民众为何支持

美国最高法院的历史轨迹

任东来 胡晓进 江振春等 著

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Why Do People Support the Court
The History of the U.S. Supreme Court

任东来 胡晓进 江振春 白雪峰 翟艳芳 著

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序

Mark S. Kende*

在其经典著述《论美国的民主》中，阿列克西·德·托克维尔写到，美国最高法院权力巨大，尤其是最高法院拥有宣布法律和政府行为违宪的重要权力，而且，其裁决有着约束力。但是，“这是一种舆论的权力，如果人民忽视或蔑视法律，[大法官]** 则无能为力”。① 没有民众的支持，最高法院便无能为力，其原因正如亚历山大·汉密尔顿在《联邦派文集》第78篇所指出的，它既没有“剑”，也不掌握着“钱袋子”，考虑到美国宪法并没有明确最高法院的作用，最高法院的权力就显得尤为突出。任东来教授的这本重要著作概述了美国最高法院的历史，有助于解释最高法院的权威性和正当性。

作为一个长期观察最高法院事务的美国学者，我想提请读者注意以下几点，因为它们可以说明最高法院为什么能够得到民众的支持。

首先，最高法院要对自己的判决提出法律上的理由。大法官个人和政治偏好被假定为不起作用。最高法院的判决意见书基于美国宪法的文本，制宪者的意图，最高法院在以前类似问题上的判决（先例），宪法

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** 凡“[ ]”部分，系本书作者为方便读者阅读而在引文中增加的内容。

① *Marbury v. Madison*, 5 U. S. 137 (1803).

的结构，公共政策的考虑，道德上的推理。所以，最高法院的宪法决定看起来要超越日常的政治，包含着值得尊崇的更高级的理性。[①] 这也就是法治（rule of law）。一个鲜明的对比是，最高法院那些受到质疑最多的决定，也是那些看上去最政治化的决定，诸如“罗伊诉韦德案”[②] 和“布什诉戈尔案”[③]，这绝非偶然。

其次，最高法院的决定通常与民意恰好重合。[④] 这样，大法官虽非民选，但是，正如马丁·杜利指出的那样，他们也关注选举的结果。比如，在20世纪30年代的大萧条时期，全美国饱受广泛失业和其他众多经济困难之苦。富兰克林·罗斯福总统提出了“新政”联邦立法，旨在帮助穷人和饥饿者。最初，最高法院裁定，这些法律违宪地行使了联邦的权力。[⑤] 它们干涉了各州，干预了自由市场的经济制度。但是，当萧条继续，罗斯福连任总统成功，最高法院便转向认可了这些新政项目。[⑥] 在最近的“劳伦斯诉得克萨斯州案”[⑦] 中，最高法院认可了男同性恋的权利，反映了社会态度的变化，因为在此之前众多的州已经取消了它们反

① 不过，也有不少的法律学者论述说，最高法院的宪法判决反映出的是包裹在华丽法律语言里面的政治偏好。Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard Univ. Press 1990).

② *Roe v. Wade*, 410 U. S. 113 (1973)（裁定限制堕胎违宪）。

③ *Bush v. Gore*, 531 U. S. 98 (2000)（解决总统选举争议）。

④ Jeffrey Rosen, *The Most Democratic Branch* (New York: Oxford Univ. Press 2006) p. 4.（“不论最高法院中的大法官是否自觉地关注民意测验的结果，中立地解释宪法，还是试图平衡美国政治制度中的其他部门，在过去两个世纪的大部分时间里，他们那些引人注目的决定一直以不多的优势赢得了美国公众的人心，或者说至少过半数。”）

⑤ *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936)（否决保护煤矿工人的法律）。

⑥ *United State v. Darby*, 312 U. S. 100 (1941)（认可了规定劳工工资和劳动时间标准的法律）。罗斯福还提出了名声欠佳的“最高法院填塞”计划，据此，他企图增加大法官的人数，指望他们能够在新政立法案件中支持自己的立场。国会拒绝了罗斯福增加新法官的图谋，但最高法院最终还是转变了立场。William E. Leuchtenberg, “The Origins of Franklin D. Roosevelt's ‘Court Packing’ Plan”, 1966 *Supreme Court Review* 347.

⑦ *Lawrence v. Texas*, 539 U. S. 558 (2003).

对男同性恋性行为的法律。①

而且，为了不过多地搅乱民众的期望，在最重要的权利案件中，最高法院的裁决经常包含了最低行动论的成分。②在裁定公立学校种族隔离违法之后，最高法院在司法救济上非常谨小慎微，因为它担心社会骚乱。③ 还有，即便这样的一个决定蕴含了社会改革的寓意，最高法院也还是反对以下看法：美国宪法包含了默示的社会经济权利。④

再次，最高法院得到了民众的支持，因为它的司法意见看起来很有权威，甚至卓尔不群。这些意见的发布深不可测，就好像来源于某种神谕，传递出神圣羊皮书——美国宪法——的天意。最高法院大厦庄严的罗马柱让人联想到古代罗马和穿着黑色长袍的大法官。最高法院内部的

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① 在这个判决作出时，50% 的公众认为同性性关系应该合法。Karlyn Bowman, Attitudes about Homosexuality and Gay Marriage, A. E. I. *Studies in Public Opinion* (May 20, 2005).

② 在 *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard Univ. Press 1999) 中，Cass Sunstein 提出了宪法解释的最低行动论 (minimalist theory)，并因此而著名。最高法院大法官布雷耶最近也写了一本书，支持最低行动论的一种观点，也就是设法确保立法部门，而非法院，作出社会上大部分重要的决定。*Active Liberty, Interpreting Our Democratic Constitution* (New York: Alfred A. Knopf 2005)。不过，最高法院的批评家已经说过，最高法院的最低行动论保护了公司和富人的既定利益，根本不可能带来有意义的社会变化。Ran Hirsch, *Towards Juristocracy* (Cambridge: Harvard Univ. Press 2004); Gerald Rosenberg, *The Hollow Hope* (Chicago: Univ. Chicago Press 1991).

③ *Brown v. Board of Education*, 349 U. S. 294 (1955) (Brown II) (联邦地区法院应该以“最稳重的步伐”行事)。Morton Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang 1999) pp. 29 – 30 (“最高法院在‘布朗案 II’的决定反映了大法官的认识：他们正在引发一场社会革命”) 不过，最高法院不愿意下令立即采取救济措施的做法受到了猛烈的批评。Paul Gewirtz, “Remedies and Resistance”, 92 *Yale L. J.* 585, 613 (1983) (他引用了前大法官瑟古德·马歇尔的看法，指出只是在事关黑人案件时，权益的保护才会被推迟)。

④ *Dandridge v. Williams*, 397 U. S. 471 (1970). 相反，在“斯科特案”中，由于用了不必要的宽泛判决来否决涉及奴隶制的《密苏里妥协案》，最高法院让自己和整个国家陷入了麻烦。*Dred Scott v. Sandford*, 60 U. S. 393 (1856).

辩论是秘密的，而不像由 C－Span 电视台转播的国会立法辩论。[①] 最高法院甚至不允许电视台转播其法庭的庭辩。由于不是民选的，且终身任职，非严重行为不端不得免职，最高法院的大法官似乎可以超越政治的纷争。尽管由总统任命并经国会参议院批准，但他们独立于其他政府部门。下面的事实进一步加深了最高法院的深不可测：大法官不太爱到处演讲，也绝少出头露面。[②]

复次，最高法院很幸运地拥有一些政治机敏的舵手。在最高法院成立初期，首席大法官马歇尔发挥了至关重要的作用，他所撰写的意见书确立了法院的角色，但却没有把政治对手逼得太甚。[③] 他从前曾经是约翰·亚当斯总统的国务卿。在 20 世纪，首席大法官沃伦构建了一个全体一致宣布种族隔离违宪的大法官同盟，而在沃伦入主最高法院之前，他们在这个问题上四分五裂。[④] 沃伦曾经做过加利福尼亚州的州长。

最后，其他政府部门向最高法院让与了决策权。这种权力委代的一个原因是，相对来说，对立的两大政党势均力敌，他们之间无休止的冲突导致国会不能尽遂人愿。而且，许多政客担心自己的连任前景，如果

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① 最高法院的相对低调以及本文中提到的其他因素，可能是最高法院在受欢迎程度上不同于其他政府部门的原因。2006 年 1 月，CBS 新闻网的民意调查显示，86% 的民众至少对最高法院有某种信任，更具体地说，22% 的人表示他们“非常”信任，27% 的人“颇为”信任，37% 的人“有些”信任，13% 的人“有点儿”信任。CBS News Poll: Americans “Undecided” on Alito, Jan. 9, 2006 http://www.cbsnews.com/stories/2006/01/09/opinion/polls/main1192317.shtml（最新一次访问，2006 年 9 月 7 日）。相对照的是，同一时间，只有 27% 的民众认可国会，57% 的人则不认可。CBS News Poll, Congress, Ethics, and Jack Abramoff, Jan. 5－8, 2006 http://www.cbsnews.com/htdocs/CBSNews_polls/JANA-CON.pdf（最新一次访问，2006 年 9 月 7 日）。最高法院与国会之间的这一差距，在民众的眼里一向如此。

② 的确，在最高法院看起来颇通人情世故时，诸如作出一项意见不一的裁决，有着令人困扰的多种司法意见时，最高法院便会遇到最多的批评。大法官提名的确认听证也是一项难题，因为只有在这时，未来大法官的缺点才暴露在光天化日之下，供人们评头论足。

③ *Marbury*, supra n. 1（联邦党人首席大法官马歇尔所撰写的意见书，让他的政治对手托马斯·杰斐逊总统免于法律程序）。

④ *Brown v. Board of Education*, 347 U. S. 483 (1954) (Brown I).

他们采取了一些极有争议立场的话。最高法院的独立独行和精干构成允许它发出道德和理性的声音，而不是政治上的权宜之计。此外，其他的政府部门通常也配合协作。当阿肯色州州长拒绝执行最高法院的裁定，让黑人学校的孩子去从前清一色白人的学校上学时，艾森豪威尔总统便召集了美国执法官来强制执行法院的决定。①

总之，最高法院对法治的执着，对舆论的敏感，其制度的高洁，一些首席大法官的勇气和智慧，以及其他政府部门不愿意决定某些事务，所有这些都有助于最高法院的权威和正当性。最后的结果是，通过不时地遏制过度的民主，最高法院起到了民主制中一个重要基石的作用。这并非偶然，众多其他国家现在也拥有了强大的法院，来对宪法问题作出具有约束力的决定。②

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① *Cooper v. Aaron*, 358 U. S. 1 (1958). 一个著名的例外是 *Worcester v. Georgia*, (1832) 案，当时最高法院裁定，佐治亚州的说辞——拥有对切诺基印第安人部落管辖权——非法。对此，据说安德鲁·杰克逊总统说过这样的话："约翰·马歇尔作出了他的决定，那就让他自个儿去执行吧。" Charles Hobson, "The Marshall Court", in Christopher Tomlins, ed., *The United States Supreme Court* (New York: Houghton Mifflin Co. 2005) p. 63.

② Vicki Jackson, Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press 1999) p. v; Barry Friedman, "Taking Law Seriously", *Perspectives on Politics*, Vol. 4 No. 2 (June 2006) p. 261. ("在保护基本人权方面，越来越多的国家转向让法院和司法审查发挥重要作用。")

PREFACE

by Mark S. Kende[①]

In his classic work Democracy in America, Alexis de Toqueville wrote that the United States Supreme Court has enormous power but that "it is the power of public opinion. [The justices] would be impotent against popular neglect or contempt of the law." Specifically, the Court has the significant power to declare laws or actions unconstitutional and its decisions are binding. ② Without popular support, the Court would be impotent because it lacks the "power of the purse" or "the sword" as Alexander Hamilton stated in The Federalist Papers No. 78. The Court's power is especially impressive considering that the U. S. Constitution does not make its role clear. ③ Thus, how has the Court obtained public support? This important book by Professor Ren Donglai chronicles the Court's history and helps provide explanations for the Court's authority and legitimacy. As a longtime American observer of the Court, let me suggest that the answer regarding public support depends on several factors.

First, the Court provides legal reasons for its decisions. The justices'

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① Mark S. Kende is a Professor of Law, the James Madison Chair in Constitutional Law, and the Director of the Drake University Constitutional Law Center.

② Marbury v. Madison, 5 U. S. 137 (1803).

③ Article III of the U. S. Constitution states that, "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." But Article III does not specify the significance of the Supreme Court's rulings regarding cases falling within this judicial power.

personal or political preferences are not supposed to matter. The Court's opinions rely on the text of the U. S. Constitution, the intent of the framers of the Constitution, previous Supreme Court decisions on similar issues (precedents), the structure of the Constitution, public policy considerations, and moral reasoning. Supreme Court constitutional decisions therefore seem to rise above ordinary politics and embrace a higher reason that deserves respect. ① This is the rule of law. It is no accident that the Court's most frequently questioned decisions are those that, by contrast, appear the most political such as Roe v. Wade② and Bush v. Gore. ③

Second, the Court's results usually coincide with public opinion. ④ Thus, though Supreme Court Justices are unelected, they read the election returns, as Martin Dooley stated. For example, during the Great Depression in the 1930's, the United States suffered huge unemployment and other massive economic problems. President Franklin Delano Roosevelt (FDR) proposed a "New Deal" of federal laws that were designed to help the poor and the hungry. Initially, the U. S. Supreme Court ruled these laws were unconstitutional exercises of federal power. ⑤ These laws interfered with the states and with the free market economic system. But as the Depression continued and FDR was

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① Numerous legal scholars, however, have argued that the Court's constitutional decisions reflect political preferences dressed up in fancy legalistic language. Mark Kelman, A Guide to Critical Legal Studies (Cambridge: Harvard Univ. Press 1990).

② 410 U. S. 113 (1973) (abortion restrictions ruled unconstitutional).

③ 531 U. S. 98 (2000) (resolving Presidential election).

④ Jeffrey Rosen, The Most Democratic Branch (New York: Oxford Univ. Press 2006) p. 4 ("Whether the moderate justices on the Supreme Court are self - consciously reading the polls, neutrally interpreting the Constitution, or trying to compensate for other polarities in the system, their high profile decisions, for much of the past two centuries, have been consistently popular with narrow majorities (or at least pluralities) of the American public.")

⑤ Carter v. Carter Coal Co., 298 U. S. 238 (1936) (striking down laws protecting coal workers).

reelected, the Court reversed course and upheld these New Deal programs. ① The Court's recent decision affirming gay rights, Lawrence v. Texas, ② only came after numerous other states had repealed their laws against gay sex, reflecting a change in public attitudes. ③

Moreover, in order not to disturb popular expectations more than necessary, the Court's most significant rights decisions often have a minimalist component. ④ After the Court ruled that racial segregation in public schools was illegal, the Court was cautious in its remedy because it feared social chaos. ⑤ Also, the Court has rejected arguments that the U. S. Constitution contains

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① United State v. Darby, 312 U. S. 100 (1941) (upholding laws that prohibit sub - standard wages and hours requirements for workers). FDR also engaged in the notorious "Court Packing" plan in which he tried to add justices to the Court who would support his position regarding the New Deal legislation. Though Congress rejected his effort to add new justices, the Court did shift positions eventually as indicated in the text. William E. Leuchtenberg, "The Origins of Franklin D. Roosevelt's 'Court Packing' Plan", 1966 Sup. Ct. Rev. 347.

② 539 U. S. 558 (2003).

③ At the time of the decision, 50% of the public believed homosexual relations should be legal. Karlyn Bowman, Attitudes About Homosexuality and Gay Marriage, A. E. I. Studies in Public Opinion (May 20, 2005).

④ Cass Sunstein is known for his minimalist theory of constitutional interpretation developed in the book, One Case at a Time: Judicial Minimalism on the Supreme Court (Cambridge: Harvard Univ. Press 1999). U. S. Supreme Court Justice Stephen Breyer has recently authored a book that supports a version of minimalism that seeks to ensure that the legislature makes most of society's important decisions, not the courts. Active Liberty, Interpreting Our Democratic Constitution (New York: Alfred A. Knopf 2005). Critics of the Court, however, have said that its minimalism protects the vested interests of corporations, and the wealthy, and can never bring about meaningful social change. Ran Hirsch, Towards Juristocracy (Cambridge: Harvard Univ. Press 2004); Gerald Rosenberg, The Hollow Hope (Chicago: Univ. Chicago Press 1991).

⑤ Brown v. Board of Education, 349 U. S. 294 (1955) (Brown II) (the federal district courts should act "with all deliberate speed"). Morton Horwitz, The Warren Court and the Pursuit of Justice (New York: Hill and Wang 1999) pp. 29 - 30 ("The Supreme Court's decision in Brown II reflected the justices' understanding that they were initiating a social revolution.") The Court's unwillingness to order an immediate remedy has, however, been harshly criticized. Paul Gewirtz, "Remedies and Resistance", 92 Yale L. J. 585, 613 (1983) (quoting former U. S. Supreme Court Justice Thurgood Marshall as stating that postponement of enforcing rights only occurs when Negroes are involved).

implied socio – economic rights given the transformative implications of such a decision. ①

Third, the Court has garnered public support because its judicial opinions appear to be authoritative and even transcendent. They are issued mysteriously, as if from an oracle rendering divine pronouncements regarding a holy parchment, namely the U. S. Constitution. The majestic columns of the Supreme Court building suggest ancient Rome, and the justices wear long black robes. The Court's internal debates are secret, unlike when Congress debates legislation on the television station C – Span. ② The Court will not even televise its formal oral arguments. The Court's members seem above the political fray as they are unelected, serve for life, and cannot be removed unless they commit a terrible misdeed. They are independent from the other branches even though they are appointed by the President and confirmed by the Senate. The Court's mystique is heightened by the fact that the justices do not give many speeches and do not have great social visibility. ③

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① Dandridge v. Williams, 397 U. S. 471 (1970). The Court, by contrast, got itself and the nation into trouble with its unnecessarily broad decision striking down the Missouri Compromise regarding slavery in Dred Scott v. Sandford, 60 U. S. 393 (1856).

② The Court's relative privacy, and the other factors mentioned in this Preface, may make a difference in the popularity of the various branches. A January, 2006 poll by CBS news revealed that 86% of the public had at least some confidence in the U. S. Supreme Court. More specifically, 22% said they had a "great deal" of confidence, 27% said they had "quite a lot", 37% said they had "some", and 13% said "very little." CBS News Poll: Americans 'Undecided' on Alito, Jan. 9, 2006 http: //www. cbsnews. com/stories/2006/01/09/opinion/polls/main1192317. shtml (last visited Sep. 7, 2006). By contrast, only 27% of the public approved of Congress around that time while 57% disapproved. CBS News Poll, Congress, Ethics, and Jack Abramoff, Jan. 5 – 8, 2006 http: //www. cbsnews. com/htdocs/CBSNews_ polls/JANA – CON. pdf (last visited Sep. 7, 2006). The gap between the Supreme Court and Congress in the public eye is longstanding.

③ Indeed, the Court receives the most criticism when it seems human such as when it renders a deeply divided decision with many confusing opinions. Confirmation hearings are also problematic because they are the one point where the warts in a future justice are visible for all to see and discuss.

Fourth, the Court has been fortunate to have some politically astute helmsman. Chief Justice Marshall played a crucial role in the Court's early years authoring opinions that built up the Court's role, but without pushing his political opponents too far. ① He had previously been President John Adams' Secretary of State. In the 20th Century, Chief Justice Warren built a coalition of justices that unanimously found segregation unconstitutional, though the Court was divided on the issue before he joined. ② He had been California's Governor.

Fifth, the other branches of government have ceded decision – making power to the Court. One reason for this delegation is that Congress cannot accomplish much due to the perpetual conflict between two relatively well matched political parties. Moreover, many politicians fear they will not be reelected if they take controversial positions. The Court's independence and small size allows it to act as the voice of morality and reason, rather than political expediency. In addition, the other branches have usually cooperated. When the Governor of Arkansas refused to carry out a Supreme Court ruling ordering the admission of black school children to a previously all white school, President Eisenhower called out the United States Marshalls to enforce the decision. ③

To sum up, the Court's adherence to the rule of law, its sensitivity to public opinion, its institutional sanctity, the courage and wisdom of some of its

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① Marbury, supra n. 1 (the federalist Chief Justice Marshall authored an opinion that resulted in his political opponent, President Thomas Jefferson, being shielded from legal process).

② Brown v. Board of Education, 347 U. S. 483 (1954) (Brown I).

③ Cooper v. Aaron, 358 U. S. 1 (1958). One notable exception is Worcester v. Georgia, (1832) where the Court ruled that Georgia's assertion of authority over the Cherokee nation was illegal. President Andrew Jackson allegedly stated that, "John Marshall has made his decision, now let him enforce it." Charles Hobson, "The Marshall Court", in Christopher Tomlins, ed., The United States Supreme Court (New York: Houghton Mifflin Co. 2005) p. 63.

chief justices, and the reluctance of the other branches of government to decide certain matters, have all contributed to the Court's power and legitimacy. The end result is that the Court serves as an important bulwark of democracy by acting at times to curb the excesses of democracy. It is no accident that numerous other nations now also have powerful courts that render binding legal decisions on constitutional issues. ①

① Vicki Jackson, Mark Tushnet, Comparative Constitutional Law (New York: Foundation Press 1999) p. v; Barry Friedman, "Taking Law Seriously", Perspectives on Politics, Vol. 4 No. 2 (June 2006) p. 261. ("More nations are turning to courts and judicial review to play an important role in the protection of basic human rights.")

致　谢

专门的致谢，在中国学者的著述中并不常见。我虽然不是一个全盘西化派，从不认为中国的一切都要与国际“接轨”，不过，就学术著述的形式而言，却主张与国际较先进的形式接轨：比如，著述应该有较完备的注释、参考书目和主题索引，还有就是致谢。

致谢是美国学术著述的“舶来品”，不过，我还是让它带着中国特色。这就是，我首先要感谢的对象，不是个人，而是“单位”，那些为本书的研究和写作提供了种种资助和便利的机构。国家教育部的人文社会科学基金为这一研究提供了启动基金，中美政府间的富布莱特学者交流计划资助笔者赴美研究，修订和完善业已完成的文稿。美国艾奥瓦州德雷克大学法学院宪法中心（Constitutional Law Center, the Law School, Drake University）热情地接待了我，为我提供了与该院教师同等的办公和研究条件。此外，我妻子吴耘任访问教授的古林学院（Grinnell College），也慷慨地允许我这个“家属”无偿地使用该校的图书馆和体育设施。我的安身立命之所，南京大学—霍普金斯大学中美文化研究中心，一如既往，为我提供了中国国内最好的人文社科研究氛围和物质条件。没有上面这些机构和组织的帮助，这本书无论如何是写不出来的。

正是在德雷克大学全球公民中心主任 David Skidmore 的介绍和帮助下，我才得以选择该校法学院的宪法中心作为我 10 个月富布莱特项目的研究基地。没有比这一选择更好的决定了，它不仅让我充分感受到艾奥瓦人的友善，而且使我们一家人在美国的团聚成为可能。宪法中心主

任 Mark Kende，总是愿意与我一起讨论我在研究过程中遇到的问题或难点，主动安排我与来德雷克法学院演讲和授课的两位美国最高法院大法官布雷耶（Stephen Breyer）和托马斯（Clarence Thomas）以及艾奥瓦州北区联邦地区法院首席法官 Mark W. Bennett 单独见面、交谈、用餐的机会。他所组织的宪法专题演讲和讨论会，让我有机会聆听下列美国一流宪法学者的精彩报告：Mark Tushnet，Burt Neuborne，Gerald Torres，Gerald Rosenberg，John Eastman，Jane Schacter，Emily Buss。这些名字我原本只是在书本上才知道。参加 Mark 讲授的比较宪法讨论班，更是让我这个历史学者大开眼界。为了让更多的读者分享 Mark 对美国最高法院的洞见，我特别请他从宪法学者的角度为本书撰写了序言。

德雷克法学院教授 Maura Strassberg 在我来美初期，为我提供了与家人团聚的交通便利。更重要的是，我们在行车路上一个小时的交流，让我得以分享她对美国司法制度的种种见解。David Skidmore 的妻子 Charlene，德雷克大学中国文化项目主任 Mark Ferrara 及其妻子 Savannah Bao，以及艾奥瓦州友好州省（Iowa State Sisters）交流项目副主席 Centy Chen 和她的丈夫 Frank Affannato，为我广泛接触社会各界、深入了解美国政治提供了各种机会和帮助。当地居民 Viv & Hud Lainson 夫妇、Arthur Neith 夫妇的热情好客，让我体会到了美国社会生活的一些细节。

南京大学历史系世界史学科的同事和多年的老友——刘成、陈仲丹和陈晓律诸位教授，帮助我分担了本应该由我来承担的一些指导研究生的责任。我年迈的父母，在我们一家人旅美期间，为我们照看我们的公寓和宠物。对于所有这些直接和间接有助于本书的研究和写作的机构、朋友和家人，我表示最深切的感谢。

任东来

2006 年 6 月 27 日于南京

前　言

（一）

在现代世界中，几乎没有哪一个国家的政治精英不在强调法治的重要，强调政府应该是在法律之下，而不能超越法律。为此，除英国、以色列和新西兰外，世界上所有的主权国家都有一份大同小异的成文宪法，规定了政府的权限范围，同时也列举了民众的基本权利与自由。但是，在这些宪法之下，绝大多数国家的法治状况远不尽如人意。国家的公权是如此强大，个体的权利却微不足道，官员常常可以用“公意”或“国家安全”这类冠冕堂皇的借口，来损害和践踏民众的自由和权利。对这些民众而言，法治依然是一个可望而不可即的理想。由于无法通过合法的途径来伸张正义、维护权利，绝望的民众或者寄希望于天上的“救世主”；或者求助于江湖的“绿林好汉”；或者孤注一掷，拼一个鱼死网破，“杀一个够本，杀两个还赚一个”。结果，专制、腐败、动荡、混乱，成为一些国家挥之不去的幽灵。

这些国家的历史教训说明，光有一部漂亮的成文宪法并不足以保证一个国家的长治久安。如果与现代以来相对发达稳定的国家相对照，或许可以发现，法治国的另一个条件是还要有一个独立行使审判权的司法机构，它能够把宪法上对公权的限制与对私权的保护落实到生活的实处。宪法与独立行使审判权的司法机构可以说是通向现代法治国的不可缺少的两翼。因此，在寻求现代法治之路的时候，不仅要关注宪法的起草与制定，同样也要注意独立行使审判权的司法机构的建立与建设。