APPROACHES TO CONSTITUTIONAL INTERPRETATION: COMPARATIVE CONSTITUTIONALISM AND CHINESE CHARACTERISTICS

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This article is based upon a lecture concerning constitutional interpretation delivered in Hong Kong in April 2000. The author addresses general questions such as what a constitution is, who interprets a constitution, and how constitutional interpretation relates to politics, and applies them to Hong Kong and mainland China, with attention to recent developments that have taken place in those jurisdictions. The author reflects on how some of these developments appear to an American constitutional lawyer, and revisits some general issues about constitutional interpretation in light of those developments.

Introduction

This article, based upon remarks delivered at a conference held in Hong Kong, concerns constitutional interpretation. I did not travel 8000 miles to give remarks about constitutional interpretation that I could deliver to any audience. I travelled that far from my usual habitat because the constitutional developments in Hong Kong and mainland China are exceptional, and this context created a distinct opportunity. Hong Kong's survival and flourishing as a place of freedom and prosperity – particularly in circumstances that everyone appreciates have involved great political and economic challenge – have captured the imagination and support of the world, the United States very much included. Issues of constitutional interpretation are now an inseparable element of Hong Kong's fate. Speaking about constitutional interpretation in Hong Kong, and now writing for a Hong Kong journal, are opportunities for me to reflect on how some of these developments look to an American constitutional lawyer, and also to revisit some general issues about constitutional interpretation in the light of those developments.

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I address three themes in particular:

1 what the constitution is;
2 who interprets the constitution; and
3 constitutional interpretation and politics.

What the Constitution Is

My first theme is that constitutional interpretation depends very centrally on what we understand a constitution to *be*. This may sound like an altogether abstract question, but it is not. It is an issue with the greatest practical consequences for constitutional law and constitutional interpretation.

In an early milestone case interpreting the US Constitution, *McCulloch v Maryland*,[1] the great Chief Justice John Marshall said, "we must never forget it is *a constitution* we are expounding". This has been called "the single most important utterance in the literature of constitutional law",[2] which may be an overstatement, but perhaps not.

In the *McCulloch* case and in his earlier opinion in *Marbury v Madison*,[3] the case establishing the power of judicial review over constitutional questions, John Marshall set forth some of the enduring understandings about what the American Constitution is. I will mention four of them.

First, the Constitution is *law*. This is crucially important because, as law, the Constitution can be an element of legal cases and can be interpreted in legal cases.

Second, it is *superior* law. This is important because, as superior law, it prevails over other law that enters into legal cases. So in cases where there is a conflict between ordinary law and the Constitution, the ordinary law is null and void, invalid, because the superior law of the Constitution prevails.

Third, the US Constitution is superior *national* law in a government where the national government is supreme over the separate states within the United States. The Constitution was adopted by "we the people," meaning the people of the entire United States. Since the Constitution is superior national law, it prevails over conflicting laws of the particular states within the United States (including conflicting state constitutional provisions).

Fourth, to use John Marshall's words, the "nature" and "character of the instrument" make it a legal charter "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs".[4] Since

1 *McCulloch v Maryland*, (1819) 17 US 316, 407.
2 *Felix Frankfurter John Marshall and the Judicial Function*, (1955) 69 *Harv. L. Rev.* 217, 219.
3 *Marbury v Madison*, (1803) 5 US 137.
4 *McCulloch v Maryland*, (1819) (n 1 above) at 407, 415.

it was designed "to be adapted to the various crises of human affairs", the Constitution must be interpreted in that way.

These are the foundational understandings in the United States about what our Constitution is. However, the status of the constitutions in both Hong Kong and the People's Republic of China (PRC) Constitution seem less clear, and this different, or at least uncertain, understanding of what the constitution *is* crucially affects how it is interpreted.

Consider first Hong Kong. What *is* the Basic Law? What does it mean to say that the Basic Law is Hong Kong's Constitution, as so many people call it? For one thing, it is law, and it is superior law; and it is certainly superior to other local enactments by Hong Kong authorities. Yet, in another crucial respect, there has been much debate about what it is. What *kind* of superior law is it? Is it an ordinary law enacted by the Mainland National People's Congress (NPC)? Is it more like a provision of the Mainland Constitution? Or is it something else? It is remarkable to an outsider that this issue remains very much debated in Hong Kong. Yet the answer is crucial. Deciding what the Basic Law "is" is crucially important because this very much affects what other kinds of laws the Basic Law restricts and, most importantly, whether the Basic Law in any way restricts actions by the NPC or its Standing Committee (NPCSC).

Whatever else the Basic Law is, it is clearly law that is superior to ordinary enactments of the Hong Kong Government, and therefore the Hong Kong Court of Final Appeal (CFA) has the power to declare an act of the Hong Kong Government invalid if the court determines that such an act is inconsistent with the Basic Law. This is a hugely important power – and may prove increasingly important in the years ahead – but, happily, this power now seems uncontroversial.

The power was established "unequivocally" in *Ng Ka Ling v Director of Immigration*, and its companion cases, *Tsui Kuen Nang v Director of Immigration* and *Director of Immigration v Cheung Lai Wah*, the initial "right of abode" cases.[5] As Hong Kongers well know, but other readers may not, these cases involved three provisions in Hong Kong ordinances concerning who would have a right of abode in Hong Kong. The first provision, known by shorthand as "Ordinance 3", provided that mainland Chinese claiming a right of abode in Hong Kong have to obtain an exit permit before being allowed to emigrate to Hong Kong.[6] The second provision, contained in "Ordinance 2", provided that a child born of a parent who has a right of abode in Hong Kong is entitled to a right of abode only if the parent already had a right of abode at the time the child was born, not if the parent's right of abode was acquired later.[7] The third

5 *Ng Ka Ling v Director of Immigration*; *Tsui Ken Nang v Director of Immigration*; and *Director of Immigration v Cheung Lai Wah*, [1999] 2 HKCFAR 4.

6 (1999) 2 HKCFAR 17.

7 (1999) 2 HKCFAR 16.

provision, also part of "Ordinance 2", provided that children may claim a right of abode on the basis of their father's right of abode only if the child was born within a marriage, although a child could claim a right of abode based on the mother's right of abode if the child was born out of wedlock.[8] These provisions were said to violate Article 24 of the Basic Law, which designates categories of persons as permanent residents of Hong Kong who "shall have the right of abode".[9] Article 24, it was argued, guarantees a right of abode without the limitations imposed by the challenged parts of Ordinance 2 and 3. Moreover, it was argued, Ordinance 3 was not justified by Article 22 of the Basic Law, which specifies that, "[f]or entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region". This provision, it was argued, does not apply to those seeking entry to Hong Kong from other parts of China who had a right of abode under Article 24.

In striking down the relevant provisions of these Hong Kong ordinances, the CFA stated:

> "In exercising their judicial power conferred by the Basic Law, the courts of the region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it

[8] *See* n 6 above.

[9] Article 24 of the Basic Law in pertinent part provides:
"The permanent residents of the Hong Kong Special Administrative Region shall be:
(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in (1) and (2);
(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;
(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and
(6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.
The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode."

> is right that we should take the opportunity of stating it unequivocally. In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law."[10]

The CFA went on, however, to conclude that it not only had the power to review local Hong Kong enactments, but also "to examine whether any legislative acts of the *National People's Congress or its Standing Committee* are inconsistent with the Basic Law and to declare them to be invalid if found to be inconsistent".[11] The CFA acknowledged that its power to assess enactments of the mainland Chinese legislature for consistency with the Basic Law was a more "controversial" question, but concluded that the Hong Kong courts did have this power and that it should "take this opportunity of stating so unequivocally". The Basic Law, the court said, "is the constitution of the Region".

> "Like other constitutions, it distributes and delimits powers, as well as providing for fundamental rights and freedoms. As with other constitutions, laws which are inconsistent with the Basic Law are of no effect and are invalid. Under it, the courts of the Region have independent judicial power within the high degree of autonomy conferred on the Region. It is for the courts of the Region to determine questions of inconsistency and invalidity when they arise. It is therefore for the courts of the Region to determine whether an act of the National People's Congress or its Standing Committee is inconsistent with the Basic Law, subject of course to the provisions of the Basic Law itself."[12]

Moreover, the CFA adhered to this position when it issued a clarification of its initial opinion a month later, amidst wide controversy, after the Hong Kong Government requested a clarification. Although many people have viewed this clarification as a retreat by the Court (and have criticised it as such), the crucial last sentence of the Court's clarifying statement reads as follows: "The court accepts that it cannot question the authority of the National People's Congress or the Standing Committee to do any act *which is in accordance with the provisions of the Basic Law and the procedure therein*."[13] This sentence contains a pregnant negative clearly indicating what the CFA believes it *can* question – acts that are not in accordance with the provisions of

10 (1999) 2 HKCFAR 25.
11 (1999) 2 HKCFAR 26 (Emphasis added).
12 (1999) 2 HKCFAR 26.
13 *Ng Ka Ling v Director of Immigration*; *Tsui Ken Nan v Director of Immigration*; and *Director of Immigration v Cheung Lai Wah*, (n 5 above) at 141.

the Basic Law and the procedure therein, as the CFA sees them. Only after the NPCSC intervened in unprecedented and controversial fashion to give its own interpretation of the Basic Law and rebuke the CFA did the Court appear to back off from this position.[14]

In political terms, everyone understands that the power claimed by the CFA to review enactments of the Mainland legislature for consistency with the Basic Law would enhance Hong Kong's autonomy, and I strongly support as much autonomy as possible for Hong Kong within the "one country, two systems" formula. However, one cannot assess the *legal* plausibility of the court's claimed authority without figuring out what kind of law the Basic Law is.

To say that the Basic Law is the "constitution" of Hong Kong, by itself, certainly does not imply that NPC legislation inconsistent with the Basic Law is invalid. The local constitution of my home state of Connecticut, like most local constitutions, is the fundamental law of Connecticut, and any other Connecticut law is inferior to it and controlled by it. The Connecticut Constitution, however, is inferior to ordinary national laws adopted by the US Congress, and national congressional enactments can usually override it. If the Basic Law were just "the Hong Kong Constitution" analogous to the Connecticut Constitution, it would clearly be wrong to say that an inconsistent NPC law is invalid.[15]

Clearly the Basic Law is something more than just a local constitution. It is a *national* law itself, as the CFA acknowledged. What kind of national law is it? The CFA does not say. If the Basic Law has the same status as the national Constitution of China, then it would indeed make sense to say that ordinary NPC legislation may not depart from it. A constitution is "higher" law, and limits what can become ordinary law.

In fact, the Preamble of Basic Law itself says that it is "enacted" by the NPC "[i]n accordance with" the PRC Constitution. It does not say that it is an amendment to the PRC constitution, and of course it has never been included in the PRC Constitution. It appears to be ordinary national law adopted under the PRC Constitution, pursuant to the NPC's powers under that Constitution. If the Basic Law is NPC legislation like other NPC legislation, then it is hard to see why later NPC legislation may not depart from it. As a matter of Chinese law, the Basic Law and the later NPC enactment would be on the same level, and the later enactment would supersede the earlier one. This is a basic principle of sovereignty: a current legislature

[14] *Lau Kong Yung v Director of Immigration*, (1999) 2 HKCFAR 300. The NPCSC interpretation is discussed in Part 2 of this essay ("Who Interprets the Constitution?"), below at page 74.

[15] Thus, the CFA certainly spoke too sweepingly when it said, "as with other constitutions, laws which are inconsistent with the Basic Law are of no effect and are invalid". A constitution invalidates inconsistent laws only if the inconsistent laws are *inferior* to it. If the Basic Law is not superior to an inconsistent NPC law, that inconsistent law cannot be invalid.

cannot bind a later one.[16] If subsequent NPC legislation appears to be inconsistent with the Basic Law, one might seek to interpret the two laws to avoid a conflict; but if a conflict is inescapable, then the later NPC legislation prevails and would effectively supersede the Basic Law. The later NPC enactment could not be deemed invalid.

This is not a perfectly satisfactory answer, however. There are provisions of the Basic Law that suggest some ambiguity about what the Basic Law is. Most obviously, there is Article 5 which states that "the socialist system and policies shall not be practised in the Hong Kong Special Administrative Region and the previous capitalist system and way of life shall remain unchanged for 50 years". There is Article 159, concerning the power of amending the Basic Law, which provides that "no amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong" and further provides that the Basic Law can be amended only by following certain specified procedures.[17] These entrenching provisions seem to be attempts to limit the NPC as well as the Hong Kong government. If next year the NPC were to attempt to change policies that the Basic Law says cannot be changed for 50 years, for example, would we not have a basis for saying that the NPC had violated the Basic Law? Well, maybe yes, maybe no. Basic sovereignty principles say that one legislature has no power to bind a future legislature. So the entrenching provisions might just be viewed as political assertions, with no legal effect at all.

It is possible to understand the Basic Law in a quite different way: not as ordinary NPC legislation, but as the implementation of an international

[16] In *United States v Winstar Corporation*, the Supreme Court of the United States traced to Blackstone "the centuries-old concept that one legislature may not bind the legislative authorities of its successors":

> "Acts of parliament derogatory from the power of subsequent parliaments bind not ... Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its [sic] ordinances could bind the present parliament."

(1996) 518 US 839, 872 (citing 1 *William Blackstone, Commentaries* *90). The Supreme Court also cited H. L. A. Hart's statement that "Parliament is 'sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra*, but also from its own prior legislation.'" *Ibid.* at n 18 (citing H. L. A. Hart, *The Concept of Law*, 1961, p 145). The American case law has long accepted this basic principle of sovereignty. For example, in *Reichelderfer v Quinn*, (1932) 287 US 315, 318, the Supreme Court pronounced, "The will of a particular Congress ... does not impose itself upon those to follow in succeeding years". My former colleague Charles Black once observed that this "most familiar and fundamental principle" that a legislature may not bind future legislatures is "so obvious as rarely to be stated". Black, "Amending the Constitution: A Letter to a Congressman," (1972) 82 *Yale L. J.* 189, 191.

[17] Also particularly noteworthy in this context is Art 39, which provides that:

> "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."

Through this provision, the Basic Law incorporates legal norms external to both the Basic Law and NPC enactments. On the legal status of international treaties in domestic law, *see* n 13 below.

treaty – the Sino-British Joint Declaration of 1984. This would make it a legal provision that the PRC has an obligation to carry out as a matter of international law. On this understanding, international law might bar the NPC from amending certain provisions of the Basic Law. Might this mean that the courts would in fact have the power to invalidate certain NPC acts inconsistent with the Basic Law? The problem with any such understanding is that in many countries, including the United States, the courts will give effect to national legislation that is inconsistent with an earlier treaty obligation, and not invalidate the legislation as inconsistent with the treaty. The national legislation may violate international legal requirements, but nevertheless, the national courts will enforce the national legislation.[18]

In its decision following the interpretation by the NPCSC, the Hong Kong CFA repeated its earlier characterisation of the Basic Law as "a national law",[19] and went on to conclude that the NPCSC had the power to interpret it in "general and unqualified terms" with "binding" effect on the Hong Kong courts. Sir Anthony Mason, separately concurring, gave a more specific characterisation of what the Basic Law is:

> "The Basic Law is the Constitution of the Hong Kong Special Administrative Region of the People's Republic of China established under the principle of 'one country, two systems'. It is a national law of the PRC, being an enactment of the National People's Congress made in the exercise of legislative powers conferred upon the NPC by the PRC Constitution."

Given this (and of course given the tumultuous events that had led up to this characterisation), it is not surprising that the CFA avoided any repetition of earlier suggestions that the Hong Kong courts could use the Basic Law to invalidate NPC or NPCSC actions. Scholars will continue to debate the matter. My point is not to insist on any particular conception of the Basic Law, but to make the more fundamental point that how we understand what the Basic Law is may be the most crucial step in interpreting it.

[18] In a long line of holdings, the Supreme Court of the United States has established the general rule that treaties and national legislation stand on equal footing. Therefore, when the two irreconcilably conflict, the one later in time prevails. *See*, eg *Breard v Greene*, (1998) 523 US 371; *Reid v Covert*, (1956) 354 US 1, 18 (plurality opinion); and *Whitney v Robertson*, (1887) 124 US 190. *See also* Louis Henkin, *Foreign Affairs and the United States Constitution* (1996), p 96.
The United Kingdom takes a similar approach. "[I]f Parliament later adopts legislation inconsistent with earlier treaty and implementing statute, the executive and the courts will give effect to the later Act of Parliament and in effect place the United Kingdom in violation of the treaty." Henkin, above, at p 99. France and the Netherlands take a contrary approach, however, giving greater force to treaty obligations even where subsequent domestic legislation is in conflict. *See* Henry Steiner, Detlev Vagts, and Harold Koh, *Transnational Legal Problems* (1994), p 593 (discussing Art 94 of the Netherlands Constitution of 1983 and Art 55 of the French Constitution of 1958).

[19] *Lau Kong Yung*, (n 9 above).

The same is true for the Constitution of the PRC. A very different kind of document from the Hong Kong Basic Law or the US Constitution. The most basic question is whether the PRC Constitution is "law" at all. Many perceive it to be more of an ideological document, a political document, or an aspirational document, than a legal one. Certainly it does not function in Chinese society the way constitutions function in other societies where the constitution is viewed as law. It has not been used by the courts in the course of deciding cases.[20] Indeed, it is not regularly interpreted by any government body. It does not function day-to-day as a superior law.

My specific point here is that constitutional interpretation in the PRC will not develop into something significant and something similar to constitutional interpretation in other countries until there is a decisive crystallisation of the idea that the PRC Constitution is *law* and indeed "superior" law. My more general point is that the enterprise of constitutional interpretation everywhere, including both in Hong Kong and on the Mainland, is shaped by a conception of what the constitution is.

Who Interprets the Constitution?

A second foundational theme about constitutional interpretation that I want to emphasise is that the institutional arrangements for interpreting the constitution shape the interpretations that are made.

Even though all government officials are usually obliged to uphold the constitution, and even though officials throughout Government interpret the constitution in the course of making and applying the law, in most countries judges play a distinctive role in interpreting and applying the constitution. This special judicial role is a product of two main factors.

First, the constitution is law. Courts customarily decide legal questions, and have distinctive expertise in doing so. Second, and more fundamentally, because the constitution constrains other branches of government, there is a felt need for an *independent* decision maker to decide whether constitutional boundaries have been exceeded. Constitutional review requires a willingness and a capacity to stand back from the day-to-day political

20 As this article was going to press, however, the Supreme People's Court issued a "pifu", replying to an inquiry from the Shandong Provincial High Court, appearing to rely directly on the PRC Constitution. For the text of the pifu and some commentary, see *China's Marbury v Madison? – Direct Application of the Constitution in Litigation*, 2001 *China Legal Change*, Issue 16, September 5,2001. http://www.chinalegalchange.com/subs/2001-16/marbury.html.

pressures and compromises, and to assess independently whether political decisions are consistent with the more enduring choices embodied in the constitution. This is particularly appropriate where constitutional rights are claimed by individuals or members of minority groups, for they are typically claiming rights against the dominant political element in the country, and one cannot expect the ordinary political branches to be adequately attentive to rights against the dominant groups. While courts are not altogether immune from the political dynamics of their time – and I would argue that is a good thing – courts are much more likely than other institutions of government to have the detachment and impartiality to examine constitutional questions fairly and to implement the fundamental values embedded in the constitution.

Courts, therefore, typically play a distinctive and distinctively authoritative role in interpreting the constitution, even though other government institutions also interpret it. Having said this, it is important to appreciate that different countries around the world have developed quite different forms of judicial review. For example, in some countries, constitutional interpretation is carried out by general jurisdiction courts capped by a supreme court; in some countries constitutional review is performed by a specialised constitutional court; and in France it is performed by an institution called the *Conseil Constitutionnel* which is becoming more court-like in its attributes but is still called a council ["Conseil"] not a court. The relationship between lower courts and these institutions, and between other government bodies and these judicial institutions, can also vary from jurisdiction to jurisdiction.

What is most striking to an American constitutional lawyer looking at these institutional issues in Hong Kong and China is the interface between Hong Kong and Beijing institutions in interpreting the Basic Law. Article 67 of the PRC Constitution gives the NPCSC the power "to interpret laws". Echoing the PRC Constitution, Article 158 of the Basic Law provides that "[t]he power of interpretation of [the Basic Law] shall be vested in the Standing Committee". The NPCSC "authorises" the Hong Kong courts "to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region", and in such cases, the role of the Hong Kong courts in reviewing the consistency of local enactments with the Basic Law is similar to the judicial review role played by courts in other jurisdictions. However, in cases not "within the limits of the autonomy of the region", the architecture is more complicated:

> "[I]f the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law *concerning affairs which are the responsibility of the*

> *Central People's Government, or concerning the relationship between the Central Authorities and the Region*, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, *seek an interpretation* of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected."[20a]

To an American constitutional lawyer, there is nothing at all surprising about the fact that the Hong Kong CFA does not have the final word in interpreting provisions of the Basic Law, particularly where the Basic Law concerns the relationships between the central government and a local government. The Basic Law is a national law; and a court of a part of the country, even a quite autonomous part, never has the final authority to say that an enactment of the national government is unconstitutional. It never has the final and unreviewable authority to interpret the meaning of national law. A part of the whole can never have the final authority over an enactment of the whole.

In US history, beginning in the early days of the republic, the states within the United States have often tried to assert the final power to interpret national law and limit its application to them. For example, in the early 19th century, the state of Virginia asserted that it had the final power to interpret national law questions that arose in Virginia courts, and that national government review of their decisions constituted an impermissible infringement on state judicial autonomy. Virginia was rebuffed by the Supreme Court of the United States, but the battle was a prolonged and bruising one and is still perceived as a crucial event in American constitutional history.[21] It took a Civil War for the national government to rebuff that position definitively, and some in our Southern states unsuccessfully tried to revive these arguments during the civil rights movement in the 1950s and 1960s in an effort to block desegregation efforts by the national government.[22] So the teaching of American constitutional law principles,

[20a] Art 158, Basic Law (emphasis added).
[21] *Martin v Hunter's Lessee*, (1816) 14 US 304; *Cohens v Virginia*, (1821) 19 US 264.
[22] Kathleen Sullivan and Gerald Gunther, *Constitutional Law*, (13th edn 1997) p 65.

hammered out over nearly two centuries of debate and battle, is that the national government must have the final authority to determine questions of national law.[23]

The idea that the central government has ultimate authority concerning provisions of national law, including the Basic Law, may sit uneasily among many in Hong Kong because the PRC has such a different political, economic and legal system from Hong Kong, and because the risks to Hong Kong's autonomy from such an arrangement are apparent; but the idea that national governments do indeed have such authority is a commonplace, not an aberration. What is striking about the Hong Kong-Beijing situation to an American constitutional lawyer is not that Beijing insists on final authority, but the mechanism of interpretation and the institutions of review. The referral mechanism set forth in Article 158 by itself is unusual, although it was modelled in part on Article 177 of the Treaty of Rome, which addresses the relationship between national courts in Europe and the Court of Justice of the European Communities and provides for a somewhat similar referral mechanism. However, what is altogether different in the Hong Kong-China context is that referral is not to a court. The power of interpretation at the national level is in the hands of a legislative entity, the NPCSC. This power of interpretation is a general power in addition to the Standing Committee's law-making and supervision powers, and it can, indeed in some instances it must, be invoked in the middle of litigation. This makes the Hong Kong judiciary directly beholden to a political body. Although judicial interpretations are not in fact

[23] This is not to say that the national government must always review such decisions, only that the national government typically retains the ultimate power to decide that review is appropriate. In particular categories of situations, the national government may authorise local governments to act without reviewing their actions. See, eg n 27 below. But typically the national government retains the ultimate power to revise that authorisation and reinsert itself, at least prospectively. There are, of course, many variations on the national supremacy theme, and many varieties of federal and confederated systems as well. The arrangements devised are typically political compromises, which then have legal consequences. The "one country, two systems" concept invites novel arrangements, as does the general provision in Art 31 of the PRC Constitution providing for the establishment of "special administrative regions". An interesting limitation on national supremacy particularly worth noting concerning Hong Kong is contained in Art 18 of the Basic Law:

> "National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law ... The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee of the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law." In the event of war or "turmoil within the Hong Kong Special Administrative Region which endangers national unity or security ... the Central People's Government may issue an order applying the relevant national laws in the Region."

always final in other countries,[24] the direct role of the NPCSC in the Hong Kong litigation process is highly unusual, and many see it as a disturbing threat to the rule of law in Hong Kong.

The latter characterisation is rhetorically forceful, but does confront a stubborn fact. These features of the interplay between Hong Kong courts and the NPCSC that make many uncomfortable were a compromise worked out in the reversion process. In the new arrangements, they arguably represent what legality and the rule of law are, not the opposite of legality and the rule of law. Nevertheless, the power of the NPCSC to interpret is potentially threatening to Hong Kong's autonomy, particularly where an interpretation is sought during litigation. There are other problems with the NPCSC playing this interpretative role. Legislative bodies are equipped to make law, but they do not have either the expertise or the independence to undertake the very different task of interpreting laws. Interpretation of law is not something that legislative bodies are well-equipped to do.

These anxieties fully flowered in the right of abode cases. The Hong Kong CFA did not ask the NPCSC for an interpretation of Article 22 or Article 24 of the Basic Law. Rather, the court interpreted those provisions on its own and struck down the relevant provisions of two Hong Kong ordinances as inconsistent with Article 24 (which defines the right of abode) and not justified by Article 22 (which requires mainland China's approvals for people leaving the Mainland to enter Hong Kong). Most relevantly here, the CFA held that "Ordinance 3" was inconsistent with the Basic Law in requiring an exit permit before people claiming a right of abode in Hong Kong could leave the Mainland. The Court held that it was not necessary to seek an interpretation from the NPCSC even though it might appear that at least some provisions being interpreted concern "the relationship between the Central Authorities and the Region". (Indeed, Article 22 appears in a chapter of the Basic Law captioned "Relationship Between the Central Authorities and the Hong Kong Special Administrative Region"). The CFA concluded that a judicial reference needs to be made to the NPCSC under Article 158 only if the "predominant" provision being interpreted in the adjudication of the case concerns matters that are the responsibility of the central authorities or concern the relationship between the central authorities and Hong Kong. In

[24] Harry Wellington, *Interpreting the Constitution: the Supreme Court and the Process of Adjudication* (1991), pp 30–40 (discussing ways in which court decisions are often not final as a practical matter). Section 33 of the Canadian Charter of Rights and Freedoms, adopted in 1982, explicitly allows Parliament or a provincial legislative to override a court's constitutional rulings in many instances. "By allowing legislatures to override the Charter's entrenched provisions, the clause reconciled the existence of entrenched rights with the tradition of parliamentary supremacy. In addition, to the extent that courts were expected to enforce the rights conferred in the Charter, s 33 meant that 'the last word would belong to the legislatures rather than the courts.'" Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty', (1995) 94 *Mich. L. Rev.* 245, 279.

resolving the constitutionality of Ordinance 3, for example, the CFA said that the "predominant" Basic Law provision to be interpreted was Article 24 (concerning an individual's right of abode in Hong Kong), not Article 22 (the exit permit provisions), and therefore reference to the Standing Committee was not required. On the merits, the CFA concluded that those with a right of abode under Article 24 are not required to secure the exit permits specified in Article 22.

In the extended controversy and turmoil that followed the CFA's invalidation of the Hong Kong ordinances, a central question was whether the court erred in not seeking an interpretation from the NPCSC before deciding the case. In the end, the Government of Hong Kong itself requested an interpretation from the NPCSC, arguing that the court's decision was not only legally erroneous, but also would lead to a huge influx of mainlanders that would overwhelm Hong Kong's ability to absorb them.[25] The Hong Kong Government requested that the NPCSC issue its own interpretation of the Basic Law, which it said the CFA would then be required to follow prospectively in individual cases not already decided.

That is what happened. The NPCSC issued an interpretation of the relevant provisions of the Basic Law, concluding that "the interpretation of the CFA is not consistent with the legislative intent". More specifically, it concluded that Article 22 requires exit approval for mainlanders claiming a right of abode in Hong Kong and that Article 24 requires that a child born in the Mainland is entitled to a right of abode only if at least one parent had a right of abode in Hong Kong at the time the child was born (not if both parents' right of abode was acquired later). The NPCSC also criticised the court for not referring these issues to it, stating that, "Before making its judgment, the Court of Final Appeal had not sought an interpretation of the Standing Committee of the National People's Congress in compliance with the requirement of Article 158(3) of the Basic Law". The NPCSC instructed the Hong Kong courts henceforth to "adhere to this Interpretation," but said the interpretation would "not affect the right of abode" acquired by the actual parties in the earlier case.

The CFA, in a judgment issued on 3 December 1999, acquiesced in the NPCSC's interpretation. It affirmed that the NPCSC had the power to make the interpretation, rejecting arguments that the NPCSC could not interpret the Basic Law except upon judicial reference by the court in the limited areas specified for judicial reference in Article 158. The NPCSC's power to interpret the Basic Law was "general and unqualified", the CFA said. That power could be exercised without a reference from the Hong Kong courts and was

[25] The Hong Kong Government contested the court's conclusions concerning two of the provisions of the Hong Kong ordinances, but not the provision that established different rules regarding mothers and fathers when children claimed a right of abode deriving from a parent.

not limited to the categories in Article 158 for which judicial reference was required. (That is, the CFA seemed to say that the NPCSC's interpretation power covers not only matters that are the "responsibility of the central authorities" or matters "concerning the relationship between the central authorities and Hong Kong", but also matters "within the limits of the autonomy of the Region".) The CFA also stated that it "may need to re-visit" its "predominant test" as the standard for when it is required to seek an interpretation of the Basic Law from the NPCSC under Article 158. The response to these events within Hong Kong was predictably intense.[26]

In dramatic and unusual fashion, therefore, the situation of Hong Kong underscores my fundamental point: the institutional arrangements for interpreting a constitution are crucially important. In this context, the differences between the two systems not only means that the mindset and purposes of individual interpreters from Hong Kong and the Mainland are likely to be very different, but that the institutions responsible for interpretation are starkly different. The differences are so substantial that direct interaction between the two legal systems in individual cases is likely to produce conflict. In any ultimate showdown, the central authorities are bound to prevail and Hong Kongers are likely to face and to feel a diminishing of autonomy. This in itself, I suppose, is an argument for why Hong Kongers should try to avoid ultimate showdowns.

Should the role of the NPCSC in interpreting the Basic Law grow, there will be a need to develop and improve the process that produces interpretations. The Basic Law Committee that was established to advise the NPCSC on Basic Law matters is potentially helpful here. If the role of this Basic Law Committee were to be strengthened and improved, the interpretation process would have more credibility. To improve the Committee's role, its processes should be as open as possible; submissions should be invited from outside parties; its recommendations to the NPCSC and the reasons for its recommendations should be openly published; and any diversity of views on the Committee should be openly stated. In addition, since interpreting a law is largely a matter of expert analysis, the practice should develop that recommendations of the Basic Law Committee are usually followed by the NPCSC.

Indeed, the Basic Law Committee has the potential to set a broader example for the future of constitutionalism on the Mainland. No one expects *judicial* review of the constitutionality of government actions to be established any time soon on the Mainland. Serious recent proposals, however, have been made to set up a permanent Committee under the NPCSC that would have

[26] For an excellent collection of materials and essays about the right of abode controversies, *see* Johannes M. M. Chan, H. L. Fu, and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2000).

the specialised power to make constitutional interpretations and assess the constitutionality of laws.[27] However limited such a legislative committee might seem to constitutionalists in most other countries and in Hong Kong, establishing such a committee might strengthen the all-important idea that the PRC Constitution is "law", not just a political document. Over time, such a committee might develop more and more expertise, procedural regularity, and independence, and thereby take on some of the institutional features that allow courts in other countries to play a significant role in interpreting the constitution and strengthening its force in society. Over the long term, such a committee might even evolve into a form of constitutional court.

Constitutional Interpretation and Politics

The last theme concerning constitutional interpretation to be discussed is the relationship between the courts and other branches of government.

Judicial invalidation of a statute as unconstitutional is extremely serious business in any country. When the courts interpret a statute, the legislature is always free to decide that the courts have misinterpreted the law and then enact a new statute that corrects what they consider to be the judicial mistake. However, when the courts declare a statute unconstitutional, the legislature cannot just enact a new law if they think the courts are wrong. The legislature's leeway is usually very much limited.

Because judicial review is such a potent coercive power, serious questions are often raised about its legitimacy. In the US, academic and judicial debates often focus on what is called "the countermajoritarian difficulty" with judicial review.[28] Some have described the supposed difficulty this way: When a court invalidates a statute, it is setting aside an act of a present majority and preventing future majorities from acting, and this judicial standing in the way of the majority is a grave problem in a democracy. When phrased this way, however, it is an easy argument to answer. Ours was never intended to be a purely majoritarian system. A constitutional democracy has majority rights, but it also has individual rights and minority rights *against* the majority. Restraints on the majority are indeed countermajoritarian, but that is not a "difficulty". The restraints are a *central feature* of American democracy; they are written right into our Constitution.

[27] Cai Dingjian, "Constitutional Supervision and Interpretation in the People's Republic of China", (1995) 9 *J. Chinese L.* 219.

[28] The best known statement of the "countermajoritarian difficulty" is contained in Alexander Bickel's brilliant book, *The Least Dangerous Branch* (1962). *See also* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution", (1989) 93 *Yale L. J.* 1013; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy", (1998) 73 *N.Y.U.L. Rev.* 333, 334.

Yet there is a stronger way to describe the countermajoritarian difficulty, and it is related to the dilemmas involved in constitutional interpretation. Even if judicial review is easily defensible where the provisions of the Constitution are very clear and explicit, consitutional guarantees are often not clearly defined. Other sources that might help to give meaning to the constitutional text are also not clear. If there is no objective way to agree upon the correct interpretation of those provisions, there is a serious risk that judges will really end up imposing their own personal values on the rest of us in the guise of interpreting the Constitution, and that is the real countermajoritarian difficulty.

These concerns lead some to say that courts should intervene only when the constitution is very clear, which will be rare, particularly when the courts are applying the very generally drafted and quite vague provisions of our Constitution, such as the Equal Protection Clause and Due Process Clause.

Now there are answers that can be given to this argument. Indeed, a large portion of contemporary constitutional theory in the United States is an attempt to answer the argument and to defend more expansive versions of judicial review. For example, some emphasise the important role that courts play in actually reinforcing majoritarianism when they actively protect free speech rights and take other steps to keep the political process open to all groups and individuals. Others defend more active judicial review on broader grounds. Some argue that the courts have a distinctive institutional capacity to protect individual and minority rights; some emphasise the ways that courts are more constrained than might first appear; some point to long-standing public acceptance of the courts' role. There are many other arguments made in defence of active judicial review. So too there are other criticisms of it in addition to the "countermajoritarian" concerns. Some raise pragmatic concerns, arguing that judicial review decisions have on balance caused significant real world harms; some argue that active judicial review weakens democratic processes.

This is not the place to review all those arguments. In any case, the details of the arguments are not really necessary here. Most commentators in my country support a role for courts in enforcing constitutional guarantees, as has long been practised. No one can deny, and no serious commentator really does deny, that general constitutional provisions give leeway for judicial choices and that there is always a risk that judges will use judicial review too expansively and end up intruding excessively in society. No set of theoretical arguments eliminates that risk. Most of us who defend judicial activism in certain circumstances also recognise the need for judicial self-restraint.

In a place like Hong Kong, and of course in mainland China, no political institution is elected as a true majority-rule institution. So American-style arguments concerning the countermajoritarian problems with judicial review

are not really applicable. How can people complain that courts are countermajoritarian when other government institutions are not rooted in majoritarian processes either? Moreover, the courts in Hong Kong are arguably the most independent institution in Hong Kong, at least in relationship to Beijing, and therefore they have distinct institutional advantages in the protection of individual rights. Nevertheless, questions about judicial interpretation and judicial review analogous to the countermajoritarian difficulty can be raised. Certainly, active judicial review in support of rights specified in the constitution is thoroughly legitimate; indeed, if courts do not attentively protect those rights, they betray their role. However, the appropriateness of courts' preventing other branches of government from implementing governmental policies is always a fair question. It is right to be wary of the capacity of courts to make and effectuate large policy choices for the rest of society, and to be concerned that courts might impose their own personal values on the rest of society in the name of interpreting the constitution.

Thus, in exercising judicial review, a considerable measure of judicial humility and caution is always appropriate. This is in part a point about legitimacy. It is also a point about how courts secure their effectiveness and maintain public acceptance for what they do. Public acceptance is necessary to assure the long term survivability of any institution, and it is also often necessary to assure even the short-term implementation and enforcement of particular court judgments. The courts are not elected. They do not have the power to tax and spend. They do not control the police force. Their authority and effectiveness rest, ultimately, on their ability to secure co-operation from other government institutions and to sustain public confidence that they are properly playing their role. The courts will do, and must do, unpopular things from time to time, and courts should not just mirror public opinion, for that would be a betrayal. Yet, over the long-term, they must maintain popular acceptance. They cannot ignore public attitudes toward their work or ignore social and political realities.

For me, all of this counsels considerable judicial caution and humility in the performance of constitutional review. This means giving a "margin of appreciation" to the choices and political compromises made by other branches of government. It means recognising the value of letting the political process continue to debate an issue rather than having the courts make a definitive policy choice for the rest of society. It means being cautious when interpreting the vague provisions in a constitution's text since they can so readily become vehicles for imposing the judge's personal values. It means considering ways to avoid conflict with other branches of government when that is possible. It means that judges should usually resist the temptation to speak sweepingly and, if possible, should decide cases on narrow grounds. At times, of course, judges must be activist and at times they must speak sweepingly.

Brown v Board of Education,[29] the great case striking down racial segregation in the United States, is a good example of this. However, caution and humility will generally keep those tendencies in check. Indeed caution and humility will allow the courts to store up public trust and confidence so that when the really essential moments come and the courts are genuinely needed to deal with a constitutional issue of transcendent importance like *Brown v Board of Education*, they will have the reservoirs of public trust to do what they should do.

One fairly recent example of wise restraint by the Supreme Court in my own country concerned the constitutionality of assisted suicide laws: laws that prohibit doctors and others from assisting terminally ill patients to end their lives.[30] As a personal matter, I am opposed to such restrictions on a dying person's liberty, and court precedents had held that the Constitution forbids somewhat analogous restrictions on individual liberty. However, the assisted suicide issue is a rather new one for society, and there is no broad consensus about it, so I think our Supreme Court acted properly in deciding not to strike down these laws as an unconstitutional deprivation of liberty. The court was right to leave the assisted suicide issue to the evolving political process for now, rather than pre-empt further public debate with a constitutional law solution imposed by the judiciary.

As I look from afar at the work of the Hong Kong courts, from the vantage point I have just suggested, the work of the Hong Kong courts generally seems admirable. Yet, as everyone in Hong Kong knows, two cases have recently received particular attention: the flag desecration case and the right of abode cases. The flag desecration case[31] involved a free speech issue: whether, consistent with the Basic Law, demonstrators could be punished for displaying a defaced national flag of the PRC and a defaced regional flag of Hong Kong, in violation of Hong Kong ordinances. Both as a matter of constitutional theory and as a reading of the text of the Basic Law, the Hong Kong courts should actively protect speech rights, for free expression is the bedrock for keeping the political process open. However, reasonable people who believe in strong speech protections can disagree about flag desecration, which raises a distinctive set of speech issues. If I were in a legislature, I would probably vote against a flag desecration law, but certainly robust and uninhibited systems of free expression can treat desecration of the national symbol as a special case and off limits. I also think it would have been far better if the jurisprudence of free speech in Hong Kong had developed more fully in a speech-protective way

[29] (1954) 347 US 483.
[30] *Washington v Glucksberg*, (1997) 521 US 702.
[31] *Hong Kong Special Administrative Region v Ng Kung Siu and Lee Kin Yun*, (1999) 2 HKCFAR 442.

before this case came up, but most courts do not have the liberty to pick the cases they get and when they get them. Given that flag desecration is symbolic speech and there are many alternative ways of making the communicative point, given the CFAs' ability to decide the case based on the special status of the flag and thus on grounds that would not justify other sorts of limitations on speech, given that courts in a variety of other democratic countries have upheld the constitutionality of their own flag desecration laws, and given the special sensitivity of the issue for Hong Kong-Beijing relations, I think the CFA probably chose the wiser path. One can hope that this path, far from weakening the court, will strengthen it should the court need to face legislative actions that represent a more dangerous assault on free expression in Hong Kong.

On the right of abode cases, again looking at it from afar, the CFA seems to have been less sure-footed. I know how politically divisive this case has been in Hong Kong, and as an outsider who supports strong autonomy for Hong Kong, I have hesitated to comment directly. Yet, if I look at the case as a lawyer – at least as an American constitutional lawyer trying to read the legal provisions in question as honestly as I can – the CFA's initial opinion does indeed seem problematic.

First, the notion that the CFA has final authority to review and invalidate legislation of the NPC seems very dubious,[32] and, in any event, discussing that question seems to have been unnecessary to decide the case at hand. It was needlessly provocative dicta, inviting a test of ultimate power that Beijing could not in the end lose, where creative ambiguities, subtle manoeuvring, and even avoidance might have served Hong Kong's interests better – as it long has.

Second, it is legally doubtful that the CFA should have interpreted the Basic Law provisions as it did without seeking an interpretation from the NPCSC as provided in Article 158. The desire not to refer the questions was understandable, of course, since such reference would limit the autonomy of Hong Kong courts and Hong Kong generally. Yet, the CFA's interpretation of at least some of the provisions seemed quite clearly to concern the relationship between the central authorities and Hong Kong and to affect the outcome of the litigation, and therefore to come within Article 158's requirement of judicial reference. This seems most apparent regarding the Court's conclusion that persons with a right of abode under Article 24 are not required to secure the Mainland exit permits specified in Article 22, particularly since the regulation of immigration of mainland Chinese to Hong Kong has long

[32] *See* "What the Constitution Is" p 201 above.

been a subject of intense concern to the Mainland government and a delicate matter in Hong Kong-Mainland relations.[33]

On the merits (as opposed to whether referral was required), the various substantive issues were complex and close, and the court's conclusions were plausible, although the arguments on the other side also reasonable. In striking down the three ordinance provisions, however, the CFA did intervene in an area where most constitutional courts around the world would probably have deferred to the conclusions of the political departments. These cases concerning who has a right to permanent residence in Hong Kong essentially involve immigration matters, and, in my own country, admission and exclusion

[33] This is not necessarily to say that judicial reference to the NPCSC was legally required under Art 158 simply because the Basic Law issues concerned the Hong Kong-Beijing relationship. It is an interesting question whether the Court of Final Appeal would have been barred from interpreting the Basic Law provisions if its interpretation had *upheld* Beijing's authority over Mainland exits and determined that the Basic Law did not bar Ordinance 3. Although it could be argued that reference would still have been necessary, there are three reasons to think otherwise.
(1) First, the purpose of the reference provision seems quite clearly to allow Beijing to protect Beijing prerogatives. That is why reference is required only "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region" and not concerning matters "within the limits of the autonomy of the Region". Thus, if the Hong Kong CFA interprets the Basic Law in a way that does not interfere with the centre's prerogatives, then the primary need for reference disappears. This parallels the rule that for a long time guided US Supreme Court review of state court judgments interpreting national law. The Judiciary Act of 1789, which established our federal court system, gave the Supreme Court jurisdiction over federal questions decided by the highest court of a state only where the state court had *rejected* a claim of federal right, not where it had *upheld* the federal law claim. The rationale was that if state authorities, who might be presumed to be predisposed to side with state law, in fact upheld a federal law claim, then the need for national court review was small. In 1914, that arrangement was modified to give the Supreme Court jurisdiction to review state court rulings that upheld a claim of federal right – but that review was discretionary with the court, so an asymmetry was preserved . The current statutory rule, contained in 28 U. S C. S 1257, has eliminated the asymmetry and provides that all state court judgments involving federal law questions are reviewable by the US Supreme Court on a discretionary basis, whether the state court judgment upholds or rejects a claimed federal right. (2) Second, the Basic Law requires reference only where an interpretation "will affect the judgments on the case". If the CFA had interpreted the Basic Law not to stand in the way of the ordinances, this interpretation arguably would not itself have changed the outcome of the case. On this view, admittedly a debatable one, the only way an interpretation of the Basic Law "affects the judgment" of the case is where the interpretation *bars* some action that the Hong Kong authorities have taken. (3) Third, if the CFA had interpreted the Basic Law provisions to uphold the Ordinance, as a practical matter it is hard to see that anyone would have sought an interpretation from the NPCSC.
This view about when reference is required was reinforced, I think, by the representative of the NPCSC, speaking in Hong Kong at the April 2000 conference. (*See* Introduction above.) According to his comments, it was apparently *the interpretation made, not the provisions interpreted*, that brought about the NPCSC interpretation. Li Zaishun, *The Legal Thoughts of the Hong Kong Basic Law and the Methods of Its Proper Implementation*, p 18. The asymmetry suggested here is significant because, from the point of view of strengthening Hong Kong autonomy, the most troubling part of the entire right of abode episode is that the NPCSC ultimately did intervene – more troubling, in my judgment, than any result on the substantive merits of the issues involved. Just as the Hong Kong Government could have avoided seeking an interpretation, so too, I think, a judicial referral could have been avoided consistently with Art 158 if the CFA had reached different conclusions in interpreting the substantive provisions of the Basic Law.

of immigrants is an area "largely immune from judicial control".[34] (The immigration characterisation is not perfect, of course, since Hong Kong is part of China, and some might see the better analogy as the right to interstate movement). I do not say it is right for courts to take this extreme hands-off posture on immigration matters – I am personally uneasy with it – but as a student of comparative constitutional law, I can tell you that courts are almost universally hands-off in this area.

In any event, a major crisis followed the CFA's decision. Both Beijing and the Hong Kong Government reacted strongly. The Hong Kong Government prepared a study predicting that the court's decision would lead to an influx of over 1.6 million people, whose social service needs would overwhelm local capacity and transform Hong Kong life. (The Government had not presented such evidence to the Hong Kong courts, and, if it had and if the evidence had withstood judicial examination, the CFA conceivably might have acted differently; where legal provisions are ambiguous, practical consequences should certainly be part of legal analysis, if only because it is unlikely that the drafters of a law meant something impractical.) While there was much criticism that this figure was exaggerated, the study significantly affected Hong Kong public opinion, which supported government steps to seek action from Beijing. As the Hong Kong Government requested, the NPCSC reinterpreted key provisions of the Basic Law. The court then backed down, accepting that the NPCSC interpretation was definitive.

Because of its foundational rulings on its powers of judicial review, the Court of Final Appeal's first right of abode decision is sometimes compared to *Marbury v Madison* in the United States, the great opinion of Chief Justice John Marshall firmly establishing our own Supreme Court's judicial review power.[35] When measured as acts of shrewd and effective judicial statesmanship, however, the cases are rather strikingly different. In *Marbury*, John Marshall acted to greatly enhance his court's power, but did so in a way that skilfully muted controversy. In using the judicial review power in the case before him,

[34] *Fiallo v Bell*, (1977) 430 US 787, 792. The *Fiallo* case involved congressional legislation that gave preferred immigration status to children of citizens or lawful permanent residents and extended this to illegitimate children only if the parent who is a citizen or lawful permanent resident was the mother and not if the parent who is a citizen or lawful permanent resident was the father. In upholding this distinction, the US Supreme Court stated: "[I]n the exercise of its broad power over [immigration], Congress regularly makes rules that would be unacceptable if applied to citizens." *Ibid.* (internal citations omitted). Invoking similar principles of judicial deference in *Miller v Albright*, 523 US 420 (1998), the Supreme Court upheld legislation providing that the citizenship of a child of an alien father and a citizen mother is established at birth, while the citizenship of a child of an alien mother and a citizen father could be established only if the father's paternity was established while the child was still a minor. *See also Kleindienst v Mandel*, (1972) 408 US 753.

[35] *Marbury v Madison* (n 3 above).

Marshall seemed to be renouncing power for the Supreme Court in the very act of seizing it, for the congressional statute that he held unconstitutional had tried to expand the Supreme Court's jurisdiction. Moreover, when Marshall dismissed the particular case before him for lack of jurisdiction, his political opponents won the case! The happy result in the case at hand absorbed the immediate political attention of Marshall's opponents, whether or not they liked his broader discussion of judicial review. The bottom line was that Marshall dramatically expanded judicial power with relatively little controversy.

By contrast, the first right of abode decision was unflinchingly provocative. The court's intention was undoubtedly, and admirably, to strengthen its autonomy and to act in a way that the Hong Kong public would broadly support, but it seemed to choose the wrong case, or, at least, the wrong strategy, to accomplish that. In the very difficult political environment in which it acted, the court did not find a successful path, a way to prevail. Some might say that even though the CFA was repudiated, Beijing was awakened to the high political costs and international attention that interference with Hong Kong's autonomy would provoke, and that Hong Kong's autonomy was thereby made more secure in the long run. Or some might say that it was better for the CFA to have tested the outer boundary of its authority and Hong Kong's autonomy rather than pull back on its own initiative in anticipation of how Beijing might react. (The boundary of freedom can surely be contracted when people, out of fear, refrain from acts which, if done, would in fact go unpunished.) Yet, it is hard to conclude that Hong Kong and its courts are stronger now than before this litigation, or, perhaps the fairer comparison, stronger than they would have been had the CFA followed a more cautious path. Litigation and a court judgment that sought to enhance the autonomy of Hong Kong seemed to lead to a train of events that has weakened that autonomy.

The December 1999 opinion responding to the NPCSC interpretation does not contain as many questionable features, but arguably is excessive in the *opposite* direction. In fairness to the Hong Kong court, it was in a difficult situation, with its options very much reduced. Once again, I think, the CFA spoke in unnecessarily sweeping utterances about ultimate powers. In particular, the Court said that the NPCSC's power to make "binding" interpretations of the Basic Law is "general and unqualified", apparently including Basic Law provisions involving matters "within ... the autonomy of Hong Kong", and it quoted approvingly a leading scholar who had written that the Standing Committee's interpretation power is "plenary" and "covers all the provisions of the Basic Law". As US constitutional lawyers well know, however, our Supreme Court has concluded that there is an implied "state autonomy" limitation even on constitutional grants of national governmental power seemingly as

sweeping as the Commerce Clause.[36] It is possible that the NPCSC itself would conclude that it should not interpret provisions of the Basic Law that concern matters "within ... the autonomy of Hong Kong". Even if it concluded that it has the ultimate power to interpret such provisions under the PRC Constitution, it conceivably could conclude that the Basic Law delegates that authority to Hong Kong and would have to be amended for that authority to be reclaimed.

Since no issue involving a purely local matter was involved in the case before it, I think the CFA should not have conceded the issue pre-emptively. It would have been better if the court had limited its conclusions to the issue presented, namely the NPCSC's power to make interpretations in areas which the central authorities conclude involve matters that are the responsibility of the central government or matters concerning the relationship between the central authorities and Hong Kong. Where issues of ultimate constitutional powers are involved, narrow and more minimal utterances are usually better.

Conclusion

Focusing on just a few high profile cases, of course, can very much distort the picture of constitutionalism in any jurisdiction. Above all, constitutionalism means a commitment to principles beyond immediate political imperatives and to structures and values that constrain government power. What matters most in sustaining this is probably not court cases, but whether institutions and people are committed to constitutional norms in day-to-day words, deeds, and beliefs – the daily habits of a society. Courts can certainly help to shape a constitutional culture, but courts cannot do it alone. Other government officials, the media, scholars, the legal profession, and the citizenry all have a significant role to play in building and sustaining a constitutional culture – and in that sense, we are all interpreters of our constitutions.

[36] *United States v Morrison*, (2000) 529 US 598, 644–645 ("assertions of national power are to be limited in favour of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual states see fit"). *See also Lopez v United States*, (1995) 514 US 549.