

ARTICLES

THE CHINESE DEMOCRACY MOVEMENT IN U.S. PERSPECTIVE

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"The rulers have policies; the ruled have counter-policies."
(*Shangmian you zhengce; xiamian you duice.*)—Chinese saying

PRÉCIS OF THE ANALYSIS

The purpose of this article is to evaluate the progress of civil liberties in China in the aftermath of the Democracy Movement of 1989. The thesis of this article is that the government's violent repression of the Movement does not disguise the fact that freedom of speech¹ and assembly in China have continued to evolve in a manner bringing China closer to the Western model. The Movement represents a definite advance in rights consciousness among ordinary people. China's positive development in this regard becomes more evident if one does a comparative analysis and closely examines the history of First Amendment jurisprudence in the United States. The development of the concept of free speech in this country has followed a long and circuitous path; the commitment to free speech requires continuous reexamination and reaffirmation. However, a critical difference between China and the United States is the more active role played by the American courts in shaping the content of civil liberties. In China the evolution of civil liberties is more

1. "Speech" and "expression" will be used interchangeably in this article unless the context indicates otherwise.

likely to be affected by the behavior of mass movements and their testing of the limits of political control than by judicial reasoning.² Nonetheless, expectations fostered in part by the legal system, however imperfect the system may be, will continue to guide the behavior of mass movements.

I. INTRODUCTION

A. The Democracy Movement in the Context of Change Within the Socialist Bloc

The wave of public protests which swept the socialist bloc in 1989 carried rapt fascination for outside observers, especially those who were able to follow events through intense media coverage. In the countries of Eastern Europe, public protests signified mass rejection of the command economy and political domination by the Communist Party. They accelerated the transition to new economic and political structures.³ By contrast, in China, the public protests collectively referred to as the Democracy Movement⁴ are generally considered to have ended in "failure." The dominant group in the Party resorted to the use of force to bring an end to the Movement. Those identified as leaders of the Movement were forced to flee the country or else face trial and imprisonment.⁵ The Movement did not produce the fundamental systemic changes which occurred in Eastern Europe; worse yet, it did not even effect a major reshuffling in the top leadership.⁶

2. Kalven characterizes the development of freedom of speech in the twentieth century as an "erratic, almost random . . . dialogue between American society and the Supreme Court." (emphasis added); see HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 241 (1988); see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 216-17 (1977).

The approach of this article is therefore to question the assumption that rights in China are defined from "the top down" by official action, rather than by the changing consensus of the society as a whole. See HUMAN RIGHTS IN CONTEMPORARY CHINA 44-45, 130-31 (R. Randle Edwards et al. eds., 1986); Owen M. Fiss, *Two Constitutions*, 11 YALE J. INT'L L. 492 (1986). This article further questions whether a determination that China has no legal system in the accepted sense or that it has a "wicked" legal system should be made purely by reference to the actions of the current government.

3. See generally Rett R. Ludwikowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 SYRACUSE J. INT'L L. & COM. 91 (1991). Perhaps the most extreme change occurred in East Germany, which ultimately disappeared as an independent state and was reunified with West Germany.

4. The term Democracy Movement is used to cover a number of disparate, geographically separated, and loosely coordinated activities which occurred in the major cities of China in the spring of 1989. See *infra* note 8. Even though they cannot be said to have been masterminded by any one individual or group, they appear to have expressed certain common aspirations or dissatisfactions with the status quo. For this reason, the use of the term in a collective sense is not misleading.

5. See generally Robin Munro, *Rough Justice in Beijing: Punishing the "Black Hands" of Tiananmen Square*, 10 UCLA PAC. BASIN L.J. 77 (1991).

6. The major exception was Zhao Ziyang, former Party General Secretary, who

The legality of the various Democracy Movement activities becomes especially significant because they did not produce revolution or a change of regime as occurred in the countries of Eastern Europe. Once leaders of mass popular movements accede to power, international attention turns to their handling of the levers of power and efforts to mobilize the population behind new policies. Rights claims, on the other hand, remain important when the existing government systematically denies them.⁷

B. The Appeal of the Democracy Movement to American Observers

Despite the failure of the Democracy Movement to produce immediate and far-reaching changes, the Chinese demonstrations and their suppression have had a tremendous impression on the American people. One might argue that the importance of events was magnified out of proportion to their real significance by media, particularly television, coverage.⁸ Mass movements in other countries, which have been suppressed with equal violence, have gone virtually unnoticed.⁹ In response it may be argued that media coverage is drawn to events by the perceived importance that the events in question have for viewers. Thus, the Chinese demonstrations were somehow more intrinsically important to the general public in the United States than similar events in other countries.¹⁰

The appeal of the Democracy Movement protests (as well as similar protests in Eastern Europe) to American observers seems ironic in view of the general lack of interest or involvement by Americans in domestic political issues.¹¹ Observation of events in socialist countries permitted Americans a kind of vicarious involve-

was accused of having sympathized with and encouraged the activities of the Democracy Movement. Zhao has been under house arrest since his removal from power in June 1989. See *Beijing Promotes 3 Officials Who Were Allies of Purged Party Chief*, N.Y. TIMES, June 2, 1991, at A13; see also *infra* note 250 and accompanying text.

7. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE* 11, 13 (1989).

8. The truth of this proposition may be evidenced by the disproportionate amount of attention given to events in Beijing, while mass demonstrations in other large cities such as Wuhan, Xi'an, and Shanghai were relatively neglected. See *THE PRO-DEMOCRACY PROTESTS IN CHINA: REPORTS FROM THE PROVINCES 1* (Jonathan Unger ed., 1991).

9. On the lack of reaction to repression of student demonstrations in Burma, see Aye Aye Thant, *Burmese Cry Out Against Their Rulers*, N.Y. TIMES, Sept. 26, 1991, at A26.

10. The existence of a special relationship between the United States and China is discussed *infra* notes 54-56 and accompanying text.

11. By domestic issues, I include foreign policy questions which involve the United States. The lack of interest is evidenced, for example, by low voter turnout rates, even in presidential elections. Mass demonstrations, on the order of those which protested the Vietnam War, have not occurred in the United States for two decades.

ment in political matters, without risk or direct stake in the outcome. The protests, which often directly invoked the American experience,¹² provided evidence of the triumph of capitalism and democratic values, which was achieved without any special effort by Americans or their government. There was a quaintness about the problems the Chinese and the Eastern Europeans were experiencing, both political and economic, because they were adopting or advocating structures such as political campaigning and stock markets which Americans have long taken for granted.¹³ At the same time, attention by Americans to these events may also have been a sign of respect or a recognition that genuine political innovation and institutional creativity occur in the face of repression.¹⁴

C. The Reaction of Informed Observers to the Democracy Movement

Most appraisals by expert observers have been highly critical of the Chinese government for its repression of the Democracy Movement and the political trials which followed.¹⁵ There has been little appreciation of the fact that any government, presented with a serious challenge to its authority, would likely resort to the use of force to maintain its power.

Nonetheless, those who can find no justification for the government's actions have still essentially adopted the position of the Bush administration: whether the regime is to be faulted for its handling of the Democracy Movement is an issue which must be separated from the question of how the United States should otherwise respond as a matter of foreign policy.¹⁶ It is ultimately inconsistent to

12. See *CRIS FOR DEMOCRACY: WRITINGS & SPEECHES FROM THE 1989 CHINESE DEMOCRACY MOVEMENT* 141, 142-43, 157 (Han Minzhu ed., 1990) [hereinafter *CRIS FOR DEMOCRACY*] (contrasting Deng Xiaoping with George Washington).

13. Free speech issues in the United States and other developed countries today are less a matter of suppression of political ideas than assuring market access for speakers who cannot afford the mass media. See ERIC BARENDT, *FREEDOM OF SPEECH* 98-107 (1985).

14. See Robert W. Gordon, *Law and Disorder*, 64 *IND. L.J.* 803, 830 (1989).

15. The condemnation voiced by China experts has been almost universal. See, e.g., William P. Alford, "Seek Truth from Facts"—Especially When They Are Unpleasant: *America's Understanding of China's Efforts at Law Reform*, 8 *UCLA PAC. BASIN L.J.* 177 (1990); Hua Sheng, *Big Character Posters in China: A Historical Survey*, 4 *J. CHINESE L.* 233 (1990). For a view that the regime's actions were not altogether irrational, see Leo A. Orleans, *Elitist Visions Won't Feed China's Masses*, *N.Y. TIMES*, Jan. 24, 1990, at A22; *Students Bear Much of the Responsibility for the Tragedy in China*, *CHRON. HIGHER EDUC.*, July 19, 1989, at A36.

16. For President Bush's policy of constructive engagement towards China, see Remarks to the Asian-Pacific Community in Fountain Valley, California, 27 *WEEKLY COMP. PRES. DOC.* 794 (June 16, 1991); Remarks at the Yale University Commencement Ceremony in New Haven, Connecticut, *id.* at 674 (May 27, 1991). For other views which condemn the Chinese government and yet encourage continued contacts between the two countries, see Andrew J. Nathan, *Scholars Must Keep Their Vision of*

encourage the maintenance of close contacts with China while the government which ordered repression is still in power, unless one believes that the seeds of democratic change remain viable in spite of, or perhaps even because of, the government's actions. Without approving of the government's actions, it is still possible to identify creative possibilities in the tensions which resulted in violent repression.

D. The Democracy Movement as a Vehicle for Examining National Implementation of International Human Rights Standards

Since the international political system continues to be organized primarily around sovereign states, the effectuation of human rights still depends in large part on the internal processes of the various countries.¹⁷ For this reason, studying the realization of international norms through national practice is essential. An examination of the Democracy Movement provides an opportunity for reconsidering the fate of free speech in China¹⁸ and applying the insights gained to the development of free speech in other countries.¹⁹

The Chinese government's suppression of the Democracy Movement raises yet again the perennial question of whether human rights standards have universal validity or acceptance. In response to criticism, whether by individual governments or inter-

China Unclouded by Politics, CHRON. HIGHER EDUC., July 26, 1989, at A36; Jimmy Carter, *Renew China's Trade Status*, N.Y. TIMES, Apr. 30, 1991, at A19. For discussion of recent efforts by Congress to predicate continued contacts on improvement in China's human rights performance, see *infra* note 58 and accompanying text.

Some of the rationales cited for maintaining continued contacts are that such contacts (1) sustain the progressive forces in China during an otherwise dark period; (2) make it possible for the United States to exert a moderating influence on the persecution of political dissidents; and (3) do not penalize the general population, which has developed a stake (economic or otherwise) in China's opening to the outside world. See Nicholas D. Kristof, *Doing Beijing a 2d Favor?*, N.Y. TIMES, July 21, 1991, at A13; Li Xianglu & Lu Mai, *Renew China's Trade Status*, N.Y. TIMES, July 23, 1991, at A21. Maintenance of contacts necessarily implies a belief that the Chinese government operates rationally and is susceptible to outside influences (seeing a connection between improving its human rights record and obtaining advantages in its dealings with other countries).

17. See DONNELLY, *supra* note 7, at 266-69.

18. For earlier studies of this subject, see ANDREW J. NATHAN, CHINESE DEMOCRACY (1985); Ellen R. Eliasoph, *Free Speech in China*, 7 YALE J. WORLD PUB. ORD. 287 (1981); Fiss, *supra* note 2.

19. The content of freedom of speech is not static even in a society such as the United States where it is believed to have transcendent value. See *infra* part III.A. Although the evolution of free speech in China cannot be said to directly affect the content of free speech in the United States (as defined primarily by the U.S. Supreme Court), the repression of free speech in other countries causes Americans to at least reevaluate, and possibly reaffirm, their own commitment. See DONNELLY, *supra* note 7, at 116.

national agencies, the Chinese government has asserted the familiar argument that such criticism of its actions constitutes meddling in its internal affairs and is therefore a violation of its sovereignty.²⁰ China's view that it is not bound by international standards and that its domestic policies are beyond scrutiny has been rejected by the United Nations. A study by the United Nations, which is the most representative of international organizations, has rated various countries on their compliance with human rights and found China to be among the most deficient members of the international community.²¹

There are strong reasons for applying international human rights standards to China even though China officially rejects such application as meddling in its internal affairs. While much of the content of international law is Western in origin, it does enjoy growing international acceptance even among countries outside the Western tradition.²² China freely invokes the concept of sovereign equality of states, a Western concept which is distinctly foreign to its tradition. It should not be permitted to pick and choose among international law principles that major instruments such as the United Nations Charter identify as fundamental, including respect

20. There are two separate but closely related issues involved here: (1) whether a state is bound by an international standard; and (2) assuming that it is bound, how a failure or refusal to comply should be treated by other states and international organizations.

On the first issue, China is not a party to the International Covenant on Civil and Political Rights, which affords protection to freedom of speech and assembly. However, as a member of the United Nations, it is bound by the U.N. Charter and the Universal Declaration of Human Rights, an authoritative elaboration of Charter principles which also protects freedom of speech and assembly. See Jeffrey A. McCredie, *Human Rights Concerns in the People's Republic of China: An Appraisal of Recent Events*, 3 TEMPLE INT'L & COMP. L.J. 217, 221, 227 (1989).

On the subject of human rights, China has taken the position that it is only bound by those international obligations to which it has expressly consented, interpreted in light of its own unique national conditions. Efforts to ensure China's compliance with human rights standards, even through indirect means such as investigation of alleged abuses, generally have been rejected as impermissible interference in its domestic affairs. See U.S. DEP'T OF STATE, 101ST CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1989, at 819 (Comm. Print 1990) [hereinafter 1990 STATE DEPARTMENT REPORT]; Hungdah Chiu, *Chinese Attitudes Toward International Law of Human Rights in the Post-Mao Era*, in CHINESE POLITICS FROM MAO TO DENG 237, 252-54 (Victor C. Falkenheim & Ilpyong J. Kim eds., 1989).

21. See Paul Lewis, *U.N. Index on Freedom Enrages Third World*, N.Y. TIMES, June 23, 1991, at A11. The Index established a general correlation between economic development and official respect for human rights. Most of the countries which scored well were developed Western countries.

Official U.N. reaction specific to the suppression of the Democracy Movement has been inconsistent. Although a subcommission of the U.N. Human Rights Commission voted to investigate the matter, ultimately the Commission refused to criticize China directly or keep the issue on its agenda. See Paul Lewis, *Rights Panel Scolds Cuba*, *Not China*, N.Y. TIMES, Mar. 7, 1990, at A3.

22. See HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra* note 2, at 163.

for human rights. Furthermore, injustice tends to flourish in the absence of scrutiny. Even when national laws, such as China's, nominally incorporate international human rights standards, international attention to human rights questions encourages governments to be more scrupulous in the observation of their own laws than they might otherwise be.²³

The Democracy Movement also raises profound questions about the effectiveness of individual expression in shaping the political process. In contrast to the United States, where freedom of speech has been justified by its salutary impact on political dialogue,²⁴ in China the individual act of protest appears to be a suicidal gesture, an act of martyrdom, which brings no lasting change to the political system.²⁵ A related question is whether political change in China can ever occur except by violent means.²⁶

Looking at the fate of the Democracy Movement from a more optimistic perspective, it is possible that China, like other countries, will exhibit distinct stages of development in the evolution of civil liberties. Behavior that would have been considered seditious in an earlier period and harshly punished was no more than a minor offense or not considered criminal at all in the period just prior to the Democracy Movement.²⁷ However, since seditious conduct has been treated differently during periods of tightened political control, when the government feels threatened, as opposed to periods of relaxation when dissent is more freely tolerated,²⁸ measuring progress is problematic. Which period does one take as the baseline? Nonetheless, periods of tightened control never completely restore the status quo ante.

Furthermore, a sense of progress can be gained by looking at the early American experience. It is probable that many of the statements made during the Democracy Movement, in wall posters, leaflets, banners, and street corner speeches, which made personal attacks on the leadership and impugned the integrity of the Party would have constituted seditious libel under laws in effect in the

23. *Id.*

24. See discussion *infra* part III.A.3.

25. See ANDREW J. NATHAN, CHINA'S CRISIS: DILEMMAS OF REFORM AND PROSPECTS FOR DEMOCRACY 183 (1990); CRIES FOR DEMOCRACY, *supra* note 12, at 327.

26. See CRIES FOR DEMOCRACY, *supra* note 12, at 140-42, 327.

27. Compare Andrew G. Walder, The Political Sociology of the Beijing Upeaval of 1989, PROBS. OF COMMUNISM, Sept.-Oct. 1989, at 32 with AMNESTY INT'L, POLITICAL IMPRISONMENT IN THE PEOPLE'S REPUBLIC OF CHINA 13 (1978). During earlier periods, listening to broadcasts by the BBC and VOA or making critical remarks about the leadership was frequently punished as "counterrevolutionary", i.e., seditious.

28. Alternation of periods of tolerance with periods of control has frequently occurred since 1949. Examples of the former include the Hundred Flowers Movement in the 1950s, the Democracy Wall Movement in the late 1970s, and the period which immediately preceded the Democracy Movement in the late 1980s.

United States after World War I.²⁹ Indeed, the doctrine of seditious libel was not put to rest in the United States until the Supreme Court's decision in *New York Times v. Sullivan*³⁰ in 1964.³¹ While condemning egregious human rights violations by the Chinese government, one cannot ignore the evolutionary nature of free speech protection even in democratic societies.

II. VALIDITY OF APPROACH ANALYZING FREE SPEECH IN CHINA FROM U.S. PERSPECTIVE

A. Introduction

Beyond the significance of free speech in China for the universal implementation of international human rights, the question of whether it is appropriate to compare China to any other country in this regard remains. Even though the international community might reject the Chinese government's efforts to put itself outside the pale of universal standards, the implementation of such standards deserves analysis in light of China's unique cultural and historical circumstances. Following this line of argumentation, applying concepts derived from the experience of any other country to China necessarily places it in an inferior position and is a form of moral imperialism.³² Even assuming that the concrete experience of other countries provides an essential gloss on the content of international human rights, there remains the problem of choosing an appropriate surrogate for comparative purposes. The two following sections will address whether comparison with the United States is justified.

B. Arguments Against a Comparative Approach

It may be argued that the Chinese experience has been so fundamentally different from that of the United States that any effort to compare the two is forced.³³ Among the reasons that may be offered for this point of view is that there is no genetic relationship between the two countries, as modern China derived its economic, political, and legal systems from the Soviet Union. Second, China has a tradition of centralized, authoritarian rule whereas the United States was born out of revolt against authoritarianism. Third, in

29. For a discussion of U.S. law, see KALVEN, *supra* note 2, at 63-68, 139.

30. 376 U.S. 254 (1964).

31. KALVEN, *supra* note 2, at 63. Although the *New York Times* case arose out of a civil libel action, its pronouncement of a "national commitment" to uninhibited debate on public issues provided a standard for seditious and private criminal libel actions as well.

32. For a contrary view defending comparative analysis, see DONNELLY, *supra* note 7, at 267-69.

33. See HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra* note 2, at 162-64.

theory the Chinese constitutional tradition has emphasized positive rights granted by the state and limitations on individual freedom for the sake of the collective good, whereas U.S. constitutional tradition has always emphasized inalienable natural rights and individual freedom from government interference and official orthodoxy.³⁴ In China, consistent with Marxist ideology, the content of rights is believed to change in response to external circumstances, chiefly economic ones.³⁵

Finally, China may be considered a prototypical activist state in which the state manages all activities and uses the law to serve its goals, whereas the United States is the prototypical reactive state, where the state merely supplies a supporting framework for individual activity and the law is an instrument for resolving conflict between individuals.³⁶

Specifically, in the area of civil liberties law, it may be argued that the American experience is irrelevant to an understanding of the Chinese experience since none of the landmark U.S. Supreme Court decisions dealt with demonstrations of the scale and duration of those during the Democracy Movement.³⁷ The Democracy Movement was a combination of many different activities occurring simultaneously in different places, making the degree of synergistic effect among them—and the consequent threat of social disorder—hard to measure. In addition, the Democracy Movement occurred against the historical background of the Cultural Revolution, when student protests did erupt into mass violence.³⁸ The U.S. cases (with the notable exception of those dealing with the Communist Party) generally address isolated phenomena of picketing, distribution of leaflets, or street corner speech by members of small, politi-

34. *Id.* at 26-34, 160-61.

35. See Eliasoph, *supra* note 18, at 291-92. This rationale may have been emptied of meaning by the government's opportunistic actions in modifying the Constitution to remove threats to its monopoly of power and also by the influence of Western notions of natural rights on popular thought. On the subject of constitutional amendment, see HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra* note 2, at 48-49. On the subject of natural rights philosophy, see *id.* at 162.

36. See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* ch. 3 (1986); Inga Markovits, *Pursuing One's Rights Under Socialism*, 38 STAN. L. REV. 689 (1986).

37. Over a million people marched through the center of Beijing on May 17-18, 1989. *CRIES FOR DEMOCRACY*, *supra* note 12, at 223-24. Since the United States political system is relatively tolerant of dissident views, it is at least possible for individuals or small groups to challenge the boundaries of permissible speech with considerable frequency. While individuals have been imprisoned for political activities, subversive advocacy has not been a capital offense in the United States. See discussion *infra* part III.A.2. In China, because of greater repression, it has been safe to speak only in very large numbers.

38. For expressions of fear by the government that a second Cultural Revolution was in the making, see *CRIES FOR DEMOCRACY*, *supra* note 12, at 84, 305.

cally marginal groups.³⁹

The bias of the judicial process in the United States towards determinations of individual guilt has made it difficult for the courts to view the issue of subversive advocacy in all of its complexity.⁴⁰ Because the judicial process focuses on individual guilt, there is always a danger of either overestimating the individual's role in a dissident group (because of his vicarious liability for the acts of others) or underestimating his role (examining his actions in isolation from the acts of others). In actuality, subversive advocacy is not simply a matter of individual freedom of speech but also involves vicarious advocacy, freedom of assembly, and political conspiracy.⁴¹ Although most U.S. cases are cast in the form of determinations of individual responsibility, they essentially involve group First Amendment rights.⁴² However, by generally avoiding the questions raised by group advocacy,⁴³ the U.S. cases do not come to terms with an important aspect of free speech and are even less useful in dealing with mass political actions of the scale which occurred in China.

Even in political crises which matched the importance of events in China, the U.S. Supreme Court suffered a failure of nerve and did not strike an independent course on controversial issues.⁴⁴ Beyond this failing, the judicial process in the United States, with its slow pace and preoccupation with technical detail, ultimately may obfuscate the boundaries of permissible speech.⁴⁵ The courts

39. See discussion *infra* part III.A.4. Even the Communist Party was considered by Justice Douglas to be a marginal threat to the established order in the United States. In his dissent to *Dennis v. United States*, he stated: "Communism has been so thoroughly exposed in this country that it has been crippled as a political force." *Dennis v. United States*, 341 U.S. 494, 588 (1951) (Douglas, J., dissenting).

40. Justice Jackson expressed awareness of the limitations of the judicial process in this regard. *Dennis*, 341 U.S. at 570 (Jackson, J., concurring).

41. See *KALVEN*, *supra* note 2, at 121, 241. To use Kalven's phrase, "[i]ndividuals join together to present opinions to the public not simply as an exercise in speech but as a complex gesture of political action." *Id.* at 241.

42. *Id.* at 242.

43. There are exceptions. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (defending the freedom of association); *NAACP v. Alabama*, 357 U.S. 449 (1958).

44. Dworkin calls the Court's decision in *Dennis v. United States*, during the McCarthy period, "shameful." *DWORKIN*, *supra* note 2, at 148.

45. For a critique of the judicial role in free speech cases, see generally Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 *CORNELL L. REV.* 302 (1984). Nagel concludes that the U.S. Supreme Court has not played any empirically demonstrable part in fostering free speech and may in fact have harmed its development. Judicial interpretation, stretched over a series of cases, may lead to confusion of basic principles. *Id.* at 329. Judicial reasoning in First Amendment cases has been increasingly characterized by complex and seemingly arbitrary categorization of permissible and impermissible speech. *Id.* at 330-34. By articulating limits to the suppression of speech, the Court may encourage suppression. *Id.* at 320. The judicial process itself, because it must decide for one side, may be essentially unsuited to the complexity

have struck questionable compromises, deciding cases which uphold the law in question though invalidating its application in the particular case.⁴⁶ Although the decisions attenuate the effects of official repression, the resulting uncertainty may dampen the enthusiasm to speak.⁴⁷ Cases can be decided so long after the fact that they lose their impact.⁴⁸ The U.S. Supreme Court, even after half a century of First Amendment cases, was not able to fully clarify how likely a violent response has to be in order to justify repression of speech.⁴⁹ It may be, for no want of trying, that free speech is an area where adjudication of constitutional issues will never settle the law because a fundamental right is involved.⁵⁰

C. Arguments Favoring a Comparative Approach

Despite the long and confused course of First Amendment jurisprudence, the United States affords more protection to free speech than perhaps any other society.⁵¹ Moreover, there is a larger body of law in this country on the subject of free speech. Even if the U.S. Supreme Court has not been able to provide definitive answers in First Amendment cases, its decisions embody an extensive public dialogue on the subject of free speech. U.S. constitutional standards in this area have influenced international standards, for example, as expressed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.⁵² Comparison using U.S. law is justified because the balance to be achieved between free speech concerns and the demands of social order in specific situations has not been extensively devel-

of free speech questions. *Id.* at 323. Finally, the Court has subordinated free speech to other social interests in many cases. *Id.* at 336.

46. See, e.g., *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) (decision upholding the constitutionality of the federal Anti-Riot Act but reversing defendants' convictions on procedural grounds).

47. See *infra* part III.A.4 for discussion of the negative impact of permit requirements on spontaneous expression.

48. See *KALVEN*, *supra* note 2, at 268-69 (commenting on *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961)).

49. *Id.* at 233-34 (discussing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)); see also Nagel, *supra* note 45, at 337-38 (commenting on belated protection given to antiwar protests in late 60s and early 70s).

50. See Dworkin, *supra* note 2, at 220.

51. U.S. law, having a written constitution as its foundation, is more protective of free speech values than British law, e.g., with respect to the licensing of public meetings. See BARENDT, *supra* note 13, at 90-94.

52. See LOUIS HENKIN, *Constitutionalism and Human Rights*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE U.S. CONSTITUTION ABROAD* 383, 392 (Louis Henkin & Albert J. Rosenthal eds., 1990). However, it should be noted that the moral authority of U.S. law within the field of international human rights is weakened by the continued failure of the United States to ratify the Civil Covenant and other major international human rights instruments.

oped in international law.⁵³

Furthermore, comparison is validated by the special relationship that is said to exist between China and the United States, even though from the U.S. perspective other countries may be of greater strategic or economic importance.⁵⁴ American attitudes about China, more so than about other countries, are a projection of current attitudes about ourselves and our society.⁵⁵ From the Chinese perspective, the United States has been a source of inspiration for advocates of political change even if they misunderstand or reject American values.⁵⁶

D. U.S. Influence on China's Human Rights Policy

Assuming a valid comparison can be made between the United States and China, the United States can actually influence Chinese civil rights policies. This is because China's failure to uphold international human rights has a number of practical consequences for its relations with the United States. Human rights issues have become an important element in a general souring of relations between the two countries, complicated by an uneven balance of trade biased in China's favor and by Chinese arms sales to the Third World.⁵⁷

Human rights compliance is a key factor in determining China's eligibility for trade privileges under U.S. law.⁵⁸ Whatever

53. See discussion *infra* notes 177-78 and accompanying text.

54. See NATHAN,, *supra* note 25, at 78. For example, recent negotiations to forge a free trade area with both Canada and Mexico evidence a somewhat belated emphasis on relations with our two immediate neighbors.

55. *Id.* at 80.

56. See NATHAN,, *supra* note 18, at 45-66.

57. See Keith Bradsher, *Senate Restricts Trade with China; Bush Veto Likely*, N.Y. TIMES, July 24, 1991, at A1; Nicholas D. Kristof, *Chinese Ties: Frosty to Icy*, N.Y. TIMES, May 2, 1991, at A13.

58. Since the suppression of the Democracy Movement, controversy in the United States over China's human rights performance has crystallized around the annual renewal of its most-favored-nation (MFN) status under section 402 of the Trade Act of 1974, the so-called Jackson-Vanik amendment. With MFN status, Chinese exports enter the U.S. market at preferential tariff rates. The volume of Chinese exports to the United States has only increased since June 1989, to the point where China is expected to achieve a trade surplus of \$15 billion in 1991. See *Chinese Government Condemns Senate Vote; President will Veto Conditional MFN Bill*, 8 INT'L TRADE REP. 1143 (1991).

President Bush has opposed Congressional efforts to condition further renewal of China's MFN status on certified improvements in its human rights record. See discussion *supra* note 16 and accompanying text. In 1991, as in 1990, conditional renewal foundered on the inability of its proponents to muster enough support in the Senate for the two-thirds majority sufficient to override a Presidential veto. The U.S.-China Act of 1991, H.R. 2212, 102d Cong., 1st Sess. (1991) would have required the President to report, *inter alia*, that Chinese citizens imprisoned for nonviolent expression of their political beliefs had been released and that China had made significant progress in preventing gross violations of human rights.

the conceptual difficulties in applying American legal standards to the Chinese experience, U.S. law requires that such an evaluation be made.⁵⁹ Indeed, because of the importance of bilateral trade to the Chinese economy, the United States has already made limited use of its political and economic clout with China in human rights cases, though perhaps not to the fullest possible extent.⁶⁰ Furthermore, popular unrest in China, stimulated by the government's failure to implement human rights, affects U.S. investors' perceptions of political stability in China and their willingness to continue doing business there.⁶¹

III. BACKGROUND OF FREE SPEECH IN THE UNITED STATES AND CHINA WITH SPECIAL EMPHASIS ON LEGAL REGULATION OF DEMONSTRATIONS

A. U.S. Perspective

1. Introduction

Much of the commentary which criticizes the Chinese government's reaction to the Democracy Movement rejects at least implicitly the government's arguments that suppression of the Movement was necessary to preserve social order.⁶² However, because of China's huge population, the country's economic backwardness, its feudal tradition, and the long period of civil war which preceded the founding of the People's Republic of China (PRC), there is a generally accepted assumption in China, not limited to the government, that China is (or should be) more concerned with preserving social order than is a country such as the United States.⁶³ How much

59. Although inquiry into China's human rights performance for purposes of U.S. trade law is made with reference to *international* human rights, domestic civil liberties law is relevant for two reasons. First, the content of international human rights has been shaped by U.S. law. Second, an inquiry which takes place in a U.S. forum inevitably will be affected by domestic legal perceptions.

60. See NATHAN, *supra* note 25, at 90. For example, Chinese dissidents Fang Lizhi and Li Shuxian took refuge in the U.S. Embassy in Beijing, where they remained for a year before being allowed free passage out of China. See Nicholas D. Kristof, *China Lets Dissidents Leave Haven in U.S. Embassy to Fly to England*, N.Y. TIMES, June 26, 1990, at A1. However, the U.S.-China Act of 1991, 303, contained a finding that the United States had failed to use existing laws and other means to rectify China's human rights performance.

61. See generally Robert Kleinberg, *China's Foreign Economic Relations After Tiananmen*, 8 UCLA PAC. BASIN L.J. 303, 303-04 (1990). For discussion of the decline of U.S. investment both before and after June 1989 for reasons other than political stability, see Cecilia L. Wagner, *A Survey of Sino-American Joint Ventures*, 12 E. ASIAN EXEC. REP. 7 (1990).

62. See discussion *supra* note 15 and accompanying text.

63. See NATHAN, *supra* note 18, at 231; NATHAN, *supra* note 25, at 113. This attitude is reflected in general approval of capital punishment as a crime control mea-

disorder can be officially tolerated⁶⁴ without threatening the foundations of society is a question which neither the Party nor its critics have satisfactorily addressed.

For the Chinese government to justify its actions out of a need to preserve order is not surprising because the very purpose of government is to maintain order. Whether destabilizing the present government would in fact have resulted in a degree of chaos unacceptable to the general population⁶⁵ is not usually considered by critics of the government.

Criticism of the Chinese government in this regard, without attempting to define the line beyond which society is truly threatened by disorder, does not advance the analysis of events. The government's claim that but for their actions disorder would have resulted is a subject which needs to be addressed directly. What is usually forgotten is that the United States also reacts to threats to the established order and has had its share of forcibly repressed public demonstrations and political trials.⁶⁶ Even in the United States, selective persecution of certain groups through the application of sanctions to individual members has had a chilling effect on freedom of speech and association.⁶⁷

This section is primarily concerned with identifying conduct which is deemed to be a threat to the social order and therefore constitutionally unprotected altogether or subject to severe constraints. In general, it may be said that despite change over time, there remains in U.S. law a profound ambivalence towards political advocacy conducted in public places. The lesson to be learned from the American experience is that meaningful standards that serve both individual liberty and social order equally are difficult to formulate. Judicial attempts at formulation are indeed a worthwhile exercise in their own right, but they have not produced a handy calculus even in this country.

sure. See, e.g., Nicholas D. Kristof, *Law and Order in China Means More Executions*, N.Y. TIMES, Jan. 15, 1991, at A2.

64. Like any society, China exhibits the phenomenon of noncompliance with law. Not every violation is prosecuted to the letter of the law for reasons such as administrative convenience, shortage of personnel, clogged court dockets, and perceived importance of the violation relative to other offenses. For example, China's laws regarding residence restrictions have not been fully enforced in recent years because rural migrants are willing to perform necessary work in the cities which urban dwellers disdain. See HILARY K. JOSEPHS, *LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY* 146 (1990).

65. Even after June 1989, despite lack of support for the current government, there has been some popular apprehension that the death of Deng Xiaoping will plunge the country into civil war. See Nicholas D. Kristof, *Fear of Chaos Grows as China's Leaders Age*, N.Y. TIMES, July 12, 1990, at A11.

66. This fact was not lost on Deng Xiaoping, however. See *CRIES FOR DEMOCRACY*, *supra* note 12, at 371.

67. See discussion *infra* part III.A.2.

2. Historical Background of Free Speech in the U.S.

Legal controls of political discussion had a long history in England, where critics of the government were prosecuted under the law of constructive treason (a capital offense) or seditious libel.⁶⁸ Criticism of the government or government officials constituted the crime of seditious libel in early America, under state law and the Sedition Act of 1798.⁶⁹ Although the Act expired by its terms two years after enactment and was never renewed,⁷⁰ the power of federal or state governments to regulate speech consistent with the First Amendment remained an unexplored question until the twentieth century.⁷¹ The number of cases brought, and the elaborate justifications offered for free speech in the past seventy years, suggest that it is far from being a settled and accepted value in American society.

The parameters of free speech came to be examined in this century mainly as a consequence of repressive federal and state legislation enacted during and after World War I.⁷² The legislation was part of a xenophobic reaction to the influx of immigrants from southern and eastern Europe, and to the rise of the Socialist Party which had a large number of immigrants in its membership.⁷³ Challenges to the legislation occasioned major Supreme Court decisions such as *Schenck v. United States*, *Debs v. United States*, and *Abrams v. United States*.⁷⁴ In China as well, foreign ideas have pro-

68. See EDWARD L. BARRETT, JR. & WILLIAM COHEN, *CONSTITUTIONAL LAW* 1047-48 (7th ed. 1985) and sources cited therein.

69. See KALVEN, *supra* note 2, at 63-64; BARRETT & COHEN, *supra* note 68, at 1050-51 and sources cited therein. The Sedition Act provided in pertinent part:

[I]f any person shall write, print, utter, or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them or either or any of them, the hatred of the good people of the U.S. . . . then such person being thereof convicted . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

70. See KALVEN, *supra* note 2, at 64.

71. *Id.* at 64-66; Kent Greenawalt, *Speech and Crime*, 4 AM. B. FOUND. RES. J. 645, 687-90, 731 (1980). For examples of suppression of speech, particularly of the press, in the nineteenth century, see BARRETT & COHEN, *supra* note 68, at 1051-53.

72. MARK A. GRABER, *TRANSFORMING FREE SPEECH* 75 (1991); KALVEN, *supra* note 2, at 125-50. The Espionage Act of 1917 made it criminal to interfere with the war effort, by willfully causing or attempting to cause insubordination in the military forces or willfully obstructing the draft. *Id.* at 126. Members of the Socialist Party who opposed the war and conscription were prosecuted under this statute. *Id.* at 130-31.

73. See GRABER, *supra* note 72, at 80-81; Gordon, *supra* note 14, at 822. Similarly, xenophobic fears of a French invasion were a motivating force behind passage of the Sedition Act of 1798. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 298-99 (1985).

74. *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250

vided a catalyst for questioning government policies and testing the limits of dissent.⁷⁵

3. Theoretical Justifications for Free Speech

In this century a number of justifications have emerged for free speech through court cases and scholarly comment. The most important justifications are the "enlightenment" function of free speech, the "self-fulfillment" function, and the "safety valve" function.⁷⁶ According to the enlightenment theory, which constitutional law scholars consider to be the most influential contemporary rationale, freedom of speech is a necessary precondition for the functioning of a participatory democracy. Absolute certainty on any issue of fact or opinion is beyond human capability; all determinations of truth are tentative. Therefore, a democratic society can only arrive at decisions of relative correctness by allowing an ongoing exchange to occur in the marketplace of ideas.⁷⁷ Open political debate also ensures the integrity of the legislative process and functions as a check on the abuse of power by public officials.⁷⁸ The self-fulfillment theory views free speech as an end in itself, serving each individual's inherent personal need for self-expression. Under the safety valve theory, free speech is viewed as a healthy means of ventilating grievances as compared to physical acts of violence.⁷⁹

U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919). See generally KALVEN, *supra* note 2, at 125-50. Although the Court upheld convictions in these cases, it began, through concurring or dissenting opinions, to question the constitutionality of statutes which impeded open political discussion.

75. See CRIES FOR DEMOCRACY, *supra* note 12, at 371.

76. The discussion which follows is based on THOMAS I. EMERSON, TOWARDS A GENERAL THEORY OF THE FIRST AMENDMENT 3-15 (1966); MELVILLE B. NIMMER, FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT ch. 1 (1984); BARENDT, *supra* note 13, at 8-23; and Greenawalt, *supra* note 71, at 670-75. It is beyond the scope of this study to discuss the intellectual antecedents of contemporary justifications for free speech. See, e.g., LEVY, *supra* note 73, at 208 (importance of free press to maintaining accountability of public officials recognized by Junius Wilkes in 1782).

77. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Emerson and Barendt treat the argument based on citizen participation in a democracy as separate from the argument based on the search for truth.

78. This notion bears some similarity to the Chinese view on the importance of "criticism from the masses." See *infra* text accompanying note 148.

79. For a related view, compare CRIES FOR DEMOCRACY, *supra* note 12, at 161, 341.

Allowing people to ventilate their grievances through speech rather than violence may also be viewed cynically as a way of reducing meaningful participation and thereby coopting a threat to the established order. In this view, tolerating dissent actually fosters stability because dissenting groups spend their energy on speech rather than more direct methods of political change. When divergent views can be freely expressed, groups emerge which are fragmented and ineffectual. Thus, it is safe to have uninhibited public debate because political parties and the press limit the range of acceptable practical politics. See Gordon, *supra* note 14, at 824-25.

Through the uninhibited expression of political ideas, the government can identify and address problems of popular concern before they lead to mass insurrection.

On the whole, free speech in this century has been justified less as a sphere of private conduct inherently beyond government control and valid for its own sake than as a phenomenon with important ramifications for the political order. The First Amendment, like article 35 of the PRC Constitution,⁸⁰ is framed in absolute terms—Congress shall make no law abridging speech—but has been interpreted through statute and case law to permit many restrictions on freedom of speech where the contribution to the political order was doubtful.

4. Drawing the Boundary Around Protected Speech

Despite the apparently absolute language of the First Amendment, the law has not been interpreted to afford freedom from criminal prosecution or civil liability to all speech in all circumstances. The Supreme Court has wrestled with a number of problems in attempting to draw the line between expression which is protected by the First Amendment and that which is not. The U.S. cases taken as a whole identify areas of controversy but do not provide definitive and predictable answers.

One of the issues analyzed by the Court is the very definition of political speech which is protected under the First Amendment. The Court has extended the scope of speech to include certain forms of expressive conduct ("symbolic speech") intended to convey a political message.⁸¹ Another issue which has preoccupied the Court is whether advocacy of abstract doctrine, as opposed to advocacy directed at promoting unlawful action, gives rise to criminal liability. In one case it was found that the teaching of Marxism-Leninism and the connected use of Marxist "classics" was not criminal activity. However, directing Party members to be prepared to convert a general strike into a revolution and mobilize blacks supported a conviction for subversive advocacy.⁸²

Another issue which has concerned the Court is whether proof

80. See discussion *infra* part III.B.2.

81. See *Texas v. Johnson*, 491 U.S. 397 (1989) (publicly burning an American flag as a means of political protest); *Spence v. Washington*, 418 U.S. 405 (1974) (displaying U.S. flag upside down with peace symbol); *Cohen v. California*, 403 U.S. 15 (1971) (wearing jacket with slogan "Fuck the Draft" in courthouse); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (wearing black armbands in school to signify opposition to the Vietnam War). *But see* *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card on courthouse steps not protected speech).

82. See *Yates v. United States*, 354 U.S. 298 (1957). In *Yates*, the Court stated the issue as follows:

The essential distinction [between advocacy of abstract doctrine and advocacy directed at promoting unlawful action] is that [in the latter case]

of the speaker's intent (which could be inferred from the speech itself) was sufficient to convict or whether proof as to the effect of incitement was also necessary. Ultimately, the Court came to require both proof of intent and proof of result.⁸³ Over the years the Court has tightened the causal relationship necessary between speech and the probability of violent action in order to justify official restraint.⁸⁴ However, it is not necessary for criminal conviction that actual violence occur.⁸⁵

The cases have further required the Court to confront the question of institutional competence and separation of powers: whether the Court should defer to legislative judgments that certain classes of speech should be proscribed.⁸⁶ Over the years, the Court has demonstrated less and less deference to legislative judgments, invalidating or limiting the application of statutes which regulated speech on the grounds of vagueness and overbreadth.⁸⁷ Finally, members of the Court have also debated whether the First Amendment absolutely protects speech (though not conduct) or whether even free speech values should be balanced against competing government interests such as preventing crime, maintaining traffic flow, and preserving the beauty of public spaces.⁸⁸ The balancing approach has

those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something.

Id. at 324-25. See also *Communist Party v. Whitcomb*, 414 U.S. 441, 449-50 (1974). Contrast this concept with counterrevolutionary incitement under Chinese law, discussed *infra* part III.B.5.

83. Compare *Brandenburg v. Ohio*, 395 U.S. 444 (1969) with *Gitlow v. New York*, 268 U.S. 652 (1925). The *Brandenburg* rule requires proof of both incitement and consequent danger of imminent unlawful action. For a discussion of the rule see KALVEN, *supra* note 2, at 119-24. The *Gitlow* rule did not require a likelihood that imminent unlawful action result. The *Brandenburg* rule should also be contrasted with the concept of counterrevolutionary incitement under Chinese law, discussed *infra* part III.B.5.

84. One should distinguish situations where speech threatens to excite others to disorder in retaliation against the speaker (reflexive disorder) from situations where speech threatens to incite others to illegal action against a target selected by the speaker. See KALVEN, *supra* note 2, at 77. Although the Supreme Court cases have addressed both types of situations, it is the second type which is relevant for purposes of comparison with China.

85. See *United States v. Dellinger*, 472 F.2d 340, 394 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) (speech must cause a high likelihood of riot; offense can be committed even if riot does not actually occur).

86. See BARENDT, *supra* note 13, at 149-50. In this light, compare *Gitlow*, 268 U.S. 652, which upheld the principle of deference to legislative judgment, with *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), which supported independent inquiry by the courts into the constitutionality of statutes affecting free speech. For discussion of constitutional interpretation in China, see *infra* part III.B.7.

87. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-27, at 1022-24 (overbreadth); *id.* § 12-31, at 1033-35 (vagueness and overbreadth) (2d ed. 1988).

88. The most prominent spokesmen for the "absolutist" view were Justices Black and Douglas, those for the "balancing" view Justices Harlan and Frankfurter. See *gen-*

remained the prevailing view.⁸⁹

Demonstrations⁹⁰ are a phenomenon covered by multiple layers of constitutional protection, since they typically involve issues of free speech (conventional and symbolic speech) as well as freedom of assembly, which is separately protected by the First Amendment.⁹¹ At the same time, they probably test the limits of First Amendment protection and society's commitment to free speech more than any other vehicle for expression because of the threat they pose to social order.⁹² Speech likely to have significance for the political process is also likely to be addressed to a mass audience, where the likelihood of violence is greater than private communications. In addition, spoken words addressed to a mass audience are likely to have a more provocative effect than written words.⁹³

Even in the electronic age, demonstrations have not become obsolete.⁹⁴ In a democratic society they are an important vehicle for expression because access to alternative channels of communication depends on wealth; demonstrations are an inexpensive means of political protest.⁹⁵ Furthermore, the Supreme Court has required that public spaces be made available for First Amendment activity,⁹⁶ although the government may impose restrictions on

erally NIMMER, *supra* note 76, ch. 2. For a balancing of free speech values against aesthetic concerns, see discussion *infra* part III.A.5.

89. See discussion *infra* notes 109-10 and accompanying text regarding time, place, and manner restrictions.

90. "Demonstrations" will be used here as an umbrella term for any type of public gathering, the purpose of which is to convey a group message through speech, conduct, or some combination of the two. The term includes street meetings, assemblies, parades, and sit-ins.

91. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

92. See C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 981-82 (1984). Mass protest is in fact most likely to occur when the status quo is not responsive to popular concerns and a serious lack of consensus has arisen within the society. *Id.* at 950, 980-81.

93. See *KALVEN*, *supra* note 2, at 93-94 (discussing *Beauharnais v. Illinois*, 343 U.S. 250 (1952)).

94. *Id.* at 104:

Indeed, the sophistication of modern communication technology enhances rather than diminishes the impact of street corner speech. The old-fashioned forms of protest and the new mass media collaborate. The former supply the colorful, newsworthy episode; the latter supply the national and global coverage.

This observation holds true as well for the Democracy Movement demonstrations. See discussion *supra* part I.B.

95. See *Baker*, *supra* note 92, at 944, 978. In an authoritarian society such as China, demonstrations are an important means of expression because the state monopolizes other channels of communication. See discussion *infra* part III.B.3.

96. The classic statement of a right of access to public spaces is found in *Hague v. CIO*, 307 U.S. 496 (1939), discussed in *BARENDT*, *supra* note 13, at 91-92.

their use.⁹⁷

In the United States, demonstrations have been associated with the grievances of those unable to obtain a hearing through the legislative process, usually because they represented a minority point of view. The Supreme Court, which has been a defender of minority groups slighted by the majoritarian political process, has supported freedom of speech or assembly for small, highly disciplined groups such as the Jehovah's Witnesses,⁹⁸ the Ku Klux Klan,⁹⁹ and the civil rights movement.¹⁰⁰ For purposes of comparison with China, the experience of the civil rights movement is particularly instructive because it represented the interests of a minority within the general population, unable to gain redress through the legislature, and faced with police repression.¹⁰¹

At the same time, demonstrations have enjoyed an uneasy status under American law. To the extent that free speech is justified by an enlightenment or "marketplace of ideas" theory,¹⁰² demonstrations are less defensible than other vehicles of expression because thoughtful debate typically does not occur on these occasions. The most important consequence of a demonstration may be to create an esprit de corps among its participants.¹⁰³ Mistrust of demonstrations has also rested on unfounded assumptions about the unruliness of crowds.¹⁰⁴ In some of the older decisions, Supreme

97. See *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); see also *Baker*, *supra* note 92, at 961. The point at which restrictions on use become so onerous that they may practically deny use of public space is discussed *infra* at notes 114-16 and accompanying text. Contrast the PRC Demonstrations Law, 22 Guownyuan Gongbao [State Council Gazette] 803 (1989), discussed *infra* part III.B.4, which puts much public space off-limits unless authorized at the very highest levels of government. See also *CRISIS FOR DEMOCRACY*, *supra* note 12, at 10.

98. See *KALVEN*, *supra* note 2, at 80-81, 182-83, 242. The Supreme Court has not always ruled in favor of the Jehovah's Witnesses. See, e.g., *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

99. The Supreme Court's treatment of the Klan has not been uniformly tolerant. Compare *Bryant v. Zimmerman*, 278 U.S. 63 (1928) (compulsory registration requirement upheld against Klansman) with *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (state statute under which Klansman convicted found unconstitutional).

100. See *KALVEN*, *supra* note 2, at 96-105, 258-63. The Supreme Court has not invariably ruled in favor of civil rights groups. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

101. See discussion *infra* part III.B.3.

102. See discussion *supra* part III.A.3.

103. See *Baker*, *supra* note 92, at 946-49, 972-73.

104. It has been shown empirically that fears of mob behavior are exaggerated and that crowds at political demonstrations behave with restraint. See *Baker*, *supra* note 92, at 982. It is official response to demonstrations which causes injury and death. *Id.* at 996 n.141; see also *Gordon*, *supra* note 14, at 820 and sources cited therein.

None of the landmark Supreme Court cases on the First Amendment has directly condemned use of excessive force by the police. Cf. *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state officials not immune from claims for damages arising out of shootings at Kent State University). Yet it is likely that the Supreme Court would require very clear proof that a demonstration could not be controlled by extra police trained in crowd

Court justices expressed the suspicion that even small groups without a mass following could manipulate street unrest to subvert public order.¹⁰⁵ Even though today, under the *Brandenburg* standard,¹⁰⁶ there is considerably greater tolerance (or less fear) of fringe extremist groups, the Constitution still does not protect radical speech posing a serious threat to the democratic system.¹⁰⁷

Since the Supreme Court has guaranteed access to *some* public places for the purpose of exercising freedom of speech, a key issue regarding demonstrations in recent decades has become the regulation of conduct as distinct from speech. The Court has determined that the government may regulate conduct even when it is intertwined with constitutionally protected speech.¹⁰⁸ Furthermore, speech itself is subject to certain restrictions.¹⁰⁹ Among the time, place and manner regulations which the Supreme Court has sanctioned is the mandatory parade permit system, whereby the organizers of a demonstration must obtain advance permission from local authorities if the demonstrators are not to face criminal liabil-

management before upholding the denial of a parade permit. See *BARENDT*, *supra* note 13, at 142, 209-10. Compare discussion of the use of force against the Democracy Movement demonstrations, *infra* part III.B.4.

105. See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951) (Jackson, J., dissenting); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (Jackson, J., dissenting), discussed in *KALVEN*, *supra* note 2, at 81-82; *Greenawalt*, *supra* note 71, at 152-53. Justice Sanford's opinion in *Gitlow v. New York*, 268 U.S. 652 (1925), recognized as legitimate the legislature's desire to prohibit a general militant program which may eventually produce specific acts of violence. *KALVEN*, *supra* note 2, at 152-53; see also *Dennis v. United States*, 341 U.S. 494 (1951) (the defendants' convictions—for "conspiring to advocate overthrow of the government" and "conspiring to organize a group to advocate overthrow"—were upheld although the danger to the established order was very remote). *KALVEN*, *supra* note 2, at 190-99. Chief Justice Vinson stated in the majority opinion to *Dennis* that it was within the power of Congress to legislate against numerically small and weak revolutionary movements. *Dennis*, 341 U.S. at 509 (1951).

106. See discussion *supra* note 83 and accompanying text.

107. See *BARENDT*, *supra* note 13, at 159-60; *Baker*, *supra* note 92, at 1015.

108. See *United States v. O'Brien*, 391 U.S. 367 (1968) (act of burning draft card in public place not protected speech); *Cox v. Louisiana*, 379 U.S. 559 (1965) (picketing and parading near courthouse is conduct subject to regulation even though intertwined with constitutionally protected expression and association).

109. As the Court has stated, "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). However, such restrictions are usually applied to communicative conduct rather than simple oral or written expression. *NIMMER*, *supra* note 76, at 2-25; see also *Cox v. Louisiana*, 379 U.S. 536, 554 (1965), which states in pertinent part:

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order.

ity.¹¹⁰ A parade permit system will be deemed unconstitutional and therefore no liability will arise for failure to obtain a permit if the system allows the administrative authorities unlimited discretion in refusing to grant a permit,¹¹¹ or if it authorizes denial for impermissible reasons.¹¹²

On the other hand, it may be argued that the system created by mandatory parade permit requirements is based on a primary concern with order and a desire to routinize public life, rather than with facilitating the expression of political opinions.¹¹³ Parade ordinances impose planning, organization, and hierarchy on demonstrations, for example, simply by requiring that the organizer obtain the necessary permit.¹¹⁴ Organizers are required by many municipalities to obtain insurance or otherwise assume financial obligations.¹¹⁵ Even if permit requirements are drafted with sufficient specificity and are neutral on their face, effective authority remains with the police and supervision by the courts is not always effective.¹¹⁶

5. Demonstrations in a Symbolic Venue

The Supreme Court weighed the reasonableness of a time, place, and manner regulation in a case which invites comparison with the Democracy Movement demonstrations because it arose out

110. See *Cox v. New Hampshire*, 312 U.S. 569 (1941) (defendants convicted of violating state statute prohibiting parade or procession without a license); *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (defendants convicted of criminal contempt for disobeying injunction not to hold march).

111. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (parade ordinance unconstitutional because standards for denying permit vague; also, ordinance enforced in a discriminatory manner). This standard should be contrasted with the PRC Demonstrations Law, discussed *infra* part III.B.4.

112. See, e.g., the racially discriminatory permit denial at issue in *Shuttlesworth*, 394 U.S. 147. On this point contrast the PRC Demonstrations Law, which contains broad prohibitions on the content of the message to be conveyed at a demonstration, discussed *infra* part III.B.4.

113. See *Baker*, *supra* note 92, at 1013-18.

114. *Id.* at 1014. Permit requirements by their nature cannot cover the spontaneous mass demonstration, an inability which is admitted by waivers or exemptions from permit requirements, for example, for funeral processions. *Id.* at 1010. Because parade ordinances have so often been used to suppress political activity, some of the most significant parades have been funeral processions for political or labor movement martyrs which were exempted from the usual requirements. *Id.* at 954-56. Similarly, in China, the deaths of popular political leaders such as Zhou Enlai and Hu Yaobang inspired huge demonstrations. For the impact of Hu's death on the Democracy Movement, see CRIES FOR DEMOCRACY, *supra* note 12, at 5-15.

115. See Edwin B. Firmage et al., *The Shanties, Symbolic Speech, and the Public Forum: Ramshackle Protection for Free Expression?*, 1990 UTAH L. REV. 503, 532 n.195 and accompanying text.

116. See *Baker*, *supra* note 92, at 1007-08, 1018. Even though no liability arises under an unconstitutional ordinance, conducting a demonstration without a permit runs the risk that the ordinance will later in fact be found valid. See *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

of a political protest in the nation's capital: *Clark v. Community for Creative Non-Violence*.¹¹⁷ The respondent had applied to the National Park Service for a permit to conduct an around-the-clock demonstration in parks in the heart of Washington D.C. for the purpose of dramatizing the plight of the homeless population. Demonstrations were allowed in the parks in question but for the most part only by permit.¹¹⁸ A permit was issued authorizing the demonstration and permitting the erection of two symbolic tent cities, but the Park Service, relying on a regulation prohibiting "camping," denied permission for 150 demonstrators to sleep in the symbolic tents.¹¹⁹

The Court determined that even assuming the act of sleeping constituted symbolic speech in these circumstances, the Park Service regulation was a reasonable time, place, and manner restriction. The regulation was valid because it was not being applied due to hostility towards the specific message presented, was narrowly tailored to serve a significant governmental interest, and left open ample alternative channels for communication of the intended message.¹²⁰ In particular, the Court emphasized the government's substantial interest in maintaining parks in the center of Washington D.C. in an "attractive and intact condition."¹²¹

There are a number of crucial factual differences between the permit denial in *Clark* and the Democracy Movement demonstrations, not the least of which is that the demonstrators in China did not—indeed, could not—apply for a permit and contest a negative determination all the way through to the highest judicial authority.¹²² The demonstrators in *Clark* did receive permission to conduct a demonstration, though one by which they believed their message would have been compromised. On the other hand, the demonstration in *Clark*, at least its objectionable aspect from the Court's point-of-view, involved only 150 people. Furthermore, the Court's decision stresses the importance of aesthetic values and the interests of tourists to Washington D.C., which seem like fairly trivial governmental interests to weigh against the First Amendment. If the Court places such emphasis on aesthetic considerations in this case, it would hardly have been sympathetic to the Democracy Movement demonstrations.

117. 468 U.S. 288 (1984).

118. *Id.* at 291.

119. *Id.* at 291-92.

120. *Id.* at 293-94.

121. *Id.* at 296.

122. See *CRIES FOR DEMOCRACY*, *supra* note 12, at 10. See also discussion *infra* part III.B.7. Chief Justice Burger, in his concurring opinion to *Clark*, does grumble about the amount of judicial time which had been consumed by the case. *Clark*, 468 U.S. at 301 (Burger, C.J., concurring).

B. Chinese Perspective

1. Changing Attitudes Towards the Concepts of Equality and Autonomy

Before proceeding to a discussion of Chinese views on free speech, it is useful to assess the continuing impact of traditional thought, as absorbed and reinterpreted by socialist ideology, as well as the contribution made by legal thought in the past dozen years. Law has provided a basis for questioning traditional assumptions and that skepticism about tradition was reflected in the activities of the Democracy Movement.

An important traditional idea adopted by the Communist Party is that the ruling elite is qualified for leadership by virtue of its proper ideological training.¹²³ The state can promote but one correct ideological path, even if that ideology has assimilated influences from other schools of thought.¹²⁴ The controlling ideology is based on a particularistic morality. Party members owe special duties to one another and enjoy special privileges by virtue of their leadership role in society.¹²⁵ Ideological training inculcates the elite with a devotion to public service, which acts as a constraint on the temptation to abuse their power. By contrast, law, in particular the criminal code, is viewed as an instrument for controlling deviant behavior among the masses, whose moral training is not so thorough as that of the elite.¹²⁶

During the imperial period, when the ruling elite, through intrigue and corruption, became divorced from its mission of public service, the successor elite led a popular revolt.¹²⁷ However, though revolt brought a change of ruling elite, it did not produce institu-

123. See Benjamin Schwartz, *On Attitudes Toward Law in China*, in *LAW IN RADICALLY DIFFERENT CULTURES* 104-12 (John H. Barton et al. eds., 1983); Tu Weiming, *Confucianism: Symbol and Substance in Recent Times*, in *HUMANITY AND SELF-CULTIVATION: ESSAYS IN CONFUCIAN THOUGHT* 257, 285-88 (1979). The controlling ideology has changed in the transition from imperial to socialist China, though Marxism-Leninism-Maoism incorporates features of Confucian thought. The elitist role of the Party, an idea associated mainly with Lenin, had its traditional underpinnings in pre-modern China.

124. See Tu, *supra* note 123, at 257, 281.

125. In pre-Liberation China the particularistic morality was based on family or clan relationships, the degree of obligation being directly based on the proximity of familial relationship. It is beyond the scope of this article to discuss how familial obligations have persisted and competed with duties owed to the Party and to the state. See discussion *infra* note 134 and accompanying text with respect to popular complaints about favoritism to family members among the leadership. For an example of privileges accruing to Party members based on longevity of service, see the discussion of pension benefits in Deborah Davis, *Unequal Chances, Unequal Outcomes: Pension Reform and Urban Inequality*, 114 *CHINA Q.* 223 (1988).

126. See Schwartz, *supra* note 123, at 108-09.

127. See Yan Jiaqi, *CHINA'S STRUGGLE FOR DEMOCRACY* 14 (David Bachman & Dali L. Yang eds., 1991).

tional reform. Even under new leadership, ideological training, rather than independent institutions, remained the sole real constraint on official misconduct. The periods of instability that China has continued to experience since 1949 may be traced to the persistence of "dynastic politics" and the absence of mechanisms for peaceful political change.¹²⁸

Legal philosophy, at least its Western forms, challenges in many fundamental respects the traditional concepts previously described. Nonetheless, the Party under Deng Xiaoping's leadership determined that the reestablishment¹²⁹ of a credible legal system was a necessary step in the modernization process. There is evidence, though fragmentary, that people outside the immediate circles of power came to realize the importance of law,¹³⁰ although they did not participate in the initial policy decision to revive the legal system.

One idea which seems to have gained general acceptance is that with the elimination of "class enemies" and firm establishment of the socialist system, legal rights and duties are personal to the individual and are no longer purely a function of class origin or other preordained status.¹³¹ Individual rights and duties also are no longer conditioned on Party membership; at least in theory, even the Party is bound by the law.¹³² The law states in several major instruments the principle of equality before the law.¹³³ The extent to which the notion of equality has gained popular support is evidenced by the criticism directed at the leadership during the Democracy Movement for appropriating special privileges to itself and practicing favoritism to family members.¹³⁴

However, the concept of equality has not yet taken hold in China in certain fundamental respects. From the activities of the Democracy Movement, it appears that popular support exists for further extension of the rule of law but the leadership has resisted such changes. First, political procedures—methods of electing offi-

128. *Id.* at 9-15, 188.

129. For discussion of the uneven development of the Chinese legal system from the 1950s through the 1970s, see VICTOR H. LI, *LAW WITHOUT LAWYERS* 19-31 (1978). It is beyond the scope of this article, and unnecessary to the analysis, whether the leadership under Deng Xiaoping has advocated development of the legal system out of genuine belief in its importance to society (e.g., as a restraint against the excesses of one-man rule) or whether they look upon legal development as a mere instrumentality to other ends, such as attracting foreign investment or enhancing China's prestige in international institutions.

130. One indication is frequent reference to the rule of law during the Democracy Movement. See discussion *infra* part III.B.6.

131. See *HUMAN RIGHTS IN CONTEMPORARY CHINA*, *supra* note 2, at 56-57.

132. *Id.* at 115-16 and sources cited therein (commenting on the 1982 Constitution).

133. XIANFA (1982) art. 33 (citizens are equal before the law); General Principles of Civil Law art. 3; Criminal Procedure Code art. 4.

134. See *CRIS FOR DEMOCRACY*, *supra* note 12, at 28-35.

cial and making their decisions responsive to the electorate—do not guarantee citizens more or less equal voice. The inability of individual citizens to influence the political process equally is demonstrated by the absence of direct elections at all but the lowest levels of government.¹³⁵ The notion of elector choice and equal opportunity to affect the political process is not even guaranteed by the Constitution, which sets forth dictatorship of the political system by the Party as a fundamental principle.¹³⁶ Thus, while the leadership acknowledges that citizens enjoy equality before the law (which is the outcome of the political process), they do not accept citizen participation in the political process which creates the law.

In terms of implementation, the concept of equality, which implies objective and universal application of rules, is violated not only by the leadership, but also at other levels of society. General disrespect for universal rules may be illustrated by the pervasive tendency throughout Chinese society to use personal connections to obtain special treatment or exemptions from the rules.¹³⁷ Even the judicial process is widely assumed to be contaminated by Party interference in particular cases.¹³⁸

The concept of autonomy, the liberty to choose and pursue

135. See HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra* note 2, at 118-19. Even local elections have been manipulated to ensure that only Party loyalists will be seated. See NATHAN, *supra* note 18, at 193-224.

136. However, the fact that the Chinese constitution establishes a particular political ideology as controlling does not eliminate the possibility of debate on how that ideology may be adapted to changing circumstances. Most of the Democracy Movement rhetoric was directed at reforming rather than abolishing the controlling ideology. See NATHAN, *supra* note 25, at 183. Adapting the controlling ideology through selective borrowing from other systems of thought, or at least creating the appearance of doing so without changing the fundamental essence of the controlling ideology, is squarely within the Chinese tradition. See Tu, *supra* note 123, at 281.

137. For a recent description, see Nicholas D. Kristof, *Escape from Tiananmen: A Chinese Odyssey*, N.Y. TIMES, May 5, 1991, § 6, at 28.

Disrespect for rules among the general population can be variously explained. The average person has no voice in the formulation of the rules, even those promulgated at the workplace or in his immediate neighborhood. See THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 4. The rules often take the form of "checkerboard" regulations, which treat similar situations differently on the basis of arbitrary distinctions and primarily serve administrative convenience. Cf. RONALD DWORKIN, LAW'S EMPIRE 179 (1986). Consequences of extreme importance to an individual's private life—the ability to have more than one child, the opportunity to go abroad for study, access to a job with tenure—turn on whether the operative event occurred before or after a certain date.

138. Party involvement in the legal system is accomplished through "political-legal committees" established to correspond to the various levels of government (e.g., the Party Committee of a given municipality will have a "political-legal committee" to oversee the administration of justice in that municipality). See CRIES FOR DEMOCRACY, *supra* note 12, at 150 n.12. It is generally thought that Party officials dictate results in particular cases, although the frequency of such Party interference is not known. Theoretically, interfering with the independence of judicial power contravenes art. 126 of the PRC Constitution.

one's own life,¹³⁹ is closely related to the concept of equality. The inability of the average person to make major life decisions without governmental interference¹⁴⁰ was another source of popular frustration that fueled the Democracy Movement protests. The desire for autonomy, not surprisingly, was expressed with particular force by younger participants in the demonstrations. However, a demand for individual self-determination ran counter to the strong current of paternalism in Chinese culture, a feature of tradition which the Party had continued and refined in its elaborate system of political controls.¹⁴¹

It appears that during the Democracy Movement, neither the controlling faction within the government nor the protesters fully appreciated the consequences of their own positions. Party elders expected unquestioning loyalty without being able to provide guarantees of material security, a necessary concomitant of paternalism.¹⁴² They expressed their condescension towards the protesters by disparaging them as mere "children."¹⁴³ For their part, the protesters wanted independence from official control—in their personal lives and political activities—yet at the same time expected protection from sympathetic Party leaders such as Zhao Ziyang. Yet on balance, the Democracy Movement illustrated that the importance of autonomy has taken hold in popular thought, even though feared and rejected by the leadership.¹⁴⁴

2. Role of Free Speech in the Constitutional Scheme

The Chinese Constitution is a compromise document: the "four cardinal principles" affirm the importance of collective goals as implemented through Party leadership,¹⁴⁵ while other sections of the Constitution affirm individual rights or claims on the collective.¹⁴⁶ Freedom of speech and other political rights are justified in the Chinese constitutional scheme not so much as an exercise of individual self-realization but for the contribution that they make to

139. See DONNELLY, *supra* note 7, at 68.

140. See discussion *supra* note 137.

141. The framework of controls consisted of intense monitoring of individual behavior (through the workplace and/or the neighborhood) and the conditioning of material rewards on political loyalty. See ANDREW J. WALDER, *COMMUNIST NEO-TRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUSTRY* 85-122 (1986).

142. See discussion *infra* part III.B.6.

143. See NATHAN, *supra* note 25, at 204-05.

144. *Id.* at 199.

145. The "four cardinal principles", as stated in the preamble to the Constitution, are: adherence to the socialist path; upholding the leadership of the Communist Party; upholding Marxism-Leninism-Maoism; and the People's democratic dictatorship.

146. Individual rights are subject to important qualifications in art. 28 (state maintains public order) and 51 (individual exercise of rights may not infringe upon interests of state or rights of other citizens). Fiss notes that it is an important reflection of Chinese constitutional thought, with its emphasis on the power of the state, that these qual-

the proper functioning of government.¹⁴⁷

Just as individuals should offer constructive criticism of official policies, it is incumbent upon the leadership to maintain contact with the masses and receive their advice. Constructive political criticism by the masses prevents the leadership from becoming detached, dictatorial, and corrupt. Therefore, political dialogue has been viewed less as input for a dynamic process of political decision-making than as a corrective for the ruling elite's straying from the true path.¹⁴⁸ In this sense, the Democracy Movement continued the Chinese tradition of loyal remonstrance, urging the regime to implement its stated values.¹⁴⁹

3. Role of Demonstrations as an Exercise of Free Speech

Freedom of procession and demonstration, like freedom of speech, are expressly protected rights under the Chinese Constitution.¹⁵⁰ Nonetheless, in the decade leading up to the Democracy Movement, though the government may have become more tolerant of political criticism expressed in the print media and in private discussion, demonstrations were consistently met with police action.¹⁵¹ That demonstrations continued to occur despite the inevitability of police action is an issue worth examining.

Demonstrations assume importance in China for the same reasons that they have occurred in the United States. They are an occasion for developing esprit de corps among those who are dissatisfied with government policy and who are denied participation in the political system.¹⁵² Because of surveillance of individual behavior through the workplace and through neighborhood organizations,¹⁵³ it is difficult for people in China to forge unsupervised relationships even in their immediate community, much less with outsiders. The Democracy Movement demonstrations, because of the large scale of participation, supplied an opportunity for discussion among groups which would otherwise have no contact with

ifications are expressly stated in the Constitution itself, rather than (as in U.S. practice) through judicial interpretation. Fiss, *supra* note 2, at 494.

The fact that constitutional rights may frequently be violated in practice, (*see* discussion *infra* part III.B.4), does not deny the importance of a positive statement of rules even if they are largely honored in the breach. *Id.* at 493.

147. XIANFA (1982) art. 35 (freedom of speech, press, assembly, association, procession, demonstration); art. 41 (right to criticize and make suggestions). In this respect civil liberties in China play the corrective function attributed to free speech in the U.S. *See* discussion *supra* part III.A.3.

148. *See* Fiss, *supra* note 2, at 501-02.

149. *See* NATHAN, *supra* note 25, at 173, 183.

150. XIANFA (1982) art. 35.

151. *See* THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 11.

152. *Id.* at 38 (describing events in Beijing), 95-96 (describing events in Xi'an). *See also* discussion *supra* note 102 and accompanying text.

153. *See* 1990 STATE DEPT REPORT, *supra* note 20, at 851-52.

each other.¹⁵⁴ Furthermore, demonstrations allow participants to express opposition to the government without sacrificing anonymity.¹⁵⁵ In this sense, they serve the same valuable function as "big character posters," which are surreptitiously pasted up in public areas and contain essays, poems, cartoons, and the like that are frequently critical of the government.¹⁵⁶

4. Statutory Regulation of Demonstrations

In the aftermath of the Democracy Movement, the Standing Committee of the National People's Congress (NPC) passed the Law of the People's Republic of China Governing Assemblies, Marches, and Demonstrations (the "Demonstrations Law" or "Law").¹⁵⁷ Although the Law purports to "ensure the lawful exercise by the people of their rights to conduct assemblies, marches, and demonstrations," as well as to "protect social stability and public order,"¹⁵⁸ the emphasis of the Law is on the latter, not the former purpose.¹⁵⁹ The effect of the statute is to encumber demonstrations with such severe restraints that staging lawful demonstrations is practically impossible.¹⁶⁰

However, current implementation does not make inquiry into the language of the statute irrelevant. It is typical that the substance of constitutional rights will be explored only after arrests for violations of "lesser" laws and regulations which restrict free speech.¹⁶¹ Even though the Law was promulgated after the Democracy Movement demonstrations, it is consistent with local regulatory schemes which were in effect at the time of the Democracy

154. See THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 23 (describing events in Beijing), 88-89 (describing events in Xi'an).

155. Anonymity is not complete, as the security apparatus has resorted to the use of video cameras at demonstrations and infiltration of demonstrations by plainclothes police. See CRIES FOR DEMOCRACY, *supra* note 12, at 292; THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 95.

156. See Sheng, *supra* note 15. Compare Justice Black's opinion in *Talley v. California*, 415 U.S. 926 (1974), about the importance of anonymity to the exercise of free speech, discussed in KALVEN, *supra* note 2, at 256.

157. 22 Guowuyuan Gongbao [State Council Gazette] 803 (1989). An English translation of this law is available from Hilary K. Josephs on request.

Local regulations which have been issued, e.g., in Beijing and Shanghai, essentially restate provisions of the national law. For implementing regulations subsequent to the promulgation of the Law, see, e.g., *Shanghai Procedures for Implementing the Demonstration Law* (BBC Summary of World Broadcasts, Jan. 27, 1990).

158. Demonstrations Law art. 1.

159. See *Public Security Minister Explains Draft Demonstrations Law* (BBC Summary of World Broadcasts, July 6, 1989).

160. Permission to hold demonstrations, even when applied for, has been routinely denied. See CRIES FOR DEMOCRACY, *supra* note 12, at 382; 1990 STATE DEPARTMENT REPORT, *supra* note 20, at 855.

161. See discussion *supra* part III.A.4 on First Amendment jurisprudence.

Movement.¹⁶²

When compared to U.S. law on the subject of demonstrations—a mosaic of criminal statutes, administrative regulations, and judicial interpretation—one striking feature of the Demonstrations Law is that it attempts to bring all of the rules within a single statute. This phenomenon reflects the importance of the legislative power in a legal system based on the continental, or civil law, model.¹⁶³ Another important difference from U.S. law is that this statute contains greater, more broadly worded restrictions on the permissible messages to be expressed at a demonstration. Certain causes cannot be the subject of public rallies.¹⁶⁴ There are restrictions on who may participate, even peacefully, in a demonstration (without being subject to arrest or other sanction): people whose legal residence is outside the situs of the demonstration,¹⁶⁵ government personnel,¹⁶⁶ and foreigners.¹⁶⁷ There are areas which would probably be deemed public spaces available for demonstrations in the United States which cannot be so used in China without extraordinary permission, such as the offices of the major organs of

162. CRIES FOR DEMOCRACY, *supra* note 12, at 10. For the local regulations which were in effect at the time of the Democracy Movement demonstrations in Beijing, see *Provisional Regulations Governing Demonstrations in Peking Municipality* (BBC Summary of World Broadcasts, Dec. 30, 1986).

163. See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 35-37 (2d ed. 1985). This is not to say that all of the laws which affect the exercise of freedom of demonstration are contained in this statute. In the aftermath of the Democracy Movement a law was enacted requiring organizations to register with the government, which is in effect a kind of prior restraint which enables the government to harass those groups which would be likely to engage in opposition activities. See *Regulations on the Registration and Management of Social Organizations*, 21 State Council Gazette 779-83 (1989); cf. KALVEN, *supra* note 2, at 264-87 (discussing the Subversive Activities Control Act). Also, there are sections of the Criminal Code which serve as a penumbral restriction on the exercise of civil liberties. See *infra* part III.B.5 for discussion of counterrevolutionary incitement. The Demonstrations Law itself refers to three sections of the Criminal Code, dealing with disturbances to social order (art. 158), assembling a crowd to disturb order (art. 159), and violating gun control regulations (art. 163).

164. Under art. 12 of the Demonstrations Law, a permit to hold a demonstration will be denied if the event would contravene the basic principles established in the Constitution; the event would endanger national unity, sovereignty, or territorial integrity; the event would involve agitation for ethnic separatism; or there are ample grounds for concluding that the event will directly endanger public safety or seriously undermine public order. On the subject of content regulation, see Peter Lin, *Between Theory and Practice: The Possibility of a Right to Free Speech in the People's Republic of China*, 4 J. CHINESE L. 257, 274 (1990).

By contrast, under the standard set forth by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968), public authorities are essentially prohibited from conditioning parade permits on the content of the message to be conveyed. See discussion *supra* part III.A.5.

165. Demonstrations Law art. 15. Freedom of movement within China is restricted by a household registration system, a system of job assignment, and the required carrying of identification cards. 1990 STATE DEPARTMENT REPORT, *supra* note 20, at 858.

166. Demonstrations Law art. 16.

167. *Id.* art. 34.

government.¹⁶⁸ Although a permit denial may be appealed, there is no judicial supervision of the review process.¹⁶⁹

Otherwise, the Law is an elaboration of time, place, and manner restrictions which would be familiar from cases dealing with parade permits in the United States. For example, conducting a lawful demonstration normally requires that an organizer file an application in advance with the proper authorities.¹⁷⁰ Police may be dispatched to ensure minimal disruption of traffic flow.¹⁷¹ Conducting a demonstration without having obtained the necessary permit or exceeding the scope of permission obtained will constitute a violation of the Criminal Code prohibition against disturbances to the social order.¹⁷²

Even in societies where freedom of speech is valued to a greater extent than in China, the right to engage in open public debate is considered not to outweigh the importance of maintaining public order. Furthermore, the maintenance of public order is not limited to preventing imminent violence but also includes ensuring the orderly flow of traffic, preserving quiet in residential neighborhoods and schools, and safeguarding the appearance of public spaces.¹⁷³ Therefore, it seems likely that some form of police intervention would have been approved by the courts had the Democracy Movement demonstrations occurred, for example, in the United States or Britain.

It is doubtful, however, whether the unrestrained use of force by the army troops on June 4 and 5 could in any way be legally justified.¹⁷⁴ Although there is conflicting evidence as to whether the demonstrators were entirely nonviolent,¹⁷⁵ the troops clearly enjoyed overwhelming superiority in the use of arms and could have used less extreme methods to disperse the crowd (such as arresting those who refused to leave the scene).¹⁷⁶ The use of extreme force

168. Compare *id.* art. 23 with *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), discussed *supra* part III.A.5. In the Democracy Movement demonstrations, there was a deliberate effort by the student protesters to appropriate those public spaces which the government uses for its own mass rallies. THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 18-19 (discussing events in Beijing).

169. Demonstrations Law art. 13. See *supra* part III.A.5 for discussion of judicial review under U.S. law; see also discussion *infra* text accompanying notes 214-15.

170. Demonstrations Law art. 7-8.

171. *Id.* art. 18-21.

172. *Id.* art. 29, citing art. 158 of the Criminal Code.

173. BARENDT, *supra* note 13, at 193-94.

174. For the purposes of this discussion, it does not matter whether the troops were specifically ordered to fire on sight or did so because they were inadequately supervised by their commanding officers. Cf. *In re Yamashita*, 327 U.S. 1 (1945) (Japanese general found guilty of war crimes for failing to control troops under his command).

175. CRIES FOR DEMOCRACY, *supra* note 12, at 357.

176. The lack of proportionality in the troops' reaction has been criticized, e.g., 1990 STATE DEPARTMENT REPORT, *supra* note 20, at 810 (1990). The U.N. Code of Con-

was neither necessary nor proportional to the exigencies of the situation. However, even courts in other countries rarely second-guess enforcement authorities in situations of this type.¹⁷⁷ Under international human rights instruments, the balance to be achieved between freedom of expression and public order is equally unclear.¹⁷⁸ Where the conflicting interests are both so important, one can only conclude that there is a presumed legitimacy for police action in a democratic society because the government has been popularly chosen. In the case of China, the government's use of violent means to suppress the demonstrations was illegitimate because the government no longer represented the popular will.

5. Counterrevolutionary Incitement

Since American and Chinese law are generally similar in their treatment of unlawful acts committed in the course of a demonstration,¹⁷⁹ it is more important to compare their treatment of speech which allegedly incites others to unlawful acts. Article 102 of the Chinese Criminal Code ("Article 102") is the provision dealing with counterrevolutionary incitement or propaganda.¹⁸⁰ Many of the regime's most visible critics from the Democracy Movement have

duct for Law Enforcement Officials art. 3, provides that "[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." G.A. Res. 169, U.N. GAOR, 34th Sess., Supp. No. 46, at 185-87, U.N. Doc. A/34/46 (1980), *reprinted in* 19 I.L.M. 526, 528 (1980). The commentary to this section states that the use of force is an exceptional measure and the use of firearms in particular is considered extreme. It also states that the use of force should be proportional to the legitimate objective to be achieved.

177. BARENDT, *supra* note 13, at 207-10; George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 54-56 (1984) (discussing mixed record of American cases); *see also* Asher F. Landun, *Use of Plastic Bullets Is Legal*, Jerusalem Post, Sept. 27, 1989, Nexis Library, available in LEXIS (application by Israeli Supreme Court of the U.N. Code of Conduct for Law Enforcement Officials); *Amnesty Calls for Inquiry into British Army Shootings*, REUTERS LIBRARY REPORT, June 28, 1988 (NEXIS Library).

178. *See* John P. Humphrey, *Political and Related Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW 185, 188-89 (Theodor Meron ed., 1984). For example, in art. 21 of the International Covenant on Civil and Political Rights, the right of peaceful assembly is subject to a number of qualifications including public order. Since international law does not require a formal declaration of a state of emergency in order for limitations to be imposed on freedom of speech and assembly, it is unnecessary to address the question of whether the declaration of martial law by the Chinese government on May 20, 1989, was consistent with international law. The declaration was facially consistent with the PRC Constitution.

179. Even the most liberal view of the First Amendment makes clear that it does not protect actions, as opposed to speech. *See* Gregory v. Chicago, 394 U.S. 111, 124 (1969) (Black, J., concurring). Ample grounds exist for arrest under U.S. law, such as criminal trespass, breach of the peace, obstruction of traffic, disorderly conduct, and destruction of property.

180. Art. 102 reads in pertinent part:

Whoever for the purpose of counterrevolution commits any of the following acts is to be sentenced. . . :

been charged under this provision.¹⁸¹

Article 102 bears some similarity to the *Brandenburg* formula in that purposeful incitement to unlawful acts is within the legitimate power of the state to suppress.¹⁸² However, the *Brandenburg* test involves both subjective and objective elements: the speaker must intend to incite his audience to the commission of imminent unlawful acts and the audience must be likely to react.¹⁸³ Article 102, on the other hand, does not require that the audience actually react or be likely to react to the speaker's exhortations. No result is necessary in order for the offense to have been committed.¹⁸⁴ In this respect, the Chinese law is similar to the standard applied in an earlier American case, *Gitlow v. New York*.¹⁸⁵

Furthermore, under Article 102, advocacy of peaceful but fundamental change in the political system is deemed counterrevolutionary. Advocating overthrow of the government through the ballot box would be counterrevolutionary even though it is nonviolent and also objectively impossible.¹⁸⁶ Another major difference between Chinese and current U.S. law is that the former still treats criticism of government officials as counterrevolutionary, even when not accompanied by a call to overthrow the political system by force or violence.¹⁸⁷

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1. Inciting the masses to resist or to sabotage the implementation of the state's laws or decrees; and
 2. Through counterrevolutionary slogans, leaflets or other means, propagandizing for and inciting the overthrow of the political power of the dictatorship of the proletariat and the socialist system.

Ironically, in the months preceding the Democracy Movement, there was discussion in the NPC of revising the section of the criminal law dealing with counterrevolutionary offenses. See Jerome A. Cohen, *Law and Leadership in China*, FAR E. ECON. REV., July 13, 1989, at 23; *Jurists Call for Criminal Law Revision*, (BBC Summary of World Broadcasts, April 7, 1989); *Provisions of Criminal Law to Be Revised* (BBC Summary of World Broadcasts, April 8, 1989).

For a summary of other provisions of the Criminal Code relevant to the exercise of freedom of speech, such as criminal libel, see Mark M. Hager, *Roots of Dissent and Repression in Deng's China*, 8 UCLA PAC. BASIN L.J. 197, 245-46 (1990).

181. Nicholas D. Kristof, *China Sentences 2 of Its Dissidents to 13-Year Terms*, N.Y. TIMES, Feb. 13, 1991, at A1; Sheryl WuDunn, *China Tries Another Student for Protests*, N.Y. TIMES, Feb. 7, 1991, at A3; Sheryl WuDunn, *Democracy Leader on Trial in China*, N.Y. TIMES, Jan. 24, 1991, at A3.

182. See Fiss, *supra* note 2, at 497-98.

183. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

184. See *Lecture on PRC Criminal Law (No 45), Offences of Counter-Revolutionary Propaganda and Incitation* (BBC Summary of World Broadcasts, Sept. 26, 1983) [hereinafter *Lecture*]; see also NATHAN, *supra* note 18.

185. See discussion *supra* note 83 and accompanying text.

186. *Lecture, supra* note 184. In this respect Chinese law should be contrasted with the Smith Act (under which the defendants in *Dennis* were convicted) and the state criminal syndicalism statute (under which *Gitlow* was decided), which criminalized advocacy of force or violence to overthrow the government.

187. *Id.*; Lin, *supra* note 164, at 275 n.62; Ross Terrill, *Pet Monkeys and Deng's Dog*, N.Y. Times, June 6, 1991, at A25. See *infra* note 197 and accompanying text for

Admittedly, applying the *Brandenburg* standard to the various communications or communicative acts of the Democracy Movement involves more than the difficulty of applying the values of one legal system to another. The *Brandenburg* test requires an assessment of impact (as Article 102 does not) but provides no precise guidance for measuring it. It is difficult to make an assessment of impact based on the cold written word of a speech transcribed, because evidence of the listener's reaction is lacking. Because of contextual factors, a communication which would be harmless in isolation may be inflammatory if part of a stream of communications. Applying the marketplace theory to the various Democracy Movement activities—parades, street meetings, camping—might dictate a different conclusion for each activity. Street meetings would probably be the most defensible form of expression because they provide an opportunity for serious communication of ideas with the least disruption of normal activities.¹⁸⁸

6. Comparison With Earlier Mass Movements in China

Since the Democracy Movement was not the first occasion of anti-government demonstrations since 1949, it is important to assess its significance in relation to earlier mass movements from the 1960s to 1980s.¹⁸⁹ The Democracy Movement could be explained as an episodic outburst of popular unrest which is certain to occur from time to time in a populous and impoverished country. The continuing inability of the government to provide regular employment for, or otherwise satisfy the expectations of the younger members of the population may explain why they tend to participate in demonstrations in greater numbers.¹⁹⁰ The government has continually exerted pressure on the population to accept sacrifices of personal autonomy¹⁹¹ without demonstrating enough economic progress to make the sacrifices worthwhile.¹⁹² The goodwill and

discussion of direct public attacks on government leaders, which had rarely occurred before the Democracy Movement.

Criticism of government officials once constituted the offense of seditious libel in the United States. See discussion *supra* part III.A.2.

188. See Baker, *supra* note 92, at 996 n.138.

189. See THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 87-89.

190. See NATHAN, *supra* note 25, at 63. The Democracy Movement demonstrations attracted not only students but also large numbers of unemployed youth. THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 4, 43, 88-89, 121, 131-32.

191. Examples include the inability to freely determine one's place of residence, one's job, or the number of children in one's family. See THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 4 and discussion *supra* note 137.

192. It seems generally agreed that one of the major factors behind the Democracy Movement was the government's inability to control inflation, with its deleterious impact on the standard of living of ordinary people. See THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 3. The urban population in particular reacted to the rise in inflation because they lived on fixed incomes. Mounting dissatisfaction occurred

popular support that the Party enjoyed in the early years of the PRC was squandered by political infighting among members of the leadership and by disastrous economic policies.¹⁹³ The ultimate result was greater popular impatience with the failings of the leadership.

Yet the Democracy Movement differed in significant respects from earlier mass movements. In contrast to mass movements of the 1960s and 1970s, it occurred after a period of economic liberalization and openness to foreign contacts.¹⁹⁴ Ironically, the government under Deng Xiaoping had been more directly concerned with improving the standard of living and the material well-being of the general population than those of his predecessors.¹⁹⁵ In contrast to the demonstrations of December 1986, which were conducted by students, the sheer volume of participation in the Democracy Movement demonstrations was greater and involved a broader cross-section of the urban population.¹⁹⁶ Profound and widespread disillusionment with the government was expressed in vehement, often scurrilous public attacks on Deng Xiaoping and Li Peng.¹⁹⁷ The demonstrators took conscious advantage of the presence of the media, both domestic and foreign, to attract support for their cause and to increase pressure on the government.¹⁹⁸

The tentative initial response of the leadership to the Democracy Movement demonstrations suggested internal division and uncertainty to a greater degree than in 1986.¹⁹⁹ Although the student leaders were themselves divided and had no long range program of action,²⁰⁰ they were nonetheless able to compel the leadership into taking the unprecedented step of conducting a public dialogue with an unofficial, unrecognized organization.²⁰¹ Ultimately, however, the government balked at officially recognizing the student move-

notwithstanding the fact that urban incomes and the urban standard of living had steadily improved since the late 1970s, and in any event continued to surpass the rural incomes and the rural standard of living. See Walder, *supra* note 27, at 33-35.

193. See discussion *supra* text accompanying note 128.

194. See THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 10.

195. *Id.* at 9.

196. NATHAN, *supra* note 25, at 172; THE PRO-DEMOCRACY PROTESTS IN CHINA at, *supra* note 8, at 13.

197. See, e.g., CRIES FOR DEMOCRACY, *supra* note 12, at 292, 336; THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 79, 99.

198. THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 43, 46; see also discussion of this phenomenon in the United States, *supra* note 94 and accompanying text.

199. Walder, *supra* note 27, at 37-38.

200. CRIES FOR DEMOCRACY, *supra* note 12, at 312-13, 331; THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 18.

201. See, e.g., CRIES FOR DEMOCRACY, *supra* note 12, at 242-46 (transcript of the televised meeting between student leaders and Prime Minister Li Peng).

ment as a political organization independent of the Party.²⁰²

Another significant difference from earlier mass movements was the role played by intellectuals and political braintrusters who were themselves Party members and who occupied positions of influence within the government.²⁰³ The rule of law occupied an important place in the political thought of individuals such as Cao Siyuan, who had been the principal architect of the Chinese Bankruptcy Law.²⁰⁴ Cao advocated an enlarged role for the NPC, which had been granted extensive powers under the Constitution but which had functioned mostly as a rubber stamp legislature implementing Party decisions.²⁰⁵ Thus, Cao was one of those who challenged the leadership to act on its own rhetoric in implementing the rule of law. He also supported the idea of strengthening freedom of speech by constitutional amendment²⁰⁶ and enhancing popular understanding and participation in the legislative process.²⁰⁷

In the spring of 1989, Cao advocated resort to legal channels to resolve the political crisis. In cooperation with Hu Jiwei, a member of the NPC Standing Committee, he urged actions to be taken pursuant to the Constitution—convening an emergency meeting of the Standing Committee to abrogate the order on martial law and to call a meeting of the NPC itself to dismiss Li Peng.²⁰⁸ The same course of action was advocated by another influential insider, Yan Jiaqi.²⁰⁹ A political scientist who assumed an important leadership role in the Democracy Movement, more visible than that of Cao Siyuan, Yan too placed great confidence in the ability of the rule of law, and the concept of equality, to restrain abuse of official power.²¹⁰

Whether in response to its internal critics or to pressure from abroad, the government has been compelled to justify its actions in terms of law. Official statements have taken pains to identify specif-

202. NATHAN, *supra* note 25, at 185-86.

203. See Jiaqi, *supra* note 127, at xi; Munro, *supra* note 5, at 93-107. This group of inside reformers is to be contrasted with outsiders, such as Fang Lizhi, Liu Binyan, and Su Shaozhi, who had been forced out of the Party earlier because of their public outspokenness. Jiaqi, *supra* note 127, at xi-xiv.

204. See generally Nicholas C. Howson, *Cao Siyuan: A "Responsible Reformer" Silenced*, 8 UCLA PAC. BASIN L.J. 267 (1990).

205. *Id.* at 280-85.

206. *Id.* at 277-79.

207. *Id.* at 282-85. However, it should be noted that Cao did not provide a role for the judiciary and did not favor popular demonstrations. *Id.* at 278, 290-91.

208. *Id.* at 285-88. For this proposal, Cao was arrested in early June 1989, apparently on charges of having committed a counterrevolutionary offense. *Id.* at 267-68. He was released in May 1990. See Nicholas D. Kristof, *China Announces Release From Jail of 211 Dissidents*, N.Y. TIMES, May 11, 1990, at A1.

209. See Jiaqi, *supra* note 127, at 160-64.

210. *Id.* at 149. Ultimately Yan was forced to flee China and go into exile in France, where he leads an opposition group, the Front for a Democratic China. *Id.* at xxv.

ically illegal actions committed by the demonstrators which justified the use of force.²¹¹ Even if official statements have misstated or distorted actual events, the government apparently accepts the fact that vague accusations of counterrevolutionary turmoil are no longer sufficient to legitimize its actions. Once the government is drawn into the position of providing detailed justification, the validity of its actions can be specifically questioned.

7. Role of the Chinese Judiciary

In contrast to the U.S. Supreme Court, the Supreme People's Court has not played, and is not likely to play a dramatic role in defining the contours of permissible speech.²¹² From an institutional perspective, the judiciary is considered an organ of government subordinate to the legislature, a feature typical of legal systems based on the continental model.²¹³ Its decisions do not carry the weight of *stare decisis*. The authority to interpret the Constitution and statutes, and to annul unconstitutional administrative regulations, are vested in the Standing Committee of the NPC, not in the Supreme People's Court.²¹⁴

Publicly, the Supreme People's Court has endorsed the actions of the government in using force to suppress the Democracy Movement and has further supported the government's position in the political trials which followed.²¹⁵ During the drafting of the Demonstrations Law,²¹⁶ the Court itself refused a role in reviewing the denial of parade permits.²¹⁷ The studied noninvolvement of the Supreme People's Court in defining political rights is typical of judicial review in socialist countries, which avoids issues that are threatening and divisive to the state.²¹⁸

Since it is not the official arbiter of constitutionality, the Court generally defers to legislative or administrative authority to justify

211. Perhaps the best example of the use of legal rhetoric by the government is *Report on Checking the Turmoil and Quelling the Counterrevolutionary Rebellion by Chen Xitong, Mayor of Beijing* (BBC Summary of World Broadcasts, July 10, 1989). Chen alleged that the following illegal acts were committed: (1) displaying big-character posters; (2) staging large-scale demonstrations (without official permission); (3) occupying Tiananmen Square; (4) assaulting the headquarters of the Party Central Committee and the State Council; (5) purchase of weapons; (6) attacks on military convoys.

212. See *CRIES FOR DEMOCRACY*, *supra* note 12, at 116-17; Lin, *supra* note 164, at 261.

213. See MERRYMAN, *supra* note 163, at 35-37.

214. XIANFA (1982) art. 67.

215. See, e.g., *Supreme People's Court Work Report*, trans. (BBC Summary of World Broadcasts, April 25, 1991).

216. See discussion *supra* part III.B.4.

217. See 5 Renmin Daibiao Dahui Changweihui Gongbao [Gazette of the Standing Committee of the National People's Congress] 17 (1989) (the legislative history of the Demonstrations Law).

218. See DAMASKA, *supra* note 36, at 194-99.

the outcome of a case. Published opinions do not contain philosophical discussion or balancing of policy considerations. Even if the Court were to address questions of civil liberties, case reports do not publish concurring or dissenting opinions,²¹⁹ the source of much fruitful dialogue in U.S. free speech cases.²²⁰

In another sense public dialogue over the permissible limits of free speech has been lacking in China because trials have essentially been closed to public scrutiny, with only outcomes revealed, if any information at all.²²¹ How words or actions of defendants violated the prohibition against counterrevolutionary offenses is not publicized. The Chinese government will not allow the outer limits of regulation to be tested and explored at public trials. If it did, the courts would be compelled to examine whether the law on counterrevolutionary incitement was fair and not unacceptably vague.²²² Unfortunately, the courts in China have acquiesced in this erosion of due process guarantees.

Some would argue that a legal system in which the judiciary does not actively protect civil liberties is no legal system at all.²²³ At the same time, it is important to determine whether the Supreme Court's actions with respect to civil liberties are consistent with a generally conservative view of the judicial role, subject to firm constraints in all matters of legal interpretation, or whether the Court's current stance with respect to civil liberties is somehow exceptional. If the latter is true, there remains the possibility that the Court may at some later point, for the sake of internal consistency in its deci-

219. Under the concept of "collective leadership," opinions are issued in the name of the Court or one of its constituent decision-making bodies (such as a special chamber). Liu Nanping, *An Ignored Source of Chinese Law: The Gazette of the Supreme People's Court*, 5 CONN. J. INT'L L. 271, 284-85 (1990).

220. Some of the most memorable judicial writing on the First Amendment has appeared in dissents and concurring opinions. These ideas were eventually adopted as mainstream authority. KALVEN, *supra* note 2, at 180.

221. As a general principle, trials are supposed to be open to the public unless state secrets or the private affairs of individuals are involved. XIANFA (1982) art. 125; Criminal Procedure Code art. 111. Exceptions have swallowed up the general rule, and trials are often closed to all but invited guests. 1990 STATE DEPARTMENT REPORT, *supra* note 20, at 850. The Chinese government has consistently refused to allow oversight by international observers at trials involving Democracy Movement activists. See generally Robin Munro, *The Beijing Trials: Secret Judicial Procedures and the Exclusion of Foreign Observers*, 10 UCLA PAC. BASIN L.J. 136 (1991).

222. See DWORKIN, *supra* note 2, at 212-17. Contrast political trials such as *Dennis* and *Dellinger* at which defense lawyers and/or defendants themselves turned the trial into political theater. Even though the laws under which prosecutions were brought were upheld as constitutional on appeal, the government was probably discouraged thereby from bringing further prosecutions. KALVEN, *supra* note 2, at 397-99.

223. An independent judiciary is considered essential to the rule of law by a number of commentators. See, e.g., ALLAN R. BREWER-CARIAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 7-8 (1989).

sionmaking, be willing to entertain challenges to official orthodoxy in the area of civil liberties as well.

Historically, the concept of human rights has been a natural outgrowth of the market economy, with its emphasis on largely unlimited private property rights. The market system maximizes personal autonomy in economic decision-making, though at the same time, it isolates individuals, who then need new forms of protection against encroachment by the modern state.²²⁴ If one draws upon the U.S. experience, there is reason to expect that the judiciary in China may also eventually shift its attention to political rights after a period of being primarily concerned with protecting property relations. In the nineteenth and even twentieth centuries, American courts focused on maintaining a free market where individual economic initiative was not inhibited by excessive government interference.²²⁵ It was not until World War I that the forces of economic and social change compelled the courts to shift their attention to the protection of civil liberties.²²⁶

As the Chinese economy has become less centralized and market transactions have come to assume greater importance, the courts there similarly have been called upon to define property relations and to protect individual economic interests against government interference.²²⁷ As groups develop with significant economic resources independent of government control, they may receive judicial support for their efforts to gain a corresponding voice in the political process. The emerging entrepreneurial class has already displayed its commitment to the development of democratic institutions in China through the financial and logistical support it gave to the Democracy Movement demonstrations.²²⁸ The routine, generally unpublicized work of the Supreme People's Court is also the basis for a cautious optimism about its ability to influence the course of civil liberties. In its nominally subsidiary role of interpreting statutes and regulations,²²⁹ the Supreme People's Court has played a very active part. It has filled a gap left by the NPC Standing Committee, which has not in fact exercised its constitutional

224. See DONNELLY, *supra* note 7, at 64.

225. See EMERSON, *supra* note 76, at 35-36.

226. *Id.* at 36-37. See also discussion *supra* part III.A.2.

227. See discussion *infra* notes 237-38 and accompanying text.

228. See NATHAN, *supra* note 25, at 181-82. It is beyond the scope of this article to analyze the composition of this group of supporters, some members of which had a loose formal affiliation with the Party but operated more or less independently. For example, Cao Siyuan, whose role in the Democracy Movement is discussed *supra* notes 204-08 and accompanying text, was director of an independent think tank. Howson, *supra* note 204, at 269-70.

229. Organic Law of the People's Courts art. 33, in SELECTED ORGANIC LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 102 (Economic Science Press ed., 1985).

powers of interpretation.²³⁰ The law made by the Supreme People's Court includes its own appellate opinions²³¹ or lower court opinions which it publishes with express or implied approval.²³² The Court also issues instructions to lower courts *sua sponte*, often in conjunction with other bodies, such as the Supreme People's Procuratorate.²³³ The Court replies to requests for advice from lower courts dealing with actual or hypothetical cases.²³⁴ The Court also publishes interpretations of statutes passed by the NPC or its Standing Committee.²³⁵ Interpretation by the Supreme People's Court has also extended to constitutional questions.²³⁶

The Supreme People's Court has been willing to address issues of vagueness and overbreadth under the criminal law. The Court has provided clarification with respect to economic crimes having imprecise boundaries, such as bribery and corruption.²³⁷ It has also implied approval of lower court action protecting individual entrepreneurs from criminal liability where the line between legal and illegal behavior was unclear.²³⁸ Narrowly defining the parameters of corruption in this way can operate to protect individual entrepreneurial initiative in its own right even if the Court's chief public purpose is to advance the state's developmental objectives.

The Supreme People's Court is still very far from being a

230. Liu, *supra* note 219, at 278, 290; see also Perry Keller, *Legislation in the People's Republic of China*, 23 U. B.C. L. REV. 653, 667-68 (1989) (discussing important de facto interpretive role of the Court).

231. In the PRC the court of second instance is the court of last resort, so very few lower court cases reach the Supreme Court on appeal by the litigants. The few cases in this category which have been published have involved citizens of foreign countries. Liu, *supra* note 219, at 301.

232. Publication of lower court opinions, with or without additional comment by the Supreme People's Court, clearly provides quasi-precedential guidance to other lower courts. Liu, *supra* note 219, at 302.

233. *Id.* at 279-80.

234. *Id.* at 291.

235. *Id.*

236. On the subject of constitutional interpretation by the Supreme People's Court, see generally Liu Nanping, "Judicial Review" in *China: A Comparative Perspective*, 14 REV. SOCIALIST L. 241 (1988). In a libel case published by the Court without comment, discussed in Liu, *supra* note 219, at 308-09, the defendant magazine correspondents had unsuccessfully raised the defense of freedom of speech on appeal. Since they had published evidently false information about a private figure, the outcome under U.S. law would likely have been the same.

While the Court has spoken quite extensively on criminal law matters, a recent compendium of Chinese statutes and administrative orders includes only one interpretive document by the Court on the subject of counterrevolutionary offenses. Collection of the Laws of the People's Republic of China 166 (Jilin People's Press ed. 1989).

237. Case of Zhao Hengdong, 1 *Zuigao Renmin Fayuan Gongbao* [Supreme Court Gazette] 14 (1987); Case of Guo Yong et al, 2 *id.* at 32. On the subject of white collar crime, see generally Helena Kolenda, *One Party, Two Systems: Corruption in the People's Republic of China and Attempts to Control It*, 4 J. CHINESE L. 187 (1990).

238. Case of Zhao Hengdong, *supra* note 237; see also Liu, *supra* note 219, at 293, 310-11 (discussing this case).

staunch defender of civil liberties. The PRC judiciary as a whole lacks the institutional independence and professional competence²³⁹ which one expects from judicial institutions elsewhere. Nonetheless, the Supreme People's Court has in the past expanded its interpretive jurisdiction to include controversial cases. It is too early to conclude that the Court will have nothing to contribute to the development of free speech in China.

IV. CONCLUSION: FUTURE OF FREE SPEECH IN CHINA

The mood in China after the suppression of the Democracy Movement understandably was one of continued pessimism about whether China would ever be able to break from its traditional cycle of poverty, instability, and authoritarianism.²⁴⁰ Although it is not possible to poll public opinion throughout the country on the issue, it appears that the current leadership has lost its legitimacy in the eyes of much of the population.²⁴¹ There is a sense that no major move can be made against the leadership until after the death of Deng Xiaoping, but that a window of opportunity for significant political reform—along the lines of developments in Eastern Europe and the Soviet Union—may open at that time.²⁴²

Given China's history of political succession, it is quite possible that some time may pass after the death of Deng Xiaoping before a new consolidation will take place.²⁴³ Therefore, the government may muddle along for years, whether under Deng Xiaoping or his successor, trying to recapture a sense of purpose and momentum. A weak regime may be more likely to react defensively to open criticism, though no longer able to impose a sense of loyalty on the population through political indoctrination.²⁴⁴

Considering the American example, it would seem that the regular exercise of civil rights requires an environment of security and political stability which may not be present in China for some

239. See James V. Feinerman, *Economic and Legal Reform in China, 1978-91*, PROBS. OF COMMUNISM, Sept.-Oct. 1991, at 62, 70 and sources cited therein.

240. See NATHAN, *supra* note 25, at 116-26.

241. See THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 33.

242. See NATHAN, *supra* note 25, at 207-08. For a view that recent political liberalization in Poland is only the culmination of a long process of transformation, see Ludwikowski, *supra* note 3, at 147-48.

243. See NATHAN, *supra* note 25, at 207-08.

244. This phenomenon did not have its beginnings with the Democracy Movement. After the death of Mao, political indoctrination, e.g., through regular "political study" sessions, became less and less important as a means of inducing compliance with the regime's objectives. See WALDER, *supra* note 141, at 231. The fact that the government has periodically resurrected intensive political study as a means of dealing with mass movements does not disguise the fact that it has become an empty ritual. THE PRO-DEMOCRACY PROTESTS IN CHINA, *supra* note 8, at 103-05.

time.²⁴⁵ In China, political stability has been a function of able leadership rather than institutional continuity.²⁴⁶ The administrative bureaucracy has provided whatever institutional continuity that has existed in recent times, carrying the country through dislocations such as the Cultural Revolution.²⁴⁷ The administrative bureaucracy, which only recently has itself become subject to general judicial review,²⁴⁸ is not likely to fulfill the role played by courts in the United States in defending civil liberties. Thus, freedom of speech in China cannot rely on any institutional support within the government as it is presently constituted.

It is conceivable that a democratic shift can take place when the regime is weak because some groups within the power structure see sponsoring change as a way of enhancing their position.²⁴⁹ There is some evidence that Zhao Ziyang, former Party Secretary and a leading proponent of economic reform, viewed the Democracy Movement protests in this light,²⁵⁰ although he and his supporters were ultimately unsuccessful in wresting control of the government.²⁵¹ However, there have been leaders in China who used popular protest as a vehicle for achieving power and then turned against their supporters once supremacy was achieved.²⁵² The problem of ensuring that the ideals of political reform are realized brings one back to the question of institutional continuity.²⁵³

It is also possible that the scope of civil liberties has been al-

245. This point is not totally inconsistent with a previous point that the dimension of free speech in the United States grew during episodes of stress and turmoil, such as during the First World War, the civil rights movement, and the antiwar protests in the 1960's and 70's. See discussion *infra* part III.A. The importance of order to the exercise of civil liberties has been frequently emphasized by the U.S. Supreme Court. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). On the need for fundamental consensus and stability in order for free speech to flourish, see EMERSON, *supra* note 76, at 78-80; LEVY, *supra* note 73, at 5.

246. See NATHAN, *supra* note 25, at 49.

247. See Martin King Whyte, *Who Hates Bureaucracy? A Chinese Puzzle*, in *REMAKING THE ECONOMIC INSTITUTIONS OF SOCIALISM: CHINA AND EASTERN EUROPE* 233, 246-47 (Victor Nee & David Stark eds., 1989).

248. See generally Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1 (1989).

249. See NATHAN, *supra* note 25, at 126, 207.

250. *CRIES FOR DEMOCRACY*, *supra* note 12, at 246-51; NATHAN, *supra* note 25, at 177-78.

251. See *supra* text accompanying note 6.

252. Both Mao Zedong and Deng Xiaoping have manipulated popular protest in this way. On Deng's suppression of the democracy movement of the late 1970's, see NATHAN, *supra* note 18, at 39.

253. See *supra* part III.B.7. For discussion of the slow but tenacious development of the legal profession, see Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 788-89 (1991).

tered in China through the mere occurrence of mass action.²⁵⁴ Each succeeding mass movement strains against the confines of official regulation and pushes the frontier of possibility to a new level. The "functioning" law is the outcome of a synergy between official statement and popular reaction.²⁵⁵ Popular reaction contains its own interpretation of the fundamental values set forth in the Constitution, giving primary emphasis to expression rather than to Party domination. However, such "street legislation" leaves much less room for the administrative machinery of the law, whether determined by the NPC or the courts.²⁵⁶ Eventually, the government may only be able to maintain control by bringing such "legislation" off the streets into the formal political process.²⁵⁷

Another factor of indeterminate importance for the evolution of free speech in China is the impact of pressure from abroad, whether exerted by governments, international human rights organizations, or Chinese political exiles.²⁵⁸ The number of arrests and trials after the Democracy Movement appear small and the punishments relatively light in view of the large number of people who participated.²⁵⁹ The international press and human rights organizations have scrutinized the aftermath of the Democracy Movement much more closely than earlier mass movements in China.²⁶⁰

However, the application of external pressure that tempers repressive actions by the Chinese government is no substitute for the creation of internal mechanisms for the protection of civil liberties.²⁶¹ The greatest impetus for change is likely to come from the internal source which made such a dramatic appearance in the spring of 1989—the continued transformation of social consciousness.

254. See *supra* Part III.B.6 for comparison of the Democracy Movement with earlier mass protests.

On the importance of grass roots dissent in the United States, see Nagel, *supra* note 45, at 312, 337.

255. This phenomenon may be compared with "hidden bargaining" which goes on between workers and management in Chinese factories in the absence of formalized collective bargaining over production goals, wages and fringe benefits, and working conditions. Workers alter management policies to their liking through slowdowns and covert actions of insubordination and resistance. See WALDER, *supra* note 141, at 239-40.

256. See *supra* Part III.A.4 on the process by which mass action has been filtered through the legal system in the United States, leading to the development of standards in the area of free speech.

257. See *supra* Part III.A.3 on the safety valve function of free speech.

258. See *supra* Part II.C on the political ramifications of human rights issues.

259. See Kristof, *supra* note 208.

260. See Chiu, *supra* note 20, at 237 (discussing the information blackout which accompanied the Cultural Revolution).

261. See DONNELLY, *supra* note 7, at 266-67 (respect for human rights principally created by internal political factors).