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# CHICAGO-KENT LAW REVIEW

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### METHODOLOGICAL APPROACHES TO ASIAN CONSTITUTIONALISM

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To what degree can traditional Asian political and legal institutions be seen as embodying constitutionalist values? This question has risen to the fore in recent decades as part of a new attention to constitutionalism around the world, as well as the decline in orientalist perceptions of Asia as a region of oppressive legal traditions. This article juxtaposes East Asian analogues or antecedents of constitutionalism with a particular set of recent theoretical understandings of the concept of constitutionalism. After conducting a historical review of political and legal institutions in China, Japan and Korea, the article argues that we can indeed speak of an East Asian constitutionalist tradition. East Asia has long had notions of limited government and constraint on authority and had, at certain times and places, genuine institutional constraints on authority.

CONSTITUTIONALISM AND THE RULE OF LAW:  
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Tom Ginsburg credibly establishes that East Asian legal traditions include elements that can be considered antecedents for perhaps the strongest form of the rule of law, constitutional restraints that apply even to sovereigns. Treating these precedents chiefly as anticipations of Western-style constitutionalism, however, may be historically misleading and may inhibit reflection on the desirability of practices that represent alternatives to Western conceptions of the rule of law.

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This essay seeks to endorse Tom Ginsburg's call for studies that expand the relatively limited range of historically informed scholarship on constitutional law

in Asia. Such a trend will no doubt also broaden the focus of the discipline of contemporary constitutional scholarship, which remains unjustifiably narrow and excludes many regions of the globe. While appreciating the virtues of Ginsburg's broader analysis, the essay also seeks to draw attention to the potential pitfalls of such historically-oriented inquiry. I emphasize the fact that in many Asian societies, contemporary constitutional practice marks radical departures from pre-existing traditions of law and constitutionalism. Drawing upon an example cited by Ginsburg and three others from debates in contemporary Indian constitutionalism, I seek to highlight potential problems with seeking to draw connections between the past and contemporary constitutional practice in Asia. Scholars seeking to follow Ginsburg's call should bear in mind the considerations of methodology and interpretation that this essay highlights.

HORIZONTAL RIGHTS AND CHINESE  
CONSTITUTIONALISM: JUDICIALIZATION  
THROUGH LABOR DISPUTES

*Ernest Caldwell* 63

Western academics who criticize Chinese constitutionalism often focus on the inability of the Supreme People's Court to effectively enforce the rights of Chinese citizens enshrined within the Constitution of the People's Republic of China. Such criticism, I argue, is the result of analytical methods too invested in Anglo-American constitutional discourse. These approaches tend to focus only on those Chinese political issues that impede the institution of western-style judicial review mechanisms, and often construe a 'right' as merely having vertical effect (i.e., as individual rights held against the State). Drawing on recent scholarship that studies Chinese constitutionalism using its own categories and values, this Article examines a series of court cases involving employer-employee labor disputes, wherein lower court judges actively engaged in constitutional interpretation and openly invoked and enforced horizontally oriented socio-economic rights to prosecute exploitative labor practices. This analysis demonstrates that the study of Chinese constitutionalism need not be methodologically confined by the institutional paradigms or the rights discourse of Euro-American constitutionalism. Due consideration should be given to the comparative implications of the judicialization of the constitution in lower courts, as well as the possibility of a rights discourse emphasizing constitutionally enshrined horizontal (rather than only vertical) rights.

BEYOND THE COURTS, BEYOND THE STATE:  
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*Victor V. Ramraj* 93

This article provides a critical response to Ernest Caldwell's article, *Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes*. According to Caldwell, those looking for an emerging constitutional culture in China should be looking not in the higher courts (as the American paradigm of constitutional law suggests), but in the lower courts that settle day-to-day disputes. Moreover, the constitutional discourse in those lower courts is not about limiting state power, but about the need for "horizontal" protections of citizens—specifically laborers—from their powerful employers in furtherance of constitutional values. This article offers three responses to Caldwell's thesis. First, while acknowledging and drawing on other constitutional traditions in western liberal democracies to illustrate the significance of "horizontal rights" in constitutional thought, Caldwell nevertheless concludes that China's approach to rights is distinct from the Western tradition, glossing over important differences within Western constitutional thought. Second, while criticizing a single-minded focus on the decisions of the higher courts, Caldwell's approach remains largely court-centric; there are, however, other understandings of constitutionalism in U.S. constitutional scholarship and in the varying practices of constitutionalism in East and Southeast Asia that are less focused on courts. Finally, the observation that constitutional principles might play an important role in moderating private power in an age of multinational enterprises could be extended beyond the jurisdictional boundaries of the state. If private and hybrid (public-private) forms of power are

increasingly operating beyond states, we need to find innovative ways of moderating that power that stretch our understanding of constitutional law.

THE UNITY OF CONSTITUTIONAL VALUES:  
A COMMENT ON ERNEST CALDWELL'S  
'HORIZONTAL RIGHTS AND CHINESE  
CONSTITUTIONALISM: JUDICIALIZATION  
THROUGH LABOR DISPUTES'

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Ernest Caldwell wants to defend Chinese constitutionalism from criticism, mainly from Western constitutional scholars or scholars who hold up Western constitutional patterns as an ideal. Caldwell makes both a 'comparative' claim and a 'value' claim. The comparative claim is that Chinese constitutional law must be understood on its own terms and that on these terms it does protect rights, even if it does not do so in the same way as Western constitutional law. The value claim is that the procedures in China's legal system satisfy value concerns captured in the term 'constitutionalism' because they show how that system respects the supremacy of constitutional norms in a way that, though different from, is not inferior to Western constitutionalism. I take up and challenge both the comparative and the value claims. In particular, I argue, first, that one need not adopt the perspective that Chinese constitutional law must be seen entirely on its own terms and in a way that cannot be compared with Western models without generating misunderstanding. Second, I argue that Caldwell is mistaken in thinking that the value of judicial review can be satisfied by the horizontal rights review he finds in Chinese constitutional law.

CONSTITUTIONAL LISTENING

*Michael W. Dowdle* 115

This article explores a particular methodology of comparative constitutional analysis that it calls "constitutional listening." Derived from the interpretive "principle of charity," constitutional listening involves interpreting constitutional discourse of other polities in their best light. This includes not simply polities whose constitutional structures and values resemble our own, but perhaps even more importantly, polities and constitutional systems whose values and structures seem alien to us. The value of this methodology, it is argued, lies in its ability to expand our understanding of the diversity of experiences that have gone into the human project of constitutionalism, and in the diversity of human possibilities that the project provokes. The utility of this methodology will be demonstrated by applying it to the debate surrounding the drafting of the Property Law in the People's Republic of China ca. 2006-2007.

FROM CONSTITUTIONAL LISTENING TO  
MORAL LISTENING

*Roy Tseng* 157

In order to provide comments on Michael Dowdle's account of "Constitutional Listening," this paper aims to establish three counter-arguments. First of all, in contrast to Dowdle's particularly narrow understanding of liberalism, I argue that to evaluate the moral import of liberalism properly, we need to draw attention to the diversities of liberalism. According to what I will call "historicist liberalism," for example, in understanding other cultures we should try to show sensitivities toward alien political systems and moral values. Second of all, although I appreciate Dowdle's effort to avoid the misinterpretation of non-Western constitutional discourse, I do not agree with his methodology purporting to maintain that we should remain morally neutral when conducting cross-cultural dialogues, and that there is no moral linkage between two different civilizations. Finally, with regard to listening to the voices of new-Left thinking which have appeared in China's recent constitutional debates, Dowdle simply overlooks the fact that in the Chinese context the major political and legal vocabularies actually originate from Europe; and consequently, he neglects the long-term historical ef-

forts that Chinese intellectuals have made to accommodate liberal visions in an attempt to resolve their moral anxiety.

## FROM CONSTITUTIONAL LISTENING TO CONSTITUTIONAL LEARNING

*Leigh Jenco* 171

In this article, I point out some limitations of Michael Dowdle’s “listening” model, particularly its basis in the “principle of charity.” I try to show that listening, as well as the principle of charity, are inadvertently passive and one-sided exercises that seem to have little similarity to the deeply self-transformative “learning” Dowdle urges us to undertake. I go on to suggest other ways of accomplishing the goals Dowdle sets for this project. Specifically, I develop the “self-reflexive approach” to think about how we might change ourselves—our conversations, our terms, our concerns—in addition to, and in the process of, learning from others. I argue that we must go beyond an expansion of the term constitutionalism, to consider its replacement: the Chinese conversation is not a case study that exhibits features predictable by already-existing (and largely Western-centric) models of legal understanding, but stands as itself an important source of socio-political theory that can contribute to solving larger puzzles within political- and social-scientific analysis more generally, including democratic theory and Chinese politics.

## STUDENT NOTES

### BEYOND THE SCHOOLHOUSE GATE: SHOULD SCHOOLS HAVE THE AUTHORITY TO PUNISH ONLINE STUDENT SPEECH?

*Brittany L. Kaspar* 187

This note analyzes the current circuit split over whether schools should have the authority to punish students for speech made on the Internet. Part I discusses the First Amendment generally and the four Supreme Court cases that have refined its application with respect to on-campus student speech. Part II presents the ensuing circuit split over the constitutionality of disciplining students for online, off-campus speech. Specifically, this section will explain both of the existing perspectives and why neither of the two is ideal. Part III attempts to devise a solution to the current divide by advocating a compromise position. In particular, an analysis of the existing case law will demonstrate the ability of this proposal to balance longstanding First Amendment principles with the interests of school administrators.

### DISCRIMINATION IN THE MARCELLUS SHALE: THE DORMANT COMMERCE CLAUSE AND HYDRAULIC FRACTURING WASTE DISPOSAL

*Eric Michel* 213

The environmentally controversial process of hydraulic fracturing (commonly referred to as “fracking”) has led to a recent explosion in the supply and sale of natural gas in the United States. However, every fracking operation creates a sizable amount of toxic wastewater that requires disposal, and drillers in Pennsylvania have increasingly been shipping their waste across the border to Ohio because of Pennsylvania’s inadequate internal disposal options. In response, Ohio has passed legislation that taxes out-of-state fracking waste at a greater rate than waste derived from natural gas drilling within its borders. This Note examines whether Ohio’s taxing scheme violates the Constitution’s “dormant” Commerce Clause, which generally prohibits states from placing discriminatory burdens on articles of interstate commerce. Analyzed through the lens of several Supreme Court decisions concerning the interstate waste market (colloquially referred to as the “Garbage Wars”), this Note ultimately concludes that Ohio’s uneven taxing scheme is an unconstitutional burden on interstate commerce.

THE NURSING STANDARD OF CARE  
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This note analyzes the current circuit split among Illinois courts over whether the same-license requirement for medical expert testimony applies to testimony about the standard of care for nurse-doctor communications. Part I traces the history of the problem by explaining the original same-license requirement, the Wingo exception for nurse-doctor communications, and the Illinois Supreme Court's decision in *Sullivan*, which cast doubt on Wingo's continued survival. Part II illustrates the nature of the circuit split by describing the lower courts' three distinct interpretations of *Sullivan*. Finally, Part III argues that courts should apply *Sullivan* strictly and abandon the Wingo exception because this is the only approach that promotes fairness for nurse defendants and rightfully recognizes nursing as a distinct medical profession.



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# METHODOLOGICAL APPROACHES TO ASIAN CONSTITUTIONALISM

Ernest Caldwell and Terry Nardin  
Symposium Editors



