoritarian! Bush received fewer popular votes and the unelected Supreme Court decision sent him to the White House. Some students tried to find out the Presidents who appointed the justices deciding *Bush v. Gore* and their findings were that *guanxi* (connections) matters in America too: some justices who decided in favor of George W. Bush were appointed by his father! The Chinese students can easily get the point of American legal realism which tends to find the personal, psychological factors that determine the judicial decision.

As for rights, I didn’t teach much about the First and Second Amendments—that would require another semester. I just made a brief introduction. I told my students that the two amendments show the American characteristics. First, America has the highest, or perhaps absolute, degree in protecting free speech. Public speeches, like criticism of government officials, are protected even if the criticism is based upon false statements of fact. Even Nazi speeches are protected by American constitutional law. In the United States, free speech can even extend to campaign finance, which startled my students. They were wondering how money can speak.

²⁰ *Wickard v. Filburn*, 317 U.S. 111 (1942).

²¹ *United States v. Nixon*, 418 U.S. 683 (1974).

²² *Bush v. Gore*, 531 U.S. 98 (2000).

As for the Second Amendment, I also said something in response to students' questions. I told them the United States is among the few countries that recognize the right to keep guns. The Second Amendment of the U.S. Constitution protects the right to bear arms. The right to gun is a subject matter that can *trigger* public debates—again, incredible to my students.

We paid a lot of attention on the Fourteenth Amendment. About equality, we compared *Plessy v. Ferguson*²³ with *Brown v. Board of Education*²⁴. No doubt, all the students highly appreciated the moral vision of the Supreme Court in ruling segregation to be unconstitutional in public education. But when they read subsequent cases and events like Little Rock that were supposed to enforce the decision, they found that the opposition from the Southern states was so strong that President Eisenhower employed the military to enforce the decision! That shocked my students who thought of constitutional law as a peaceful way of resolving disputes. I asked my students to imagine the Chinese government summoning the army to enforce a decision of the Supreme People's Court, and they just thought that would be incredible. Students got to know that even today, school segregation is still a problem in the United States.

I tried to show how due process became substantive and produced the single most unintelligible phrase to my students: "substantive due process". I told my student that this is like to say a female man. Then I showcased how its focus shifted from contract to the body: we read cases from *Lochner v. New York*²⁵ to *Roe v. Wade*²⁶, from *laissez-faire* economy to reproductive freedom. We also covered the recent decisions on same-sex marriage. Most students, to my surprise, generally accepted the thrust of *Lochner*—limits on working hours violate the right to reaching private agreements. Living in a "socialist market economy", they thought freedom of contract in the market economy should be constitutionally protected.

As for abortion and homosexuality, which made my students extremely excited, responses were split. Students were confused about the reason why abortion is a problem in America. They were then startled by the trimester solution to the right to abortion in *Roe*: How can a justice write like a legislator? So we focus less on the reasoning of Justice Blackmun than the reasons why abortion has become a problem and why each side in the abortion debate holds divergent beliefs so firmly. Many began to appreciate the point of judicial restraint: the question is not either-or; rather, there should

²³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁴ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

not be a single, unified answer to the question of legality of abortion. Why not allow different states to choose different policies? Why should the Supreme Court step in and demands a unified rule?

Gay rights also excited my students. We read related cases from *Bowers v. Hardwick*²⁷ to *Obergefell*. Many students generally supported *Lawrence v. Texas*²⁸, which decriminalizes homosexual “sodomy”. Yet they were split on the legality of homosexual marriage. In general, they were wondering why the Supreme Court focuses on issues related to sexuality, reproduction, and family arrangement. After I introduced several European countries which legalized same-sex marriage or civil union through legislation, my students began to wonder why Americans took that matter to the judiciary.

In each case, I encouraged my students to appreciate the particular role of the Constitution in forging and maintaining the American national identity, which is typically an American characteristic. In America, the Constitution is not merely a set of rules and procedures, but also a cultural symbol that unites the people with divergent views and values. I told my students that no other nation takes a written constitution as the core symbol of national identity like America does. Without cultural and ethnic homogeneity, American nationality is made by the Constitution. It definitively answers the question that haunts the American people: Who are we? I asked my students whether the Chinese people would take the Constitution as their symbol of national identity? They generally answered: perhaps unlikely in the near future.

Students also came to appreciate the symbolic function of the Supreme Court. They always asked what if the Supreme Court got a decision wrong, especially while reading *Dred Scott v. Sandford*²⁹. I told them just because of the status of the Court, it decided on the questions of right or wrong. Even if some strongly disagree with the Court, they nevertheless conformed to its decisions. My students were impressed by Al Gore’s obedience to the Court’s decision with strong disagreement in the 2000 presidential election. The point is that the Court personifies the Constitution.

My students were also asked to think about the peculiar phenomenon of life tenure of Supreme Court justices. How can a republic have life tenure public officials? Do we want such an institution in China? The U.S. Constitution establishes life tenure for the justices of the Supreme Court, while in almost all other major countries constitutional judges have term limits. They have been

²⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

educated that a critical feature of republican government is its rejection of life-tenure. Then they came to see the particular constitutional culture of the United States: justices are supposed to represent the continuity of the nation governed by law. Congress and President represent the living people. The Court represents those dead and yet to be born.

After reading large amounts of cases and materials, almost every student's first reaction is confusion. The truth they once believed in has been broken; the faith they once held has been questioned; the seemingly simple problems have become complicated. The core concepts of American constitutionalism have become full of uncertainty and controversies. As a student wrote at the ending of his final report,

Instead of having a clearer mind, I am much more confused now. But, the process is still a progress. At least, I no longer believe in anything blindly or take any good thing as granted. I start to question, which also means I start to think.

This attitude was not uncommon in students' final reports. They felt the course raised more questions than gave answers, which means my students had swiped out their blindness over American constitutionalism and begun to think critically.

In the final exam, I asked my students the question: Do you think constitutional questions should be finally decided by nine justices? In each time, responses were divided. One side agreed with the reason Justice Marshall gave in *Marbury* and Alex Bickel argued in the 1960s: the justices can settle constitutional disputes because they are wiser on long-term issues. The other side opposed judicial review since it greatly expands the judicial power and committed great evils in history. Despite the division, all the students appreciated the basic character of judicial review: in one sense, the justices are high-minded; in another sense, they are just high-handed. Historically, they made great "mistakes" like the *Dred Scott* decision or the *Lochner* decision. They also made honorable decisions like *Brown*. They also made extremely controversial decisions like *Roe* or *Obergefell*, which are honorable for some but dishonorable for others. Anyway, students came to be very careful in judging the desirability of judicial review. They became precarious in arguing for introducing such an institution in China.

One of the ideas I wanted to convey was that we should not only focus on what the U.S. Supreme Court says, but also on how the American people understand their sayings. We should also place constitutional law in American history, politics, and culture.

Constitutional comparison at the level of deep structure is necessary. We cannot just compare, say, the laws of abortion in China and the United States. That would be quite meaningless and perhaps ironical: Chinese law is very much *liberal* in abortion; in the past decades, abortion was even coercive. Rather, we should ask why abortion is a big constitutional issue in America, but not in China. In a large sense, it would be unproductive to compare the institutions of judicial review in the two countries: America has a robust supreme court while China has no judicial review. Rather, I urged students to ponder the *authoritarian nature* of the nine unelected men's power, which can be compared to similar decision-making mechanism in China. Then they began to grapple with the troubling, yet interesting, problems.

IV. CONCLUSION

I conclude by drawing two lessons from the teaching experience.

First, teaching American constitutional law can give Chinese students a general education in constitutional law. American constitutional law, which combines law, politics, philosophy, and history, is very much suitable for doing such an education. The point is neither to prepare them for practice,³⁰ nor to indoctrinate American political ideas. Rather, it is to deepen their understanding of American constitutionalism. It may not promote the *use* of American constitutional law in China, but it can at least prevent the *abuse* of it.

Second, studying American constitutional law, students can understand the Chinese constitution better. Although it cannot provide ready-to-use blueprint for constitutional reform, American constitutional law can serve as a mirror to reflect upon Chinese constitutional law and help Chinese elites to re-understand their constitutional system.

³⁰ Even in American law schools, constitutional law as a compulsory course cannot function as a training for practice, partly because few graduates would do constitutional litigations and partly because constitutional law can change rapidly. See David P. Bryden, *Teaching Constitutional Law: Homage to Clio*, 1 CONST. COMMENT. 131, 131 (1984).

